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# Presidential Documents

**Title 3—**

**The President**

**Proclamation 10658 of October 26, 2023**

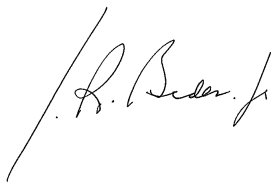
## Honoring the Victims of the Tragedy in Lewiston, Maine

**By the President of the United States of America**

**A Proclamation**

As a mark of respect for the victims of the senseless acts of violence perpetrated on October 25, 2023, in Lewiston, Maine, by the authority vested in me as President of the United States by the Constitution and the laws of the United States of America, I hereby order that the flag of the United States shall be flown at half-staff at the White House and upon all public buildings and grounds, at all military posts and naval stations, and on all naval vessels of the Federal Government in the District of Columbia and throughout the United States and its Territories and possessions until sunset, October 30, 2023. I also direct that the flag shall be flown at half-staff for the same length of time at all United States embassies, legations, consular offices, and other facilities abroad, including all military facilities and naval vessels and stations.

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



[FR Doc. 2023–24104
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# Rules and Regulations

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## FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

### 5 CFR Part 1650

### Elimination of Mandatory Roth Distributions

**AGENCY:** Federal Retirement Thrift Investment Board.

**ACTION:** Direct final rule.

**SUMMARY:** This direct final rule makes technical conforming revisions necessary to implement statutory amendments made by the SECURE 2.0 Act of 2022. Specifically, it eliminates the requirement to take mandatory Roth distributions.

**DATES:** This rule is effective on January 1, 2024, unless significant adverse comment is received by December 15, 2023.

**ADDRESSES:** You may submit comments using one of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Office of General Counsel, Attn: Dharmesh Vashee, Federal Retirement Thrift Investment Board, 77 K Street NE, Suite 1000, Washington, DC 20002.

**FOR FURTHER INFORMATION CONTACT:** *For press inquiries:* contact Kim Weaver at (202) 942–1641. *For information about commenting on this rule:* contact Magali Matarazzi at (202) 805–2823.

**SUPPLEMENTARY INFORMATION:** The FRTIB administers the Thrift Savings Plan (TSP), which was established by the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99–335, 100 Stat. 514. The TSP provisions of FERSA are codified, as amended, largely at 5 U.S.C. 8351 and 8401–79. The TSP is a tax-deferred retirement savings plan for Federal civilian employees and members of the uniformed services. The TSP is similar to cash or deferred arrangements established for private-sector employees under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)).

#### Background

The Internal Revenue Code requires TSP participants to receive a portion of their TSP account (''required minimum distribution'') beginning when they reach a specific age and are separated from service. Currently, a participant's entire TSP account—both traditional and Roth—is subject to the required minimum distribution rules of the Internal Revenue Code. If a separated participant does not withdraw from his or her account an amount sufficient to satisfy his or her required minimum distribution for the year, FRTIB regulations provide that the TSP record keeper will automatically distribute the necessary amount pro rata from the participant's traditional balance and the participant's Roth balance.

Section 325 of the SECURE 2.0 Act of 2022, which was included in Division T of the Consolidation Appropriation Act, 2023 (Pub. L. 117–328), amended the Internal Revenue Code to eliminate the requirement to take mandatory Roth distributions. To conform FRTIB regulations to this statutory amendment, this rule will delete the provision of FRTIB regulations that says the TSP record keeper will distribute required minimum distributions pro rata from traditional balances and Roth balances.

#### Direct Final Rulemaking

A direct final rule is a final rule that does not go through proposed rulemaking first. We use direct final rulemaking when we expect that the rule will generate no significant adverse comments. We are issuing a direct final rule because we expect this regulatory change to be entirely non-controversial. This rule does not involve any statutory interpretation or create any new regulatory law. We believe this rule does no more than conform FRTIB regulations to the Internal Revenue Code as amended by the SECURE Act of 2022. However, to be certain that we are correct, we set the comment period to end before the effective date. If we receive a significant adverse comment, we will withdraw the direct final rule before it becomes effective.

For purposes of this rulemaking, a significant adverse comment is one that explains (1) why the rule is inappropriate, including challenges to the rule's underlying premise or approach; or (2) why the rule will be ineffective or unacceptable without a change. In determining whether a significant adverse comment necessitates withdrawal of this direct final rule, the FRTIB will consider whether the comment raises an issue serious enough to warrant a substantive response had it been submitted in a standard notice-and-comment process. A comment that objects to the underlying statutory amendments to which FRTIB regulations must conform will be considered out of scope. A comment recommending an addition to the rule will not be considered significant and adverse unless the comment explains how this direct final rule would be ineffective or unacceptable without the addition.

#### Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities. This regulation will affect only participants and beneficiaries of the Thrift Savings Plan, which is a Federal defined contribution retirement savings plan created under the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99–335, 100 Stat. 514, and which is administered by the FRTIB.

#### Paperwork Reduction Act

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act.

#### Unfunded Mandates Reform Act of 1995

Pursuant to the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 602, 632, 653, 1501–1571, the effects of this regulation on State, local, and Tribal governments and the private sector have been assessed. This regulation will not compel the expenditure in any one year of $100 million or more by State, local, and Tribal governments, in the aggregate, or by the private sector. Therefore, a statement under section 1532 is not required.

#### Submission to Congress and the General Accounting Office

Pursuant to 5 U.S.C. 810(a)(1)(A), the FRTIB submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States before

publication of this rule in the **Federal Register**. This rule is not a major rule as defined at 5 U.S.C. 804(2).

**List of Subjects in 5 CFR Part 1650**

Alimony, Claims, Government employees, Pensions, Retirement.

**Ravindra Deo,**

*Executive Director, Federal Retirement Thrift Investment Board.*

For the reasons stated in the preamble, the FRTIB amends 5 CFR chapter VI as follows:

## PART 1650—METHODS OF WITHDRAWING FUNDS FROM THE THRIFT SAVINGS PLAN

■ 1. The authority citation for part 1650 continues to read as follows:

**Authority:** 5 U.S.C. 8351, 8432d, 8433, 8434, 8435, 8474(b)(5) and 8474(c)(1).

**§ 1650.16 [Amended]**

■ 2. Amend § 1650.16 by removing paragraph (d).

[FR Doc. 2023–24004 Filed 10–30–23; 8:45 am]

**BILLING CODE 6760–01–P**

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

### 7 CFR Part 870

**[Doc. No. AMS–FTPP–21–0055]**

**RIN 0581–AE26**

## Economic Adjustment Assistance for Textile Mills

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule with request for comments.

**SUMMARY:** The Agricultural Marketing Service (AMS) revises the regulation providing guidance for domestic manufacturers that consume Upland Cotton and voluntarily participate in the Economic Adjustment Assistance for Textile Mills Program. The revisions add definitions and codify certain participant responsibilities currently outlined in the existing user Agreement. The changes made by this rule are intended to strengthen management controls that have been added into the Agreement to prevent fraud, waste, and abuse. This action provides the necessary legal support for program administration.

**DATES:**

*Effective date:* October 31, 2023.

*Comment date:* We will consider comments that we receive by the close of business January 2, 2024. AMS may consider the comments received and may conduct additional rulemaking based on the comments.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this final rule. All comments must be submitted through the Federal e-rulemaking portal at *https://www.regulations.gov* and should reference the document number and the date and page number of this issue of the **Federal Register**. All comments submitted in response to this final rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting comments will be made public on the internet at *https://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Dan Schofer, Cotton Program Manager, Warehouse and Commodity Management Division, Fair Trade Practices Program, AMS, USDA; Telephone: (202) 690–2434, or Email: *Dan.Schofer@usda.gov.*

**SUPPLEMENTARY INFORMATION:** Section 1207(c) of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–234; May 22, 2008) directed the Secretary of Agriculture (Secretary) to provide economic adjustment assistance to domestic users of upland cotton under the Economic Adjustment Assistance to Users of Upland Cotton program. Under the program, domestic users of upland cotton may qualify for financial assistance that can be used to acquire, construct, install, modernize, develop, convert, or expand land, plant, buildings, equipment, facilities, or machinery used in the manufacture of final cotton products. Payments for such assistance are issued by the Commodity Credit Corporation (CCC). Recipients must use these funds within a certain timeframe and must maintain and provide, to program administrators, records related to their use of upland cotton and allowable capital expenditures under the program.

Section 1203(b) of the Agriculture Improvement Act of 2018 (Pub. L. 115–334; December 20, 2018) renamed the program ''Economic Adjustment Assistance for Textile Mills'' (EAATM). In a memorandum dated July 1, 2019, the Secretary redelegated authority to administer EAATM from the Farm Service Agency to AMS. A final rule published in the **Federal Register** on October 15, 2020 (85 FR 65500), amended 7 CFR part 2 to reflect the redelegation. The amended 7 CFR 2.79(a)(23) authorizes the AMS Administrator to administer the EAATM program (7 U.S.C. 9037(c)). A final rule published in the **Federal Register** on October 1, 2021 (86 FR 54339), removed the EAATM regulations from 7 CFR part 1427 and added them in a new 7 CFR part 870—Economic Adjustment Assistance for Textile Mills, in §§ 870.1 to 870.9.

For participation in the EAATM program, domestic users must enter into an Upland Cotton Domestic User Agreement (Form CCC–1045–DOM) (Agreement) and submit upland cotton consumption documentation to AMS's Warehouse and Commodity Management Division (WCMD) to receive financial assistance.

AMS is now codifying the requirements specified in the Agreement as regulations. This final rule amends 7 CFR part 870 by reorganizing and revising existing sections and adding several new sections, supplying definitions of certain program terms, and clarifying current program practices to provide a better understanding of CCC requirements for program participants.

Under this final rule, references in 7 CFR part 870 to the Upland Cotton Domestic User Program are revised to reflect the current name of the program, Economic Adjustment Assistance for Textile Mills. The final rule adds a new § 870.2—Definitions, to provide the meaning of several terms used in program administration that have been subject to differing interpretations in the past. For example, the term *domestic user* is defined as a person regularly engaged in the business of opening bales of eligible upland cotton for the purpose of spinning such cotton into yarn, papermaking, or production of non-woven cotton products. This definition clarifies and enhances the use of other terms already defined in the current regulations. *Eligible domestic users* is defined as domestic users who have entered into an Agreement with CCC to participate in the program. *Eligible upland cotton* is defined to mean baled lint; loose samples used for classification purposes that have been re-baled; semi-processed motes that are suitable for spinning, paper making, or production of non-woven fabric; or re-ginned motes. Eligible upland cotton cannot be cotton for which previous EAATM payments have been made, unprocessed derivatives of the lint cleaning process, or textile mill wastes. Similarly, the term *final cotton product* is defined to mean a domestically manufactured final product that contains upland cotton to clarify those manufacturing purposes for which program assistance funds are eligible. Each of these definitions is intended to

clarify eligibility for program participation.

The term *capital expenditures* is defined to mean a business's expenses related to the purchase or improvement of depreciable fixed assets, such as physical property, facilities, and equipment used in the manufacture of final products containing upland cotton. The terms *equipment* and *facility* or *plant* is defined to identify those fixed assets for which capital expenditures are recognized under the program. *Equipment* is defined to mean any machine used directly in the production of final cotton products in order to improve product quality, handling, and/or production efficiency, and *facility* or *plant* would mean the structures that house such equipment. *Readily put into service* is defined to mean facilities, equipment, and/or plants put into service within 24 months of purchase. The definition of *operating expenses* includes examples of funds expended that are not eligible for EAATM benefits, such as rent, salaries, supplies, utilities, insurance, taxes, and maintenance. Each of these definitions are necessary to clarify which expenses program participants can include in claims for assistance under the program.

Terms including *linters, pills,* and *raw motes* are defined to clarify types of processing byproducts that are not considered eligible upland cotton for program purposes. Terms including *agreement effective date, date of consumption, fiscal year,* and *marketing year* would be defined to clarify various timeframes related to application and reporting deadlines for program participation.

Terms used in the existing Agreement that are related to reporting and recordkeeping requirements also are defined in the regulations. The *Upland Cotton Domestic User Agreement* (Form CCC–1045 DOM) means the agreement between CCC and an EAATM program participant, which outlines general program provisions and responsibilities of the program participant. This agreement is required of all program participants. The *Monthly Consumption Report* refers to Form CCC–1045–UP–2—Monthly Consumption/Application for Payment Report, or other form as prescribed by CCC, that contains documentation of the baled cotton inventory consumed, the eligible domestic user's calculation of program payments for the month, and a signed certification regarding the documents submitted. Participants are required to maintain a *supplemental ledger,* which is defined as a line-item ledger of proposed capital expenditures for audit purposes. *Statement of eligible claim certification* is the document that identifies which domestic user in the manufacturing chain is eligible to claim financial assistance under the EAATM program for the use of specific semi-processed motes or re-ginned mote bales.

Terms used in filling out records and reports are also defined in § 870.2. *Upland cotton* means the widely cultivated American cotton plant (*Gossypium hirsutum*) that has short-to-medium staple fibers. *Final cotton product* is defined to mean domestically manufactured products containing upland cotton. *Net weight* means the gross weight of baled upland cotton consumed, less the weight of the bagging and ties.

Finally, § 870.2 includes definitions for other terms necessary for administration of the program as explained earlier, such as *Agricultural Marketing Service, Commodity Credit Corporation, Director* of AMS's Warehouse and Commodity Management Division, and the *Economic Adjustment Assistance for Textile Mills* program.

Currently, §§ 870.3 to 870.9 contain the definitions of upland cotton and domestic users eligible for program participation and provide instructions for filing applications for participation and payments under the program. Under this final rule, those sections are reorganized and revised to incorporate program provisions that are currently only provided in the Agreement, and other sections are added to ensure that all of the program's parameters are codified.

Under the final rule, § 870.3—Upland Cotton Domestic User Agreement, specifies how domestic users of upland cotton can enter into Agreements with CCC to participate in the EAATM program. Applicants are required to agree to use EAATM Program funds only in compliance with the program and to identify all manufacturing facilities under their operational control and for inclusion in the Agreement.

Section 870.5—Eligible upland cotton, describes upland cotton eligible for payment under EAATM and specifies that only eligible cotton consumed by the user in the United States on or after the effective date of the Agreement is eligible for payment claims. Further, EAATM Program funds cannot be used for expenses incurred by a domestic user prior to signature by both parties to the Agreement.

Section 870.7—Monthly Consumption Report, requires program participants to submit cotton consumption reports and supporting documentation to AMS during each month of the Agreement term, including those months in which no eligible upland cotton was consumed. Required reports would constitute participants' claims for payments under the program and include their calculations for such payments. Under the final rule, delinquent Monthly Consumption Reports are ineligible for payment for the applicable month. Section 870.7 further provides that AMS will not process reports/claims that contain errors or omissions. Finally, § 870.7 requires that, in the event of a transfer of eligible upland cotton bales, both program participants involved report to AMS any transfers of eligible upland cotton bales between them and that such transactions must be accompanied by a statement of eligible claim certification. Submission of the Monthly Consumption Report allows for validation of active participants, enumeration of domestic consumption, and provides a baseline for verifying that duplicate claims are not submitted for program payments.

Section 870.9—Payment, specifies that the current rate for payment under the EAATM program is 3 cents per pound of eligible cotton consumed, and that cotton is considered consumed on the date the eligible cotton user removes the bale's bagging and ties immediately prior to manufacturing it into final cotton products—without further processing. Section 870.9 further provides that payments are based on the bale's net weight and are made available upon the eligible cotton user's submission of the required reports and documentation.

Section 870.11—Capital expenditures, specifies that eligible domestic cotton users can only use payments under the EAATM program to acquire or modernize land, buildings, or equipment in the United States which are directly attributable to the purpose of manufacturing upland cotton into final cotton products in the United States. Other uses, such as for operating expenses or other purchases are not allowed. Under § 870.11, participants using EAATM program funds for disallowed purposes are required to repay the money to CCC with interest and are ineligible for program participation for one year after the year of violation. Section § 870.11 further specifies that program participants must submit requests for pre-approval of capital expenditures under the program that exceed an amount specified in the Agreement and for any expenditures greater than $10 million on a single, allowable, fixed asset. The regulation outlines the elements required to be submitted in a pre-approval request.

The threshold value is specified in the latest Upland Cotton Domestic User Agreement, rather than in the regulations to allow the Agency to consider and respond to economic pressures.

Under the final rule, participants are required to make capital expenditures equal to or greater than amounts received as EAATM program payments within 18 months of the end of the marketing year for which payments are made, unless participants apply for and are granted a Funding Utilization Extension, but in no case more than an additional 36 months.

Fixed assets acquired and/or modernized with EAATM Program funds must be in operation within 24 months after the date of delivery. If unforeseen difficulties prevent utilization within the 24-month period, written approval must be obtained from WCMD for an extension of time. The timeframes and increased communication about expenditures between the Agency and participants are expected to increase auditability and transparency. Finally, § 870.11 provides that program participants cannot transfer—directly or indirectly—EAATM Program funds to another entity. Participants are required to complete an asset transfer certification in the event of a sale or transfer of assets to another program participant. Except for extenuating circumstances approved by AMS, fixed assets, purchased using EAATM Program funds, cannot be sold until they have been in operation for at least 36 months and cannot be purchased with EAATM Program funds again by another eligible domestic user.

Section 870.13—Records and inspection, requires program participants to maintain all records and reports relating to their EAATM Agreement for a period of three years following termination of the Agreement. Detailed record requirements are intended to provide better guidance to the participants and expedite audits. These requirements include identifying elements of the monthly consumption listing, supporting documentation of purchased and consumed cotton, supporting documentation of used but ineligible cotton, inventory records, capital expenditures, and the supplemental ledger. Section 870.13 requires program participants to provide copies of records supporting payment claims to AMS upon demand, and to make all records related to their Agreements accessible to AMS, USDA, and/or any other governmental unit needing access for audit or inspection purposes. The reporting and recordkeeping requirements are needed for oversight to safeguard program integrity.

Section 870.15—Compliance, enforcement, and appeals, provides that AMS will notify appropriate investigating agencies—and that CCC may terminate an Agreement and demand full repayment plus interest—if a program participant is suspected of violating the Agreement, making any fraudulent representation, or misrepresenting any fact affecting a determination under the Agreement. Under the final rule, the participant could be barred from further government program participation as necessary to protect government interests. Further, CCC retains the authority to terminate an Agreement at any time. Section 870.15 also provides a process for appealing program administration decisions.

**Required Regulatory Analyses**

*Paperwork Reduction Act*

The Economic Adjustment Assistance for Textile Mills Program is exempt from the requirements of the Paperwork Reduction Act (Agricultural Act of 2014 (Pub. L. 113–79, Title I, Subtitle F, Administration Generally, Section 1601(c)(2)). Accordingly, the information collection requirements of this final rule have not been reviewed by the Office of Management and Budget.

*Executive Order 13175*

This final rule was reviewed under Executive Order 13175—Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions have Tribal implications. AMS has determined that this final rule is unlikely to 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.

*Executive Orders 12866 and 13563*

Executive Order 12866—Regulatory Planning and Review, and Executive Order 13563—Improving Regulation and Regulatory Review, direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Management and Budget (OMB) designated this rule as not significant under Executive Order 12866. Therefore, OMB has not reviewed this rule.

*Regulatory Flexibility Analysis*

Pursuant to the requirements set forth in the Regulatory Flexibility Act (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of the action on small entities, and, accordingly, has prepared this Regulatory Flexibility Analysis (RFA).

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be unduly or disproportionately burdened. AMS certifies that this rule will not have a significant economic impact or burden on small Textile Mill entities. In making this determination, AMS considered the current and possible participant base of the Economic Adjustment Assistance for Textile Mills (EAATM) Program and the nature of this action. The EAATM Program is authorized by the Farm Bill, first in 2008 (Food, Conservation, and Energy Act (Pub. L. 110–246)), reauthorized in 2014 (Agricultural Act of 2014 (Pub. L. 113–79)) and 2018 (Pub. L. 115–334), and funded through Commodity Credit Corporation (CCC), with administrative oversight delegated to AMS.

AMS used the Small Business Administration's (SBA) definition of small business in reference to Textile Mills, found at 13 CFR 121.201. The affected industry falls under the North American Industry Classification System (NAICS) as Subsector 313, with most current participants classified as code 313110—Textile Mills, Fiber, Yarn, and Thread Mills. This classification includes firms that process raw cotton into cotton products. SBA determines firm size for this industry by number of employees, but on a per firm basis, with small firms defined as having fewer than 1,500 employees. Current participants of the EAATM Program are required to be registered with the System for Awards Management; however, none of the current participants appear to have the small business registration denoted on their entity profile. EAATM participants do not disclose the number of employees in the agreements or applications submitted to CCC but based on familiarity with the industry and information from SBA's Dynamic Small Business Search Database, AMS estimates that 25 out of the 34 current

participants can be considered small entities.

This action codifies existing requirements in the EAATM Domestic User Agreement and does not impose any new requirements. In analyzing the current economic impact on small entities, AMS could only deduce positive impact. The EAATM program has fewer than 40 participants, and AMS does not anticipate any surge in participation due to the action. Small Textile Mill participants in the EAATM Program will not be unduly or disproportionately burdened. Textile Mills of all sizes may benefit proportionately from the program, as it provides a payment per pound of cotton consumed to encourage domestic consumption of cotton.

The definition of an eligible participant in reference to the EAATM Program is someone regularly engaged in opening bales of eligible upland cotton for the purposes of spinning cotton into yarn, paper making, or production of non-woven cotton products in the United States, who has entered into an agreement with the CCC to participate in the upland cotton user program. Participants may be public or private nonprofit entities. All entities that adhere to the eligible participant definition and submit a monthly application indicating consumed bales of upland cotton, regardless of size, can voluntarily participate and benefit from the EAATM Program. Program provisions are administered without regard for business size. The paperwork required to participate asks for information that is part of normal business records. The information collection burden for eligible participants is minimal as they must only compete the user application form with the Textile Mill's monthly consumption. The voluntary nature of the program allows any eligible participant to stop participating if they find program participation causes an undue or disproportionate burden.

*E-Government Act*

USDA is committed to complying with the E-Government Act (44 U.S.C. 3601 *et seq.*) by promoting the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

*Executive Order 12988*

This final rule was reviewed under Executive Order 12988—Civil Justice Reform. This rule will not preempt State or local laws, regulations, or policies unless they represent an irreconcilable conflict with this rule. The final rule is not intended to have retroactive effect. Before any judicial actions may be brought regarding the provisions of this rule, administrative appeal provisions of 7 CFR parts 11 and 780 must be exhausted.

*Exemption From Notice and Comment*

The EAATM program is authorized under Title I of the Agricultural Act of 2014. As such, regulations for EAATM may be made without regard to the notice and comment provisions of the Administrative Procedures Act at 5 U.S.C. 553. (See 7 U.S.C. 9091(C)(2)(a)) Nevertheless, AMS is interested in public feedback and invites comments on this final rule from interested persons that may inform future rulemaking. Comments are due January 2, 2024.

Further, AMS finds there is good cause for making this rule effective immediately. Implementing the provisions of this final rule without a 30-day delay provides program continuity and enumerates participation requirements necessary for the industry to ensure access to program benefits.

**List of Subjects in 7 CFR Part 870**

Cotton, EAATM, Payments, Reporting and recordkeeping, Textile mills, Upland Cotton Domestic User Agreement.

■ For the reasons set forth in the preamble, the Agricultural Marketing Service revises 7 CFR part 870 to read as follows:

## PART 870—ECONOMIC ADJUSTMENT ASSISTANCE FOR TEXTILE MILLS

Sec.



**Authority:** 7 U.S.C. 9037(c).

### § 870.1 Applicability.

(a) These regulations specify the terms and conditions under which the Commodity Credit Corporation (CCC) will make payments to eligible domestic users who have entered into an Upland Cotton Domestic User Agreement with the Agricultural Marketing Service to participate in the Economic Adjustment Assistance for Textile Mills Program.

(b) The Agricultural Marketing Service will specify the forms to be used in administering the Economic Adjustment Assistance for Textile Mills program.

### § 870.2 Definitions.

For the purposes of the regulations in this part:

*Agreement effective date* means the date on which the Upland Cotton Domestic User Agreement takes effect or becomes operative and enforceable.

*Agricultural Marketing Service* (*AMS*) means the Agricultural Marketing Service of the United States Department of Agriculture, which administers the Economic Adjustment Assistance for Textile Mills Program.

*Bale weight* means the auditable weight of a bale of cotton as determined on a scale certified as accurate by an independent party.

*Baled lint* means ginned or processed cotton lint, including but not limited to lint classified by the Agricultural Marketing Service as Below Grade, compressed into a standard-sized and weighed pack.

*Capital expenditures* means funds expended by a business for modernization or acquisition of depreciable fixed assets such as property, fixtures, or machinery that are directly attributable to the improvement of productivity or efficiency of the domestic user in the manufacturing of final products containing upland cotton. Capital expenditures do not include debt service payments, even if such debt service payments are for debt used to finance capital expenditures.

*Commodity Credit Corporation (CCC*) means the wholly owned government corporation within the U.S. Department of Agriculture, whose funds, facilities, and authorities are used to implement specific activities as authorized by Congress.

*Date of consumption* means the date the bagging and ties are removed from the bale, as determined by AMS.

*Director* means the Director of the Warehouse and Commodity Management Division (WCMD) part of the Agricultural Marketing Service's Fair Trade Practices Program.

*Domestic user* means a person who is regularly engaged in the business of opening bales of eligible upland cotton in the United States for the purpose of spinning such cotton into yarn, papermaking, or production of non-woven cotton products also in the United States.

*EAATM Program funds* means funds provided by CCC as Economic Adjustment Assistance for Textile Mills under the terms of the Agreement.

*Economic Adjustment Assistance for Textile Mills* (*EAATM*) means the

program authorized by Congress under which eligible domestic users of eligible upland cotton can apply for and receive financial assistance to offset capital expenditures related to investments in the United States for the manufacturing of products containing cotton, as provided in this part.

*Eligible domestic user* means a domestic user in the United States, who has entered into an agreement with CCC to participate in the Economic Adjustment Assistance for Textile Mills program.

*Eligible upland cotton* means baled upland cotton, regardless of origin, that is opened by an eligible domestic user and is baled lint, re-baled loose samples, suitable semi-processed motes, or re-ginned motes.

*Equipment* means any machine used directly in the production of final cotton products in order to improve product quality, handling, and/or production efficiency.

*Facility* or *Plant* means the structure(s) that houses the necessary equipment for consuming and manufacturing eligible upland cotton into the final cotton product.

*Final cotton product* means product manufactured domestically that contains upland cotton.

*Linters* means lint produced from the cottonseed crushing process.

*Marketing year* means the one-year period starting on August 1 and ending on the following July 31.

*Monthly Consumption Report* means Form CCC–1045–UP–2, the Monthly Consumption/Application for Payment Report, or other form as prescribed by AMS, submitted by the eligible domestic user for program payment purposes that contains documentation of inventory consumed, payment amounts, and a signed certification.

*Net weight* means the bale weight less the weight of the bagging and ties.

*Operating expenses* means funds expended by a business in its normal activities, including but not limited to rent, salaries, supplies, utilities, insurance, taxes, and maintenance.

*Operational control* means the domestic user has plenary control over the facility during the term of the Upland Cotton Domestic User Agreement.

*Person* means any individual, partnership, corporation, association, public or private organization or governmental entity, or combination thereof.

*Pills* means waste from the mote cleaning process.

*Raw motes* means lint cleaner waste resulting from the ginning process.

*Readily put into service* means facilities, equipment, and/or plants put into service within 24 months of delivery.

*Re-baled loose samples* means loose samples of upland cotton that have been removed from cotton bales for classification purposes and subsequently re-baled.

*Re-ginned mote bales* means baled cotton fiber that has been removed from small, broken, or immature cotton seeds by re-ginning.

*Statement of eligible claim certification* means an official document identifying the entity eligible to claim EAATM financial assistance for their use of suitable semi-processed motes or re-ginned mote bales.

*Suitable semi-processed motes* means small, broken, or immature cotton seeds with attached cotton fibers that are of a quality suitable, without further processing, for spinning, papermaking, or production of non-woven fabric.

*Supplemental ledger* means a line-item record detailing qualifying capital expenditures that the eligible domestic user proposes to claim for program purposes.

*Upland cotton* means a widely cultivated American cotton plant (*Gossypium hirsutum*) having short-to-medium staple fibers.

*Upland Cotton Domestic User Agreement (Form CCC–1045DOM* or *Agreement)* means an agreement between CCC and an eligible domestic user regarding EAATM program participation.

### § 870.3 Upland Cotton Domestic User Agreement.

(a) To be eligible for payment under the Upland Cotton Economic Adjustment Assistance for Textile Mills program, domestic users must apply for program participation by submitting a signed original copy of the version of the Upland Cotton Domestic User Agreement, then in effect, for approval and execution by the Agricultural Marketing Service on behalf of CCC. Upon approval, AMS will return an executed copy to the domestic user.

(b) The domestic user must stipulate in writing that the intended use of all funds received under the EAATM program will be for the sole purpose of capital expenditures directly attributable to the purpose of manufacturing upland cotton into final cotton products in the United States.

(c) The domestic user must identify all plants and/or facilities to be included as a part of the Upland Cotton Domestic User Agreement. The domestic user must have operational control of these plants and/or facilities.

(d) Payments will be made available to eligible domestic users who have entered into the version of an Upland Cotton Domestic User Agreement with CCC, then in effect, and who have complied with the program requirements of this part.

(e) Upland Cotton Domestic User Agreement forms may be obtained from the Warehouse and Commodity Management Division website.

### § 870.5 Eligible upland cotton.

(a) Upland cotton eligible for payment under this part must be cotton that is consumed by the domestic user in the United States on or after the effective date of a signed Upland Cotton Domestic User Agreement, but not later than such date as may be set by the Agricultural Marketing Service.

(b) The following are not eligible for payment under this part:

(1) Cotton for which a payment under the provisions of this part has already been claimed or made available;

(2) Raw (unprocessed) motes, pills, linters, or other derivatives of the lint cleaning process; or

(3) Textile mill wastes.

### § 870.7 Monthly Consumption Report.

(a) Eligible domestic users making applications for payment under this part must submit a Monthly Consumption Report to AMS. The Monthly Consumption Report must include the following:

(1) Documentation of eligible upland cotton inventory consumed by the eligible domestic user;

(2) The eligible domestic user's calculation of financial assistance claimed for payment under the program; and

(3) The eligible domestic user's signed certification as to the accuracy of the Monthly Consumption Report.

(b) The eligible domestic user must report to AMS the activity pursuant to paragraph (a)(1) of this section for each month beginning on the effective date of the Agreement.

(1) If the eligible domestic user's facility is temporarily closed for any reason, the eligible domestic user must notify AMS and submit a Monthly Consumption Report prior to the end of the month following the plant closure.

(2) Except as provided in paragraph (b)(1) of this section, the domestic user must submit Monthly Consumption Reports every month, even when no eligible upland cotton has been consumed.

(c) Monthly Consumption Reports not submitted by the last business day of the following month will be considered late by AMS and are ineligible for payment.

(d) AMS will not process for payment Monthly Consumption Reports or any other required documents from an eligible domestic user that contain errors or omissions.

(e) Any transaction between two eligible domestic users involving the transfer of eligible upland cotton bales must be reported to AMS by both eligible domestic users with a statement of eligible claim certification as defined in § 870.2.

**§ 870.9 Payment.**

(a) The payment rate for purposes of calculating payments as specified in this part is 3 cents per pound.

(b) The payment rate is the rate in effect on the date of consumption.

(1) Baled eligible upland cotton consumption must take place in a building or collection of buildings where the cotton bale will be used in the continuous process of manufacturing the cotton into final cotton products in the United States, and as determined by AMS. Unbaled eligible upland cotton will be considered consumed by the domestic user on the date processed.

(2) The quantity of eligible upland cotton with respect to which a payment is made available shall be determined based upon the net weight of each bale of eligible upland cotton.

(c) Payments specified in this part will be determined by multiplying the payment rate by one of the following:

(1) In the case of baled upland cotton, whether lint, loose samples, or re-ginned motes, but not semi-processed motes, the net weight of the cotton consumed;

(2) In the case of unbaled re-ginned motes consumed, without re-baling, for an end use in a continuous manufacturing process, the weight of the re-ginned motes after final cleaning; or

(3) In the case of suitable semi-processed motes, 25 percent of the net weight of the semi-processed motes.

(d) In all cases, the payment will be determined based on the amount of eligible upland cotton that an eligible domestic user consumed during the immediately preceding calendar month.

(e) Payments specified in this part will be made available upon application for payment and submission of supporting documentation, as required by the provisions of this part.

**§ 870.11 Capital expenditures.**

(a) All payments to eligible domestic users of upland cotton under this part shall be used only for capital expenditures that acquire, construct, install, modernize, develop, convert, or expand land, plant, buildings, equipment, or machinery in the United States. Capital expenditures must be directly attributable to the purpose of manufacturing upland cotton into final cotton products in the United States and certified as such by the domestic user. Expenditures that are not directly associated with manufacturing of upland cotton into final cotton products in the United States are outside the purpose and scope of the Economic Adjustment Assistance for Textile Mills Program and are not eligible expenditures for funds under this part.

(b) Operating expenses are not eligible for purposes of this part.

(c) If AMS determines, after a review or audit of the eligible domestic user's records, that economic adjustment assistance under this part was not used for the purposes specified in paragraph (a) of this section, the eligible domestic user shall be:

(1) Liable to repay the assistance to CCC, plus interest, as determined by CCC; and

(2) Ineligible to receive assistance under EAATM for a period of one year following AMS's determination.

(d) Any specific capital expenditure exceeding an amount, as specified in the version of the Upland Cotton Domestic User Agreement, then in effect, must be submitted for pre-approval. The request for pre-approval must include:

(1) The description of the proposed expenditure specified for the applicable marketing year;

(2) Itemized purchase order and/or invoice number, if applicable;

(3) Documentation of scheduled purchase date(s), installation date, and location (which facility); and

(4) Any additional information required by AMS.

(e) The eligible domestic user must make capital expenditures equal to, or greater than, any amounts received as EAATM Program funds, within 18 months following the end of the applicable marketing year. Equipment, facilities, and plants purchased with EAATM Program funds must be readily put into service as defined in § 870.2. The eligible domestic user must:

(1) Make capital expenditures that exceed the amount paid to the eligible domestic user for any marketing year. EAATM Program funds will not carry over to the following marketing year without a written Funding Utilization Extension from AMS.

(2) Request a Funding Utilization Extension for approval from AMS to be considered for any capital expenditure exceeding a value of $10 million on a single, allowable, fixed asset.

(3) Request a Funding Utilization Extension at the time of a pre-approval for a single item expenditure pursuant to paragraph (d) of this section.

(4) Applications for a Funding Utilization Extension Request must include, but are not limited to:

(i) Detailed plans for the expense;

(ii) Timeline of construction;

(iii) Schedule of payments;

(iv) Estimated date of when the capital expenditure will be operational;

(v) Explanation of how the expense meets the criteria for allowable purposes;

(vi) Justification for the extension request; and

(vii) Any other information or supporting documentation required by AMS.

(5) WCMD will consider Funding Utilization Extension requests based on allowable purposes. In any event, the maximum time extension for EAATM Program funds to be used for capital expenditures will be 36 months beyond the existing timeframe of 30 months (Marketing Year + 18 months), for a total of 66 months.

(6) EAATM Program funds will be reconciled against the eligible expense(s) specified in the Funding Utilization Extension until the approved time extension has expired or funds are exhausted.

(f) Fixed assets acquired and/or modernized with EAATM Program funds must be in operation within 24 months after the date of purchase. If unforeseen difficulties prevent utilization within the 24-month period, written approval must be obtained from WCMD for an extension of time.

(g) Direct or indirect transfer of EAATM Program funds to another entity is prohibited. In the event of a sale/transfer of an eligible domestic user's business or its assets, the eligible domestic user must sign a written verification certifying that no EAATM Program funds were transferred, either in cash or as an asset purchased exclusively to be transferred to the acquiring company.

(h) Each eligible domestic user involved in an acquisition/merger/transfer must notify AMS and provide AMS with an itemized ledger detailing specific equipment, building, facility, property, and/or plants bought with EAATM Program funds included with any acquisition/merger/transfer. In the event of an acquisition/merger/transfer and without extenuating circumstances, equipment, facilities, and/or plants purchased with EAATM Program funds by an eligible domestic user must be operational for a minimum of 36 months prior to its sale and cannot be purchased

with EAATM Program funds again by another eligible domestic user.

**§ 870.13 Records and inspection.**

(a) *Required records.* The eligible domestic user shall maintain all records and reports relating to their Upland Cotton Domestic User Agreement for a period of three years following termination of the Agreement. At a minimum, records must include those listed in paragraphs (a)(1) through (6) of this section.

(1) A monthly consumption record including a detailed list of bales consumed, showing the bale numbers, net weights, date received, date consumed, type of eligible upland cotton, and a facility identifier. The consumption record must be accompanied by source documents such as purchase orders and invoices to verify the information provided.

(2) Documentation supporting the receiving of cotton, including a register of contracts, amendments, and cancellations. Records must show the number of bales received each month by type of cotton, supported by invoices or waybills and weight sheets documenting the net weight when received at the user's facility.

(3) Documentation tracing the consumed bale weight back to source documents showing the documented bale weight received at the user's facility.

(4) Documentation supporting the acquisition, consumption, and disposition of ineligible cotton and other textiles.

(5) A bale inventory record that summarizes, at least monthly, the eligible domestic user's beginning inventory, receipts, adjustments, consumption, and ending inventory.

(6) Documentation of capital expenditures that are equal to or greater than payments received.

(i) The eligible domestic user must record information about capital expenditures in a supplemental ledger as defined in § 870.2, including, but not limited to, detailed descriptions of each capital expenditure, acquisition date, date of payment, amount of payment, and proof of payment, serial number(s), invoice number, and location (applicable facility).

(ii) Capital expenditures must be grouped by Marketing Year.

(iii) Each line item must reflect only a single expense for an identifiable single expenditure.

(b) *Inspection of records.* (1) Upon request from WCMD, the eligible domestic user must forward to WCMD copies of any and all records which support the domestic user's claims for payment.

(2) Eligible domestic users must make records available at all reasonable times for an audit or inspection by authorized representatives of AMS, the United States Department of Agriculture, and/or any other governmental unit needing access for audit or inspection purposes.

(3) Eligible domestic users shall permit, and assist without impediment, any AMS-authorized individual to inspect or audit, on any business day during the normal and customary hours of business, the books, papers, records, accounts, and other applicable documents relating to the Agreement. Failure to provide access or respond timely to requests for information and records will result in denial of benefits.

**§ 870.15 Compliance, enforcement, and appeals.**

(a) AMS will notify the appropriate investigating agencies of the United States and CCC may terminate the Agreement and demand a full refund of payments plus interest and suspend and debar the offending company from further government participation as deemed necessary to protect the interests of the government, if the eligible domestic user is suspected by AMS to have knowingly:

(1) Adopted any scheme or device which violates the Agreement;

(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting a determination under the Agreement.

(b) No Member or Delegate of Congress shall be admitted to any share or part of the Agreement or to any benefit to arise therefrom, except that this provision shall not be construed to extend to their interest in any incorporated company, if the Agreement is for the general benefit of such company, nor shall it be construed to extend to any benefit which may accrue to such official in their capacity as a party to an Agreement.

(c) Eligible domestic users who dispute a WCMD program administration decision may request a review of the decision by the Director.

(1) Requests for review must be in writing and contain the relevant facts upon which the review will be heard. Requests must be received by WCMD within 15 days from the date the eligible domestic user receives the disputed decision.

(2) Requests must be directed to: Director, Warehouse and Commodity Management Division, Agricultural Marketing Service, U.S. Department of Agriculture, at *EAATM.ELS@usda.gov.*

(d) 7 CFR 2.79(a)(23) authorizes the AMS Administrator to administer the EAATM program (7 U.S.C. 9037(c)). In light of the aforementioned redelegation, AMS is considered a successor ''Agency'' under 7 CFR 11.1, and decisions made under EAATM, if deemed adverse, are subject to NAD jurisdiction. Accordingly, appeals under this program shall be heard by the USDA National Appeals Division.

(e) Eligible domestic users who dispute a review decision by the Director must appeal such decision to the USDA National Appeals Division pursuant to 7 U.S.C. 6912(e) and 7 CFR 11. Such an appeal must be made within 30 days of receipt of a WCMD decision.

(f) CCC may terminate the Upland Cotton Domestic User Agreement at any time.

(g) When a new Agreement is executed for any reason, including but not limited to programmatic requirements, expiration of authorizing legislation, or exhaustion of funds, any previous Agreement between CCC and the eligible domestic user shall be null and void/terminated.

(h) The Director may waive or modify deadlines and other program requirements in cases where timeliness or failure to meet such other requirements does not adversely affect the operation of the program.

**Erin Morris,**

*Associate Administrator, Agricultural Marketing Service.*

[FR Doc. 2023–23727 Filed 10–30–23; 8:45 am]

**BILLING CODE 3410–02–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

### 9 CFR Part 11

**[Docket No. APHIS–2011–0009]**

**RIN 0579–AE76**

## Horse Protection; Licensing of Designated Qualified Persons and Other Amendments; Withdrawal

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Final rule; withdrawal.

**SUMMARY:** The Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA) is withdrawing a final rule that was filed for public inspection by the Office of the Federal Register on January 19, 2017, in advance of publication,

amending the Agency's Horse Protection Act regulations (the 2017 HPA final rule). On January 23, 2017, APHIS withdrew the 2017 HPA final rule from publication without undertaking notice and comment procedures, in accordance with a memorandum that was issued by the Executive Office of the President on January 20, 2017. However, following a lawsuit, the U.S. Court of Appeals for the District of Columbia Circuit found this withdrawal to be deficient. The District Court subsequently ordered that USDA could remedy this deficiency by undertaking notice and comment procedures on the proposed withdrawal. APHIS therefore issued a notice of proposed rulemaking to withdraw the 2017 HPA final rule, and we are finalizing that withdrawal based on the comments received.

**DATES:** This withdrawal is effective November 30, 2023.

**FOR FURTHER INFORMATION CONTACT:** Dr. Aaron Rhyner, DVM, Assistant Director, USDA–APHIS-Animal Care, 2150 Centre Ave., Building B, Mailstop 3W11, Fort Collins, CO 80526–8117; *aaron.a.rhyner@usda.gov;* (970) 494–7484.

**SUPPLEMENTARY INFORMATION:** Under the Horse Protection Act (HPA, or the Act, 15 U.S.C. 1821 *et seq.*), the Secretary of Agriculture is authorized to promulgate regulations to prohibit the movement, showing, exhibition, or sale of sore horses.

The Secretary has delegated responsibility for administering the Act to the Administrator of the U.S. Department of Agriculture's (USDA's) Animal and Plant Health Inspection Service (APHIS). Within APHIS, the responsibility for administering the Act has been delegated to the Deputy Administrator for Animal Care. Regulations and standards established under the Act are contained in 9 CFR part 11 (referred to below as the regulations), and 9 CFR part 12 lists the rules of practice governing administrative proceedings.[1]

On July 26, 2016, APHIS published in the **Federal Register** (81 FR 49112–49137, Docket No. APHIS–2011–0009) a proposal[2] to amend the regulations. Primarily, APHIS proposed to discontinue third-party training and oversight of Designated Qualified Persons, or DQPs, who inspect regulated horses for evidence of soring. Instead, we proposed all inspectors would have to be trained and licensed by APHIS. The rule also proposed several changes to the requirements that pertain to the management of horse shows, exhibitions, sales, and auctions, as well as changes to the list of devices, equipment, substances, and practices that are prohibited to prevent the soring of horses. Finally, we proposed to revise the inspection procedures that inspectors are required to perform.

We solicited public comments on the proposal and received 130,975 submissions, as well as comments provided at 5 listening sessions. After APHIS reviewed the comments, on January 11, 2017, we submitted a final rule to the Office of the Federal Register (OFR) for publication (the 2017 HPA final rule). That rule was filed for public inspection, in advance of publication, on January 19, 2017. However, on January 20, 2017, the Executive Office of the President issued a memorandum instructing Federal agencies to immediately withdraw all regulations awaiting publication at the OFR.[3] In response to the memorandum, the 2017 HPA final rule, which was filed for public inspection (and available on the **Federal Register** website, *www.federalregister.gov*), was withdrawn from publication by USDA on January 23, 2017, the first business day following January 20, 2017.

In August 2019, the Humane Society of the United States (HSUS) and other non-governmental organizations sued USDA. HSUS argued that the 2017 HPA final rule had been duly promulgated and could not be withdrawn without first providing public notice in the **Federal Register** and an opportunity for public comment. On July 22, 2022, the Court of Appeals for the D.C. Circuit held that ''an agency must provide notice and an opportunity for comment when withdrawing a rule that has been filed for public inspection but not yet published in the **Federal Register**.'' *Humane Soc'y of the U.S.* v. *U.S. Dep't of Agric.,* 41 F.4th 564, 565 (D.C. Cir. 2022). In remanding the case to the lower court, the Court of Appeals clarified that ''[o]n remand, the district court may consider all remedial issues, including the question of whether remand to the agency without vacatur is appropriate under the criteria established by Circuit precedent.'' *Humane Soc'y of the U.S.* v. *U.S. Dep't of Agric.,* 54 F.4th 733, 734 (D.C. Cir. 2022).

On May 12, 2023, the District Court issued its decision on remand. *Humane Soc'y of the U.S.* v. *U.S. Dep't of Agric.,* No. 19-cv-2458 BAH, 2023 WL 3433970 (D.D.C. May 12, 2023). The Court remanded the withdrawal of the 2017 HPA final rule to APHIS without vacatur, but ordered that the withdrawal of the 2017 HPA final rule would be vacated in 120 days if the agency failed to take appropriate remedial action before then. The Court indicated that USDA could attempt to promulgate a new HPA rule or ''remedy the deficiency in the withdrawal of [the 2017 HPA final rule] by conducting notice and comment on the withdrawal.'' 2023 WL 3433970, at *14. On May 23, 2023, APHIS requested that the Court extend the deadline for action from 120 days to 180 days and the court granted that request on June 1, 2023.

On July 21, 2023, we published a notice of proposed rulemaking for the proposed withdrawal[4] of the 2017 HPA final rule (''notice of proposed rulemaking'') in the **Federal Register** (88 FR 47068–47071, Docket No. APHIS–2011–0009). In that notice of proposed rulemaking, we cited several bases for the proposal to withdraw the 2017 HPA final rule. First, the National Academy of Sciences (NAS) reviewed methods for detecting soreness in horses and published a report of their findings in 2021, and we determined that the 2017 HPA final rule did not sufficiently address the report's findings. Second, a significant period of time had elapsed since the 2017 HPA final rule was issued, and the underlying data and analyses that supported the rule likely needed to be updated. Third, it was our intent to issue a new proposed rule (''new proposed HPA regulations'') that would incorporate more recent findings and recommendations, including the NAS report, and the new proposed HPA regulations were then under review by the Office of Management and Budget (OMB) pursuant to Executive Order 12866. Finally, withdrawing the 2017 HPA final rule would avoid regulatory whiplash by having the final rule go into effect only to have it subject to change, within a relatively short period of time, by another rulemaking.

We solicited comments concerning our notice of proposed rulemaking for 30 days, ending August 21, 2023.

We received 22,971 unique submissions comprising 114,994 comments by the close of the comment period. They were from non-

[1] To view the regulations, go to *https://www.ecfr.gov/current/title-9/chapter-I/subchapter-A/part-11.*

[2] To view the 2016 proposed rule, its supporting documents, and the comments that we received, go to *https://www.regulations.gov/docket/APHIS-2011-0009.*

[3] To view the memorandum, go to *https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-heads-executive-departments-agencies/.*

[4] To view the notice of proposed rulemaking on the proposed withdrawal, its supporting documentation, and the comments that we received, go to *https://www.regulations.gov/docket/APHIS-2011-0009.*

governmental organizations; national organizations representing veterinarians, equine practitioners, and equestrian interests; a State farm bureau; former and current judges of walking horse shows; former walking horse inspectors; and private citizens.

Below, we discuss the comments that we received, by topic.

**Comments Suggesting We Implement the 2017 HPA Final Rule Rather Than Pursue New Proposed HPA Regulations**

We received a number of comments that suggested we implement the 2017 HPA final rule rather than withdraw that rule and proceed with new proposed HPA regulations.

Many commenters stated that the HPA final rule included protections to preclude sore horses from being shown or exhibited that do not exist in the current regulations, and therefore should be implemented. For example, several commenters pointed out that the 2017 HPA final rule had restrictions and prohibitions specific to the Tennessee Walking and Racking Horse (TWH) industry that are not found in the current regulations.

We agree that the 2017 HPA final rule is preferable to the current regulations, but consider the new proposed HPA regulations to be preferable to the 2017 HPA final rule for reasons discussed in the notice of proposed rulemaking regarding the withdrawal of the 2017 HPA final rule and in this document. Additionally, allowing the 2017 HPA final rule to go into effect would have a significant adverse effect on the new proposed HPA regulations that we wish to avoid; we discuss this at greater length later in this document.

A number of commenters stated that it would be easier and quicker for the Agency to allow the 2017 HPA final rule to go into effect than to proceed with new proposed HPA regulations.

Even if allowing the 2017 HPA final rule to go into effect were easier and quicker, we consider the new proposed HPA regulations to be preferrable to the 2017 HPA final rule for reasons discussed in the notice of proposed rulemaking regarding the withdrawal of the 2017 HPA final rule and this document.

A commenter stated that the 2017 HPA final rule should not be withdrawn because it prohibited the use of chemicals and devices associated with soring.

Section 11.2 of the current regulations already prohibits the use of chemicals associated with soring, as well as the devices mentioned by the commenter.

Finally, a commenter stated that the 2017 HPA final rule should not be withdrawn because, in its absence, there would be none of the current protections in place against allowing sore horses to be shown or exhibited.

The commenter appears to mistakenly believe that we proposed withdrawal of the HPA regulations in their entirety, rather than withdrawal of the 2017 HPA final rule that revised the existing HPA regulations. Because the existing HPA regulations are not affected by the withdrawal, the current protections will remain in place, and this is not a reason to refrain from withdrawing the 2017 HPA final rule.

**Comments Suggesting We Implement the 2017 HPA Final Rule While the Rulemaking Process for New Proposed HPA Regulations Are Underway**

As noted above, one of our stated reasons for proposing to withdraw the 2017 HPA final rule was to avoid regulatory whiplash associated with implementing that rule, only to have it subject to change, within a relatively short period of time, by another rulemaking.

Several commenters disagreed with this position.

One commenter stated that issuing new proposed HPA regulations does not preclude the agency from subsequently implementing the 2017 HPA final rule after the new proposed HPA regulations are published and proceed through the rulemaking process.

While the publication of new proposed HPA regulations [5] on August 21, 2023 (88 FR 56924–56962, Docket No. APHIS–2022–0004) does not necessarily preclude APHIS from implementing the 2017 HPA final rule, as we stated in the notice of proposed rulemaking regarding the withdrawal of the 2017 HPA final rule and further elaborate on in this document, we would prefer not to implement a rule that is based on outdated data. Moreover, implementing the 2017 HPA final rule would substantially adversely impact the new proposed HPA regulations. The new proposed HPA regulations were drafted as a complete revision of the existing HPA regulations, meaning that, the new proposed HPA regulations do not propose to amend the regulations as set forth in the 2017 HPA final rule but instead propose to amend the regulations that were in place before the 2017 HPA final rule. Thus, allowing the 2017 HPA final rule to become the current HPA regulations would fundamentally and unnecessarily shift the regulatory scheme on which the new proposed HPA regulations are predicated. As one commenter opined, APHIS would thus have to withdraw, substantially revise, and repropose the new proposed HPA regulations were the 2017 HPA final rule implemented. We agree that either withdrawal or a new regulatory action, such as a supplemental proposal, would be warranted. Specifically, we would have to revise the amendatory instructions and regulatory text of the new proposed HPA regulations—which do not refer to the 2017 HPA final rule or otherwise take that rule and its changes to the pre-existing regulatory landscape into account—to comport with the structure of the regulations in the 2017 HPA final rule, and allow for public comment on this revised regulatory text. This additional regulatory action would significantly extend the timelines for any possible finalization of the new proposed HPA regulations, and any withdrawal or substantive modification to the new proposed HPA regulations heightens the likelihood of confusion regarding the Agency's intent. This likelihood of confusion is underscored by the comments on the notice of proposed rulemaking regarding the withdrawal itself, many of which interpreted the proposed withdrawal of the 2017 HPA final rule as indicating an intent not to issue new HPA regulations despite the stated intent in the notice of proposed rulemaking to do so.

One commenter stated that regulatory whiplash would not occur because it would take a significant amount of time to finalize the new proposed HPA regulations. Another commenter stated that regulatory whiplash would not occur because the horse industry could easily adjust to regulatory changes.

As noted above, implementing the 2017 final rule would substantially adversely impact the new proposed HPA regulations, and trigger the need for regulatory actions to withdraw or modify it. For this reason, we disagree with the commenters that regulatory whiplash will not occur if the new proposed HPA regulations takes significantly longer than anticipated to finalize. Rather, it is the Agency's position that any such withdrawal or modification to the new proposed HPA regulations is likely to result in confusion regarding the Agency's intent, and thus actual or perceived regulatory whiplash.

We also disagree that the 2017 HPA final rule could quickly be implemented. We note that most of the sections in the 2017 HPA final rule would have had an effective date of January 1, 2018, that is, about 1 year

[5] To view the proposed rule, supporting documentation, and the comments that we have received, go to *https://www.regulations.gov/docket/APHIS-2022-0004.*

after the date it was placed on public inspection. This was done out of recognition that there were aspects of the rule that were dependent on other aspects, such as the need to implement a process for Agency training of new third-party inspectors before the inspectors could be appointed to shows and exhibitions, and the rule therefore could not be immediately implemented. We also note that the final rule indicated that one of the provisions of the final rule, a prohibition on the use of pads by Tennessee Walking Horses (TWHs) ''would be harmful to some horses currently on high pads . . . without a phasing-in period,'' and indicated that the January 1, 2018 effective date was chosen in part to ensure this phasing-in period could occur.

Finally, several commenters stated that we could implement the 2017 HPA final rule, and then issue new proposed HPA regulations proposing any additional revisions to the regulations that were necessary.

This was an option before the Agency; however, as noted in the notice of proposed rulemaking regarding the withdrawal of the 2017 HPA final rule, we had reservations about implementing a rule that relied on underlying data and analyses that were at least 7 years old. Indeed, as several commenters noted, the preponderance of data in support of the 2017 HPA final rule was from 2011 or prior, and not necessarily indicative of current industry practices. One of these commenters also noted that the age of the data could present a possible legal vulnerability in the event of litigation by the industry. Accordingly, we preferred to withdraw the 2017 HPA final rule in favor of new proposed HPA regulations that would completely revise the existing HPA regulations and would be based on the most up-to-date data, including that in the NAS report.

**Comments Regarding Issuance of the New Proposed HPA Regulations**

Many commenters urged us to finalize the new proposed HPA regulations referenced in the notice of proposed rulemaking regarding the withdrawal of the 2017 HPA final rule as expeditiously as possible, and that the proposed withdrawal of the 2017 HPA final rule should not be finalized until the new proposed HPA regulations are issued. Several commenters stated that the 2016 proposed rule on which the 2017 HPA final rule was based should be reissued until new proposed HPA regulations are issued, while others stated that, if new proposed HPA regulations could not be issued expeditiously, the 2017 HPA final rule should go into effect instead. A number of commenters stated that APHIS was not intent on issuing new HPA regulations, with some citing the length of time they had been under OMB review as purported evidence of this. Finally, many commenters pointed out that APHIS did not provide a timeline for issuance of new HPA regulations.

These comments have all been overtaken by the fact that the new proposed HPA regulations have been published. As we noted above, the new proposed HPA regulations were published in the **Federal Register** on August 21, 2023.

**Comments Regarding Finalization of the New Proposed HPA Regulations**

Several commenters stated that the 2017 HPA final rule should not be withdrawn until the new proposed HPA regulations are finalized.

As noted previously in this document, the District Court afforded APHIS 180 days, or until November 8, 2023, to remedy the deficiency in its previous withdrawal of the 2017 HPA final rule. APHIS has remedied that deficiency by providing notice and opportunity for public comment on the proposed withdrawal and, based on the comments received, making this determination to withdraw the 2017 HPA final rule. Whereas the deadline to undertake this rulemaking process is November 8, 2023, the comment period for the new proposed HPA regulations ended on October 20, 2023. It is not possible to fulfill the legal and procedural requirements associated with issuance of a final regulatory action regarding the new proposed HPA regulations—which include reviewing and responding to all issues raised by commenters, as well as revising supplemental documentation, as warranted, and clearing the final action and documentation through the appropriate offices—in the 19 days between October 20, 2023, and November 8, 2023.

A commenter stated that the withdrawal of the 2017 HPA final rule should only be finalized before the new proposed HPA regulations are finalized if legally or procedurally necessary.

As noted above, it will be legally necessary to publish a final determination on the proposed withdrawal of the 2017 HPA final rule before we can take any subsequent regulatory action regarding the comments on the new proposed HPA regulations.

A number of commenters urged us to finalize and implement a final rule resulting from the new proposed HPA regulations as expeditiously as possible. Several of the commenters stated that, if this were not to occur, the withdrawal of the 2017 HPA final rule would possibly be in violation of the Administrative Procedure Act (APA). Specifically, they stated that the withdrawal could be found unlawful pursuant to 5 U.S.C. 706(2)(A). (This section of the APA provides that a reviewing court shall hold unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.) In their estimation, APHIS provided no evidence that the 2017 HPA final rule was without foundation or otherwise inadequate, and thus the basis for the withdrawal was predicated solely on the issuance, finalization, and implementation of the new proposed HPA regulations.

We note that the commenters urged us to finalize the new proposed HPA regulations irrespective of the comments received on the proposed rule; the APA precludes us from doing so.

Additionally, we disagree with the commenters that the proposed withdrawal did not articulate concerns with the foundation for the 2017 HPA final rule; as noted above, we stated that the underlying data and analyses in support of the final rule were outdated and without the benefit of the recent NAS report's findings or recent inspection data. We further noted that allocating resources towards implementing outdated regulations would hamper APHIS' efforts to modernize the horse protection regulations. We also agree with a commenter who stated that the age of the data could present a possible legal vulnerability in the event of litigation by the industry.

Finally, while it is APHIS' intent to act as promptly as possible regarding the new proposed HPA regulations, we note that there are legal and procedural requirements that we must follow regarding any regulatory action. This includes, but is not limited to, the need for fulsome review of the comments received to fulfill the requirements of the APA; the need to review, and, as necessary, revise supporting documentation in response to comments; and the need to comply with Executive Orders governing the regulatory process. We also note that we have never claimed that a complete revision to the existing HPA regulations could be immediately implemented; as noted above, the 2017 HPA final rule afforded nearly a year between when it was placed on public inspection and when it would have been effective.

**Comments Regarding the 2017 HPA Final Rule's Consistency With the NAS Report**

As noted above, one of our stated reasons for proposing to withdraw the 2017 HPA final rule was that we had reviewed the 2017 HPA final rule in light of the NAS report, and determined that the rule did not sufficiently address the report's findings.

One commenter disagreed and stated that, having watched discussions regarding the drafting of the report and having reviewed the report, the commenter was certain it was entirely consistent with the provisions of the 2017 HPA final rule. Other commenters stated that the report recommended revising the ''scar rule,'' which the 2017 HPA final rule did not propose to do, and that new proposed HPA regulations would indeed be needed to incorporate all of the report's recommendations.

We agree with the latter commenters; the former commenter is in error about the report's consistency with the 2017 HPA final rule for the reasons the latter commenters articulated.

**Comments Requesting That the New Proposed HPA Regulations Retain Certain Provisions of the 2017 HPA Final Rule**

A number of commenters cited provisions of the 2017 HPA final rule that, they stated, should be retained in the new proposed HPA regulations if APHIS were to withdraw the 2017 HPA final rule.

Several commenters stated the new proposed HPA regulations should also propose to relieve horse industry organizations, or HIOs, of all regulatory responsibilities for approving and training third-party inspectors.

The new proposed HPA regulations propose to relieve HIOs of such responsibilities.

A commenter stated that the new proposed HPA regulations should also contain clear criteria for being a third-party inspector, as well as a process for denying an application to be an inspector.

The new proposed HPA regulations do contain such criteria and such a process.

A commenter stated that the new proposed HPA regulations should also propose to limit third-party inspectors to veterinarians and other individuals with knowledge of the equine industry who had been screened for possible conflicts of interests.

The new proposed HPA regulations do so.

A commenter stated that the new proposed HPA regulations should also propose to require horse show management to pay for inspectors.

The new proposed HPA regulations do so, provided that management elects to use third-party inspectors. The proposed HPA regulations do propose to allow inspection directly by APHIS representatives, free of charge.

Several commenters stated that the new proposed HPA regulations should also include additional requirements specific to the TWH industry, which, the commenters stated, has a long history of documented instances of soring and violations of the regulations.

The new proposed HPA regulations proposes additional requirements specific to that industry.

A commenter stated that the new proposed HPA regulations should also prohibit any device, method, practice, or substance that could mask evidence of soring.

The new proposed HPA regulations propose such a prohibition.

A commenter stated that the new proposed HPA regulations should contain the reporting requirements specific to the TWH industry that were contained in the 2017 HPA final rule.

They contain such reporting requirements.

Finally, a number of commenters stated that the new proposed HPA regulations should retain all key elements of the 2017 HPA final rule, without further elaborating regarding which elements they considered ''key''.

We believe that they do, insomuch as they further the same purposes under the HPA.

**Comments Seeking To Ensure That the New Proposed HPA Regulations Include Provisions That the Proposed Withdrawal Represented Would Be Included in the New Proposed HPA Regulations**

Several commenters noted that the notice of proposed rulemaking regarding the withdrawal of the 2017 HPA final rule stated that the new proposed HPA regulations would take into consideration the findings of the NAS report, and asked for assurances that it did in fact do so.

The new proposed HPA regulations do take the NAS report's findings into consideration.

A number of commenters noted that the NAS report recommended revisions to the ''scar rule,'' and requested that the new proposed HPA regulations propose to revise the scar rule consistent with the report's recommendations.

The new proposed HPA regulations do so.

Finally, one commenter interpreted the notice of proposed rulemaking regarding the withdrawal of the 2017 HPA final rule to suggest that the new proposed HPA regulations would allow for inspection directly by an APHIS representative at no cost to show management, rather than inspection by a third-party inspector. The commenter supported this proposed provision and requested that it in fact be included in the new proposed HPA regulations.

The new proposed HPA regulations contain such a provision.

**Comments Requesting Additional Provisions in the New Proposed HPA Regulations**

We also received a number of requests for additional provisions that were not included in the 2017 HPA final rule, and that we did not suggest in the proposed withdrawal would be part of the new proposed HPA regulations.

Several commenters suggested that the new proposed HPA regulations should prohibit the use of weighted shoes. Other commenters stated that prohibitions on the use of shoes, pads, wedges, and action devices that were specific to the TWH industry in the 2017 HPA final rule should also be extended to the Spotted Saddle Horse industry in the new proposed HPA regulations. One commenter suggested that the new HPA regulations should require all inspectors to be trained in evidence of pain and anxiety in horses, and should include random and targeted swabbing for use of prohibited chemicals.

We consider these comments to be outside of the scope of the proposed withdrawal.

With that being said, under current operational practice, APHIS does train inspectors in noticing evidence of pain and anxiety in horses, and random and risk-based swabbing for use of prohibited chemicals does occur.

**Miscellaneous**

One commenter stated that soring is an inhumane practice, while another, who owned racking horses, said that they did not need to be sored in order to produce an elegant gait.

This comment is outside the scope of the notice of proposed rulemaking regarding the withdrawal of the 2017 HPA final rule. As we noted in the new proposed HPA regulations, Congress has declared that the soring of horses is cruel and inhumane. 15 U.S.C. 1822.

A commenter stated that American Quarter Horse Association horses, Arab horses, American saddlebred horses, and Morgan horses are also sored prior to competitions.

This comment is outside the scope of the notice of proposed rulemaking regarding the withdrawal of the 2017 HPA final rule. We note, however, that in the new proposed HPA regulations, we invited public comment on any observations persons may have regarding soring in breeds other than in the TWH industry.

Several commenters suggested that APHIS should ban all soring of horses, while other commenters stated that this would be outside the scope of the HPA, and either new legislation or a revision to the HPA would be required in order for APHIS to prohibit such practices unilaterally.

The latter commenters are correct; the HPA does not prohibit the practice of soring outright but, rather, requires the disqualification of sore horses from being shown or exhibited, and prohibits them from being shown or exhibited in any horse show or exhibition; and from being sold, auctioned, or offered for sale in any horse sale or auction.

A commenter stated that the Prevent All Soring Tactics Act of 2022 should be issued, while another stated that horse slaughter should be outlawed.

The issuance of legislation is outside the scope of the notice of proposed rulemaking regarding the withdrawal of the 2017 HPA final rule.

A commenter stated that APHIS' Wildlife Services and Animal Care programs should be abolished, while another stated that the latter program should receive additional funding for HPA enforcement.

Both comments are outside the scope of the notice of proposed rulemaking regarding the withdrawal of the 2017 HPA final rule.

A commenter stated that Animal Care should use thermography to detect signs of inflammation in horses.

This is outside the scope of the notice of proposed rulemaking regarding the withdrawal of the 2017 HPA final rule. However, we note that Animal Care uses thermography currently and plans to continue this use.

A commenter stated that Animal Care should collect blood samples to test for use of prohibited medications and medications administered beyond therapeutic levels.

This is outside the scope of the notice of proposed rulemaking regarding the withdrawal of the 2017 HPA final rule.

A commenter stated that all APHIS regulations should be immediately withdrawn and rewritten in plain language, using Webster's dictionary definitions, and maintained on a single government site.

This is outside the scope of the notice of proposed rulemaking regarding the withdrawal of the 2017 HPA final rule.

Finally, a commenter noted that horses are beautiful animals.

We agree.

Therefore, for the reasons set forth in the proposed withdrawal of the 2017 HPA final rule and in this document, we are withdrawing the 2017 HPA final rule.

**Executive Orders 12866, 13563, and 14094, and the Regulatory Flexibility Act**

This proposed withdrawal has been determined to be significant for the purposes of Executive Order 12866, as amended by Executive Order 14094, and, therefore, has been reviewed by the Office of Management and Budget.

We have prepared an economic analysis for this rulemaking. The economic analysis provides a cost-benefit analysis, as required by Executive Orders 12866 and 13563, which 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, 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 economic analysis also examines the potential economic effects of this rulemaking on small entities, as required by the Regulatory Flexibility Act. The economic analysis is summarized below.

APHIS is withdrawing a final rule that was filed for public inspection, in advance of publication, by the Office of the Federal Register on January 19, 2017, amending the Agency's Horse Protection Act regulations (the 2017 HPA final rule). APHIS withdrew the 2017 HPA final rule from publication without undertaking notice and comment procedures on January 23, 2017, in accordance with a memorandum that was issued by the Executive Office of the President on January 20, 2017. However, following a lawsuit, the U.S. Court of Appeals for the District of Columbia Circuit found this withdrawal to be deficient. The U.S. District Court for the District of Columbia has indicated that one way to remedy this deficiency is to undertake notice and comment procedures on the proposed withdrawal. Based on the comments received, APHIS is withdrawing the 2017 HPA final rule.

This withdrawal is an administrative action and is intended to support the withdrawal of the 2017 HPA final rule, and this action will not have a significant impact on the affected entities. In the absence of apparent significant economic impacts, we have not identified alternatives that would minimize any impacts. In addition, APHIS is in the process of developing new HPA regulations that would provide protections to the regulated horses. Also, these new amendments to the Horse Protection regulations propose to incorporate the findings of a 2021 National Academy of Sciences (NAS) report that examined methods used to inspect horses for soreness. This NAS report was published after the 2017 HPA final rule was filed for public inspection.

**Executive Order 12372**

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 2 CFR chapter IV.)

**Executive Order 13175**

This withdrawal has been reviewed in accordance with the requirements of Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

We have determined that this action does not have tribal implications, insofar as it withdraws a final rule that the Agency never implemented or enforced.

**Paperwork Reduction Act**

This withdrawal contains no reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Done in Washington, DC, this 23rd day of October 2023.

**Jennifer Moffitt,**

*Undersecretary, Marketing and Regulatory Programs, USDA.*

[FR Doc. 2023–23938 Filed 10–30–23; 8:45 am]

**BILLING CODE 3410–34–P**

**CONSUMER PRODUCT SAFETY COMMISSION**

**16 CFR Part 1461**

**[Docket No. CPSC–2022–0017]**

## Portable Fuel Container Safety Act Regulation

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Direct final rule.

**SUMMARY:** The Portable Fuel Container Safety Act of 2020 (PFCSA) provides that the Consumer Product Safety Commission (Commission) must promulgate a rule to require flame mitigation devices in portable fuel containers that impede the propagation of flame into the container, unless the Commission determines that there is a voluntary standard for flame mitigation devices that achieves the same result. In January 2023, the Commission published in the **Federal Register** a notice of its determinations under the PFCSA that three such voluntary standards collectively apply to all known classes of portable fuel containers. Pursuant to the PFCSA, therefore, the requirements of the three voluntary standards are treated as a consumer product safety rule under the Consumer Product Safety Act (CPSA). ASTM then notified the Commission that one standard had been revised. The Commission evaluated the revised standard and found that the revisions carry out the purposes of the PFCSA. Accordingly the revisions will be incorporated into the mandatory standard for portable fuel containers. This direct final rule creates a new part codifying the incorporation by reference of this revised standard and the other two voluntary standards that are mandatory under the PFCSA.

**DATES:** The rule is effective on December 9, 2023, unless CPSC receives a significant adverse comment by November 30, 2023. If CPSC receives such a comment, it will publish in the **Federal Register** a notice withdrawing this direct final rule before its effective date. The incorporation by reference of the publication listed in this rule is approved by the Director of the Federal Register as of December 9, 2023.

**ADDRESSES:** You can submit comments, identified by Docket No. CPSC–2022–0017, by any of the following methods:

*Electronic Submissions:* Submit electronic comments to the Federal eRulemaking Portal at: *www.regulations.gov.* Follow the instructions for submitting comments. Do not submit through this website: confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. CPSC typically does not accept comments submitted by electronic mail (email), except as described below.

*Mail/Hand Delivery/Courier/Confidential Written Submissions:* CPSC encourages you to submit electronic comments by using the Federal eRulemaking Portal. You may, however, submit comments by mail, hand delivery, or courier to: Office of the Secretary, Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814; telephone: (301) 504–7479.

*Instructions:* All submissions must include the agency name and docket number. CPSC may post all comments without change, including any personal identifiers, contact information, or other personal information provided, to: *www.regulations.gov.* If you wish to submit confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public, you may submit such comments by mail, hand delivery, or courier, or you may email them to: *cpsc-os@cpsc.gov.*

*Docket:* For access to the docket to read background documents or comments received, go to: *www.regulations.gov,* and insert the docket number, CPSC–2022–0017, into the ''Search'' box, and follow the prompts.

**FOR FURTHER INFORMATION CONTACT:** Will Cusey, Small Business Ombudsman, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814; telephone (301) 504–7945 or (888) 531–9070; email: *sbo@cpsc.gov.*

**SUPPLEMENTARY INFORMATION:**

### A. Background

The PFCSA [1] requires the Commission to promulgate, not later than 30 months after December 27, 2020, a final rule to require flame mitigation devices in portable fuel containers that impede the propagation of flame into the container. 15 U.S.C. 2056d(b)(1), (2). However, the Commission is not required to promulgate a final rule for a class of portable fuel containers within the scope of the PFCSA if the Commission determines at any time that:

- there is a voluntary standard for flame mitigation devices for those containers that impedes the propagation of flame into the container;
- the voluntary standard is or will be in effect not later than 18 months after the date of enactment of the PFCSA (*i.e.,* June 27, 2022); and
- the voluntary standard is developed by ASTM International or such other standard development organization that the Commission determines to have met the intent of the PFCSA.

15 U.S.C. 2056d(b)(3)(A). Any such Commission determinations regarding applicable voluntary standards must be published in the **Federal Register.** 15 U.S.C. 2056d(b)(3)(B).

On January 13, 2023, the Commission published favorable determinations under section 2056d(b)(3)(A) of the PFCSA regarding three voluntary standards for portable fuel containers: ASTM F3429/F3429M–20, ASTM F3326–21, and section 18 of ANSI/CAN/UL/ULC 30:2022 (UL 30:2022). 88 FR 2206. Therefore, by operation of the PFCSA, portable fuel containers manufactured after July 12, 2023, must comply with the requirements of either ASTM F3429/F3429M–20, ASTM F3326–21, or section 18 of UL 30:2022, as applicable. In particular, portable fuel containers sold empty (that are not safety cans [2]) are required to comply with the requirements of ASTM F3326–21. Safety cans are required to meet the requirements of either ASTM F3326–21 or section 18 of UL 30:2022. Portable fuel containers sold pre-filled are required to comply with the requirements of ASTM F3429/F3429M–20. However, in a May 19, 2023, letter, the CPSC Office of Compliance and Field Operations exercised enforcement discretion regarding pre-filled portable fuel containers subject to ASTM F3429/F3429M–20 to prevent a shortage of critical fuels, including fuels used for emergencies.[3]

Under section 2056d(b)(5) of the PFCSA, a voluntary standards organization must notify the Commission of any revision to the requirements for flame mitigation devices for the Commission-approved voluntary standards for portable fuel containers. Once a voluntary standards organization notifies the CPSC, the revisions will be incorporated into the

[1] Portable Fuel Container Safety Act of 2020, codified at 15 U.S.C. § 2056d, as stated Public Law 116–260, div. FF, title IX, § 901, available at: *www.govinfo.gov/content/pkg/PLAW-116publ260/pdf/PLAW-116publ260.pdf.*

[2] Safety cans are portable fuel containers sold empty that the U.S. Occupational Safety and Health Administration (OSHA) generally regulates for use in the workplace but are also available for purchase by consumers at many physical and online retailers.

[3] The letter is available here: *https://www.cpsc.gov/s3fs-public/Enforcement-Discretion-Related-to-Portable-Fuel-Containers.pdf?VersionId=7ZC5ry.So7vVIpsL2J7329Pfhshyh49a.*

consumer product safety rule not later than 180 days after notification (or such later date as the Commission determines appropriate), unless within 90 days of such notice, the Commission determines that the revisions do not meet the requirements of section 2056d(b)(3) of the PFCSA, and so notifies the voluntary standards organization. 15 U.S.C. 2056d(b)(5)(B).

On June 12, 2023, ASTM notified CPSC that it has revised ASTM F3429/F3429M–20 with the publication of ASTM F3429/F3429M–23. On June 23, 2023, the Commission published a notice of availability and request for comment regarding revised ASTM F3429/F3429M–23. Two comments were submitted in support of a favorable Commission determination on the revisions to ASTM F3429/F3429M. 88 FR 41046. On August 22, 2023, as set forth in section B of this preamble, the Commission determined that the revisions meet the requirements of section 2056d(b)(3)(A) of the PFCSA.[4] Accordingly, ASTM F3429/F3429M–23 shall be treated as a consumer product safety rule promulgated under section 9 of the CPSA effective December 9, 2023 (which is 180 days after ASTM's notification). This direct final rule creates a new 16 CFR part 1461 for portable fuel containers to incorporate by reference the revised ASTM F3429/F3429M–23, as well as ASTM F3326–21 and section 18 of UL 30:2022.[5] This direct final rule is codifying the three voluntary standards for portable fuel containers that are mandatory under the PFCSA for the convenience of stakeholders and the public and to provide clarity regarding which versions of the voluntary standards are mandatory for portable fuel containers under the PFCSA.

**B. Revisions to ASTM F3429/F3429M**

On January 13, 2023, the Commission published a **Federal Register** notice in accordance with the PFCSA, determining that pre-filled portable fuel containers must comply with ASTM F3429/F3429M–20 as a consumer product safety rule. 88 FR 2206. On June 12, 2023, ASTM notified the Commission that a revision of that standard, ASTM F3429/F3429M–23, was published in May 2023. ASTM F3429/F3429M–23 includes substantive revisions affecting the flame mitigation performance tests (the endurance test and the flashback test) and non-substantive revisions concerning its scope, a referenced document, a section title, and the appendix of the standard. The substantive revisions affecting the performance test requirements relate to testing containers with large volumes, testing containers with wide mouths, modifying the allowable downward angle of the container during testing, and eliminating redundant testing when the same flame mitigation device is used on differently sized containers.

As discussed below, the Commission concluded that the changes in ASTM F3429/F3429M–23 do not affect the effectiveness of the flame mitigation device in impeding the propagation of a flame or other ignition source into the container. The changes to the standard will improve the safety of testing flame mitigation devices on larger volume containers and facilitate compliance testing of these containers.

Many of the revisions to ASTM F3429/F3429M–20 were requested by laboratories conducting the testing for compliance, to improve safety for test personnel and facilities. Without these changes to the test methods, manufacturers may not be able to find a certification testing laboratory to demonstrate compliance for some of their products, which could limit consumer access to these products. If consumers are unable to buy pre-filled portable fuel containers that are compliant with ASTM F3429/F3429M, they may use hazardous substitute containers.

As explained below, the Commission concluded that the revisions in ASTM F3429/F3429M–23 meet the requirements of section 2056d(b)(3)(A) of the PFCSA is allowing ASTM F3429/F3429M–23 to become the mandatory consumer product safety rule for pre-filled portable fuel containers pursuant to section 2056d(b)(5) of the PFCSA. The background and revisions to ASTM F3429/F3429M are described in more detail in the CPSC staff's briefing memorandum.[6]

*1. Substantive Revisions to ASTM F3429/F3429M*

a. Larger Volume Containers

The first substantive revision in ASTM F3429/F3429M–23 allows the container volume to be reduced for testing purposes if the reduced volume does not impact, change, hinder, or deform the flame mitigation device or how the flame mitigation device is mounted on the container. Laboratories that tested containers with larger volumes to ASTM F3429/F3429M–20 found that a failed test produced a large explosion that presented a risk to test personnel and equipment. Testing laboratories determined that they could not safely mitigate the risks when testing larger volumes without a revision to ASTM F3429/F3429M–20. We note a flame mitigation device impedes the propagation of the flame into the container by quenching an external flame at the mouth of the container before it can ignite the vapors within the container. The shape and size of the container does not impact determination of the flame mitigation device's effectiveness because an effective device stops the flame before it enters the container. The changes proposed affect only the consequences of a failure, not whether the flame mitigation device fails. The Commission therefore concludes that this revision facilitates compliance testing but does not affect the voluntary standard's satisfaction of the requirements of section 2056d(b)(3)(A) of the PFCSA.

b. Containers With Wider Mouths

The second substantive revision to ASTM F3429/F3429M–23 limits the maximum flow rate of gaseous fuel and air used to fill the container before the tests. This change only alters the rate of filling the container to prepare it to be tested. Laboratories that tested containers with wider mouths to ASTM F3429/F3429M–20 found that the flow of gaseous fuel and air created a large cloud of explosive gas outside the container. Open flames near the cloud of explosive gas presented an explosion risk. Testing laboratories determined that they could not safely mitigate the risks to test personnel when testing containers with wider mouths without modifying ASTM F3429/F3429M–20.

Under the revision, gaseous fuel and air at the appropriate ratio fill the container before the trials, but the flow is stopped before the external flames are introduced. Because the gaseous fuel and air flow is stopped before the external ignition source is introduced, slowing the fill rate does not affect the performance of the flame mitigation device. The Commission concludes that this revision facilitates compliance testing but does not affect the voluntary standard's satisfying the requirements of section 2056d(b)(3)(A) of the PFCSA because the performance of the flame mitigation device when exposed to

[4] See Record of Commission Action here: *https://www.cpsc.gov/s3fs-public/RCAASTMsRevisedStandardforPrefilledContainersandDirectFinalRuleUnderthePortableFuelContainerSafetyActof2020.pdf?VersionId=2bvaQho_RlirJo.xyAFUZXyFS2.7Qw7R.*

[5] The Commission voted 4–0 to approve publication of this notice as drafted.

[6] Staff Memorandum available at: *https://www.cpsc.gov/s3fs-public/ASTMsRevisedStandardforPerfilledContainersandDirectFinalRuleUnderthePortableFuelContainerSafetyActof2020.pdf?VersionId=_p5lXY4B1YRCU_horxqDSMNF_VcI0NbI.*

external ignition sources is evaluated the same as with a faster fill rate.

c. Downward Angle When Testing Container

The third substantive revision to ASTM F3429/F3429M–23 allows the container to be mounted at a downward angle between 45 and 60 degrees when tested, rather than at 45 +/− 2 degrees as under the 2020 version of the standard. Testing laboratories proposed this change to allow greater flexibility to position the flame directly onto the mouth of the container as required in the test. Testing laboratories had found it difficult to properly position the flame as required in the performance test without being able to adjust the position of the container significantly. Because an effective flame mitigation device impedes the flame before it reaches inside the container, and an ineffective device allow the ignition of the gaseous fuel and air in the container regardless of the angle, the precise downward angle of the container is not critical to the effectiveness of the flame mitigation device.

d. Accepting Flame Mitigation Devices on Other Containers

The fourth substantive revision to ASTM F3429/F3429M–23 allows a container that uses a flame mitigation device that has met the requirements of the standard when attached in the same manner to a similar container model, to be considered compliant with this standard, without needing to be re-tested. Because a compliant flame mitigation device prevents flame from reaching vapors in the container, changing the shape and size of the container does not affect the effectiveness of the flame mitigation device.

*2. Non-Substantive Revisions to ASTM F3429/F3429M*

There are three non-substantive revisions in ASTM F3429/F3429M–23. First, ASTM changed the order of the scope subclauses to match the standard structure of other ASTM specifications. The text of the scope was not otherwise changed. Second, ASTM F3326 was removed from the listed reference documents as it was not used elsewhere in ASTM F3429/F3429M–23. A reserved section was renamed from a ''permanency'' test to a ''retention'' test. Currently, this is a placeholder for a potential future requirement. Finally, some explanatory information in the non-mandatory appendix for the ''retention'' test was removed, but no mandatory requirements were added or changed. The Commission concludes these non-substantive changes do not implicate the standard satisfying the requirements of section 2056d(b)(3)(A) of the PFCSA.

**C. Description of the Rule**

This direct final rule creates a new part 1461, ''Portable Fuel Container Safety Act Regulation.'' Part 1461 incorporates by reference the three voluntary standards the Commission has determined under the PFCSA to be mandatory: ASTM F3429/F3429M–23 (updated from the 2020 version of the standard), ASTM F3326–21, and section 18 of UL 30:2022. The provisions of the direct final rule are described below.

*A. Section 1461.1—Scope and Application*

Section 1461.1 of the rule provides, in accordance with the PFCSA, that portable fuel containers must comply with the requirements specified in § 1461.3, which are considered to be consumer product safety rules.

*B. Section 1461.2—Definition*

Section 1461.2 of the rule provides the statutory definition of ''portable fuel container'' found in the PFCSA. Although this definition is provided in the PFCSA, this section restates the definition for the convenience of the regulated community and the public.

*C. Section 1461.3—Requirements for Flame Mitigation Devices on Portable Fuel Containers*

Section 1461.3 provides that each portable fuel container manufactured for sale in the United States shall conform to the applicable requirements of this section depending on whether the portable fuel container is sold pre-filled or empty.

Section 1461.3(a)(1) of the rule requires that portable fuel containers sold to consumers pre-filled must comply with the requirements of ASTM F3429/F3429M–23, *Standard Specification for Performance of Flame Mitigation Devices Installed in Disposable and Pre-Filled Flammable Liquid Containers.* ASTM F3429/F3429M is listed by ASTM as a dual standard in inch-pound (F3429 designation) and metric (F3429M designation) units. Both designations of the standard are substantively identical except for the inch-pound versus metric units used in the standard. The standard requires two performance tests of the container's flame mitigation device. The first is an endurance test, in which the container is subjected to an external and stationary 2.5-inch flame at the mouth of the container for 30 seconds. The second test is a flashback test, in which the container is subjected to an external flash fire near the container mouth. The container passes each test if the contents of the container do not catch fire or otherwise ignite in each of five consecutive trials. The two tests are used to demonstrate that the flame mitigation device impedes the propagation of two different types of ignition sources, a stationary flame and a moving flame.

Section 1461.3(a)(2) of the rule requires portable fuel containers sold empty to the consumer to comply with ASTM F3326–21, *Standard Specification for Flame Mitigation Devices on Portable Fuel Containers.* ASTM F3326 requires a performance test of the container's flame mitigation devices after the container is exposed to several use-and-abuse tests. Use-and-abuse tests are designed to ensure a flame mitigation device still functions after simulating normal use and reasonably foreseeable abuse of the container over time. The flame mitigation device performance test demonstrates that the container prevents a flame traveling at five meters per second from igniting the contents of the container in each of five consecutive trials. The test also demonstrates that the flame mitigation device impedes the propagation of a rapidly travelling flame front into the container.

Portable fuel containers sold empty to the consumer that are classified as safety cans that meet the requirements of section 18 of UL 30:2022, *Standard for Safety Metallic and Nonmetallic Safety Cans for Flammable and Combustible Liquids,* are not required to comply with ASTM F3326–21. UL 30:2022 is a voluntary standard that covers various requirements for safety cans, including requirements for flame mitigation devices. Section 18 of UL 30 has two performance test options. The first option is to subject the safety can mouth to an external and stationary 2.5-inch flame for 30 seconds. The safety can passes the test if the interior contents of the safety can do not catch fire or otherwise ignite in each of five consecutive trials. The second performance test option is used for safety cans that have a flame arrestor. In this performance test, a 7.5-inch flame is balanced on one side of the flame arrestor as a fuel-air mixture passes through. The flame arrestor fails if the flame crosses the flame arrestor and ignites the fuel-air mixture.

Section 1461.4 of the rule incorporates by reference the three voluntary standards that are mandatory under the rule.

**D. Direct Final Rule Process**

The Commission is issuing this rule as a direct final rule. Although the Administrative Procedure Act (APA; 5 U.S.C. 551–559) generally requires agencies to provide notice of a rule and an opportunity for interested parties to comment on it, section 553 of the APA provides an exception when the agency ''for good cause finds'' that notice and comment are ''impracticable, unnecessary, or contrary to the public interest.'' *Id.* 553(b)(B).

The purpose of this direct final rule is to codify in the CFR three voluntary standards (ASTM F3429/F3429M–23, ASTM F3326–21, and section 18 of UL 30:2022) that are mandatory consumer product safety rules by operation of law under the PFCSA. Public comments would not alter whether the three voluntary standards are considered mandatory consumer product safety rules under the PFCSA. The Commission concludes that when it merely codifies voluntary standards that are already mandatory consumer product safety rules by statute under the PFCSA, notice and comment are unnecessary.

In its Recommendation 95–4, the Administrative Conference of the United States (ACUS) endorses direct final rulemaking as an appropriate procedure to expedite rules that are noncontroversial and not expected to generate significant adverse comments. *See* 60 FR 43108 (Aug. 18, 1995). ACUS recommends that agencies use the direct final rule process when they act under the ''unnecessary'' prong of the good cause exemption in 5 U.S.C. 553(b)(B). Consistent with the ACUS recommendation, the Commission is publishing this rule as a direct final rule, because CPSC does not expect any significant adverse comments.

Unless CPSC receives a significant adverse comment by November 30, 2023, this rule will become effective on December 9, 2023—the end of the 180-day period specified in the PFCSA. In accordance with ACUS's recommendation, the Commission considers a significant adverse comment to be ''one where the commenter explains why the rule would be inappropriate,'' including an assertion challenging ''the rule's underlying premise or approach,'' or a claim that the rule ''would be ineffective or unacceptable without a change.'' 60 FR 43108, 43111 (Aug. 18, 1995). As noted, this rule merely codifies in the CFR the three voluntary standards that are mandatory consumer product safety rules under the PFCSA and restates the statutory definition of ''portable fuel container''; thus, public comments would not change such statutory requirements or definitions.

If the Commission does receive a significant adverse comment, the Commission will withdraw this direct final rule. Depending on the comment and other circumstances, the Commission may then incorporate the adverse comment into a subsequent direct final rule or publish a notice of proposed rulemaking, providing an opportunity for public comment.

**E. Incorporation by Reference**

Section 1460.3 of the direct final rule incorporates by reference ASTM F3429/F3429M–23, ASTM F3326–21, and section 18 of ANSI/CAN/UL/ULC 30:2022. The Office of the Federal Register (OFR) has regulations regarding incorporation by reference. 1 CFR part 51. Under these regulations, agencies must discuss, in the preamble to a final rule, ways in which the material the agency incorporates by reference is reasonably available to interested parties, and how interested parties can obtain the material. In addition, the preamble to the final rule must summarize the material. 1 CFR 51.5(b).

In accordance with the OFR regulations, section C of this preamble summarizes the major provisions of ASTM F3429/F3429M–23, ASTM F3326–21, and section 18 of UL 30:2022 that the Commission incorporates by reference into 16 CFR part 1461. The standards are reasonably available to interested parties. Until the direct final rule takes effect, read-only copies of ASTM F3429/F3429M–23 and ASTM F3326–21 are available for viewing, at no cost, on ASTM's website at: *www.astm.org/CPSC.htm.* Once the rule takes effect, a read-only copy of those two ASTM standards will be available for viewing, at no cost, on the ASTM website at: *www.astm.org/READINGLIBRARY/.* Interested parties can purchase copies of ASTM F3429/F3429M–23 and ASTM F3326–21 from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959 USA; telephone: (610) 832–9585; *www.astm.org.*

A read-only copy of UL 30:2022 is available for viewing, free-of-charge at UL's Standards Sale Site at: *shopulstandards.com.* Click ''Browse and Buy Standards,'' and search for UL 30 and then click ''Digital View,'' and sign in, or create a user account. The read-only copy of UL 30:2022 will remain available for viewing, free-of-charge after the direct final rule goes into effect. Interested parties can purchase a copy of UL 30:2022 from UL Standards and Engagement, 151 Eastern Avenue, Bensenville, IL 60106 USA; telephone: (888) 853–3503; *shopulstandards.com.*

Interested parties can also schedule an appointment to inspect copies of ASTM F3429/F3429M–23, ASTM F3326–21, and UL 30:2022 at CPSC's Office of the Secretary, U.S. Consumer Product Safety Commission, Room 820, 4330 East-West Highway, Bethesda, MD 20814, telephone: (301) 504–7479; email: *cpsc-os@cpsc.gov.*

**F. Effective Date**

Section 2056d(b)(5)(B) of the PFCSA provides that not later than 180 days after the Commission is notified of a revised voluntary standard (or such later date as the Commission determines appropriate), such revised voluntary standard shall become enforceable as a consumer product safety rule promulgated under 16 U.S.C. 2058, in place of the prior version, unless within 90 days after receiving the notice the Commission determines that the revised voluntary standard does not meet the requirements in section 2056d(b)(3)(A) of the PFCSA. Unless the Commission receives a significant adverse comment by November 30, 2023, the rule therefore will become effective on December 9, 2023. Based on the Commission's January 2023 published determinations under the PFCSA, portable fuel containers that are sold empty to the consumer manufactured after July 12, 2023, must comply with the requirements of either ASTM F3326–21, or section 18 of UL 30:2022, as applicable. This direct final rule's effective date of December 9, 2023, which is the effective date of the ASTM F3429/F3429M–23 revision as a mandatory safety standard, does not alter the previously established effective date of July 12, 2023, for ASTM F3326–21 and section 18 of UL 30:2022 under the PFCSA. Products subject to the requirements of those standards are already required to meet those standards.

Further, portable fuel containers sold pre-filled are also required under the PFCSA to comply with the requirements of ASTM F3429/F3429M–20 after July 12, 2023. However, on May 19, 2023, the Office of Compliance and Field Operations issued a letter exercising enforcement discretion regarding pre-filled portable fuel containers subject to ASTM F3429/F3429M–20 to prevent a shortage of critical fuels used for emergencies.

**G. Regulatory Flexibility Act**

The Regulatory Flexibility Act (RFA; 5 U.S.C. 601–612) generally requires

agencies to review proposed and final rules for their potential economic impact on small entities, including small businesses, and prepare regulatory flexibility analyses. 5 U.S.C. 603, 604. The RFA applies to any rule that is subject to notice and comment procedures under section 553 of the APA. *Id.* As discussed in section D of this preamble, the Commission has determined that notice and the opportunity to comment are unnecessary for this rule. Therefore, the RFA does not apply. CPSC also notes the limited nature of this document, which merely creates a new part in the Code of Federal Regulations codifying the incorporations by reference to reflect the voluntary standards that are mandatory under the PFCSA and the statutory definition of portable fuel containers.

### H. Environmental Considerations

The Commission's regulations provide a categorical exclusion for the Commission's rules from any requirement to prepare an environmental assessment or an environmental impact statement where they ''have little or no potential for affecting the human environment.'' 16 CFR 1021.5(c)(2). This rule falls within the categorical exclusion, so no environmental assessment or environmental impact statement is required.

### I. Preemption

Section 26(a) of the CPSA provides that where a consumer product safety standard is in effect and applies to a product, no state or political subdivision of a state may either establish or continue in effect a requirement dealing with the same risk of injury unless the state requirement is identical to the federal standard. 15 U.S.C. 2075(a). Section 26(c) of the CPSA also provides that states or political subdivisions of states may apply to CPSC for an exemption from this preemption under certain circumstances. The PFCSA deems rules issued under that statute to be a ''consumer product safety rule.'' Therefore, once a rule issued under the PFCSA takes effect, it will preempt in accordance with section 26(a) of the CPSA.

### J. Congressional Review Act

The Congressional Review Act (CRA; 5 U.S.C. 801–808) states that before a rule can take effect, the agency issuing the rule must submit the rule, and certain related information, to each House of Congress and the Comptroller General. 5 U.S.C. 801(a)(1). The CRA submission must indicate whether the rule is a ''major rule.'' The CRA states that the Office of Information and Regulatory Affairs determines whether a rule qualifies as a ''major rule.''

Pursuant to the CRA, OIRA has determined that the rule does not qualify as a ''major rule,'' as defined in 5 U.S.C. 804(2). To comply with the CRA, CPSC will submit the required information to each House of Congress and the Comptroller General.

### List of Subjects in 16 CFR Part 1461

Consumer protection, Portable fuel containers, Incorporation by reference, Safety.

■ For the reasons discussed in the preamble, the Commission amends 16 CFR chapter II by adding part 1461 to subchapter B to read as follows:

## PART 1461—PORTABLE FUEL CONTAINER SAFETY ACT REGULATION

Sec.



**Authority:** 15 U.S.C. 2056d.

#### § 1461.1 Scope and application.

In accordance with the Portable Fuel Container Safety Act of 2020 (PFCSA), portable fuel containers must comply with the requirements specified in § 1461.3, which are considered to be consumer product safety rules.

#### § 1461.2 Definition.

The definition of portable fuel container in the PFCSA (5 U.S.C. 2056d(b)(8)) applies to this part. Specifically, a portable fuel container is defined in the PFCSA as any container or vessel (including any spout, cap, and other closure mechanism or component of such container or vessel or any retrofit or aftermarket spout or component intended or reasonably anticipated to be for use with such container)—

(a)(1) Intended for flammable liquid fuels with a flash point less than 140 degrees Fahrenheit, including gasoline, kerosene, diesel, ethanol, methanol, denatured alcohol, or biofuels;

(2) That is a consumer product with a capacity of 5 gallons or less; and

(3) That the manufacturer knows or reasonably should know is used by consumers for transporting, storing, and dispensing flammable liquid fuels.

(b) [Reserved]

#### § 1461.3 Requirements for flame mitigation devices on portable fuel containers.

Each portable fuel container manufactured for sale in the United States shall conform to one of the following applicable requirements.

(a) *Containers sold pre-filled.* Portable fuel containers sold pre-filled with a flammable liquid to the consumer must comply with the requirements of ASTM F3429/F3429M–23 (incorporated by reference, see § 1461.4).

(b) *Containers sold empty.* Portable fuel containers sold empty to the consumer must meet the requirements of ASTM F3326–21 (incorporated by reference, see § 1461.4). Portable fuel containers sold empty to the consumer that are classified as safety cans that meet the requirements of section 18 of ANSI/CAN/UL/ULC 30:2022 (incorporated by reference, see § 1461.4) are not required to comply with ASTM F3326–21.

#### § 1461.4 Incorporation by reference.

Certain material is incorporated by reference into this part with the approval of the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. All approved incorporation by reference material is available for inspection at the Consumer Product Safety Commission and at the National Archives and Records Administration (NARA). Contact the U.S. Consumer Product Safety Commission at: Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814; telephone (301) 504–7479, email *cpsc-os@cpsc.gov.* For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations* or email *fr.inspection@nara.gov.* The material may be obtained from the following sources:

(a) ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959; phone: (610) 832–9585; website: *www.astm.org.*

(1) ASTM F3326–21, *Standard Specification for Flame Mitigation Devices on Portable Fuel Containers,* approved on September 1, 2021.

(2) ASTM F3429/F3429M–23, *Standard Specification for Performance of Flame Mitigation Devices Installed in Disposable and Pre-Filled Flammable Liquid Containers,* approved on May 1, 2023.

(b) UL Standards and Engagement, International, 151 Eastern Avenue, Bensenville, IL 60106; phone: 1–888–853–3503; website: *www.shopulstandards.com.*

(1) ANSI/CAN/UL/ULC 30:2022, Standard for Safety: *Metallic and*

*Nonmetallic Safety Cans for Flammable and Combustible Liquids,* Tenth Edition, dated April 29, 2022.

(2) [Reserved]

**Alberta E. Mills,**

*Secretary, Consumer Product Safety Commission.*

[FR Doc. 2023–23655 Filed 10–30–23; 8:45 am]

**BILLING CODE 6355–01–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### 21 CFR Part 1308

**[Docket No. DEA1258]**

## Schedules of Controlled Substances: Placement of Zuranolone in Schedule IV

**AGENCY:** Drug Enforcement Administration, Department of Justice.

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** On August 4, 2023, the United States Food and Drug Administration approved a new drug application for ZURZUVAE (zuranolone) capsules for the treatment of post-partum depression. The Department of Health and Human Services provided the Drug Enforcement Administration (DEA) with a scheduling recommendation to place zuranolone and its salts in schedule IV of the Controlled Substances Act (CSA). In accordance with the CSA, as amended by the Improving Regulatory Transparency for New Medical Therapies Act, DEA is hereby issuing an interim final rule placing zuranolone, including its salts, in schedule IV of the CSA. This action facilitates the public availability of zuranolone as a schedule IV controlled substance.

**DATES:** This rule is effective October 31, 2023. Comments must be submitted electronically or postmarked on or before November 30, 2023.

Requests for hearing and waivers of an opportunity for a hearing or to participate in a hearing, together with a written statement of position on the matters of fact and law asserted in the hearing, must be received on or before November 30, 2023.

**ADDRESSES:** Interested persons may file written comments on this rulemaking in accordance with 21 U.S.C. 811(j)(3) and 21 CFR 1308.43(g). The electronic Federal Docket Management System will not accept comments after 11:59 p.m. Eastern Time on the last day of the comment period. To ensure proper handling of comments, please reference ''Docket No. DEA1258'' on all correspondence, including any attachments.

- *Electronic comments:* The Drug Enforcement Administration (DEA) encourages commenters to submit comments electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon completion of your submission, you will receive a Comment Tracking Number for your comment. Submitted comments are not instantaneously available for public view on *Regulations.gov*. If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment.
- *Paper comments:* Paper comments that duplicate electronic submissions are not necessary. Should you wish to mail a paper comment *in lieu of* an electronic comment, it should be sent via regular or express mail to: Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, VA 22152.
- *Hearing requests:* All requests for hearing and waivers of participation, together with a written statement of position on the matters of fact and law asserted in the hearing, must be filed with the DEA Administrator, who will make the determination of whether a hearing will be needed to address such matters of fact and law in the rulemaking. Such requests must be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152. For informational purposes, a courtesy copy of requests for hearing and waivers of participation should also be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

**FOR FURTHER INFORMATION CONTACT:** Terrence L. Boos, Drug & Chemical Evaluation Section, Diversion Control Division, Drug Enforcement Administration; Telephone: (571) 362–3249.

**SUPPLEMENTARY INFORMATION:**

### Posting of Public Comments

Please note that all comments received in response to this docket are considered part of the public record. DEA will make comments available for public inspection online at *https://www.regulations.gov.* Such information includes personal or business identifying information (such as name, address, State or Federal identifiers, etc.) voluntarily submitted by the commenter. In general, all information voluntarily submitted by the commenter, unless clearly marked as Confidential Information in the method described below, will be publicly posted. Comments may be submitted anonymously. The Freedom of Information Act applies to all comments received.

Commenters submitting comments which include personal identifying information (PII), confidential, or proprietary business information that the commenter does not want made publicly available should submit two copies of the comment. One copy must be marked ''CONTAINS CONFIDENTIAL INFORMATION'' and should clearly identify all PII or business information the commenter does not want to be made publicly available, including any supplemental materials. DEA will review this copy, including the claimed PII and confidential business information, in its consideration of comments. The second copy should be marked ''TO BE PUBLICLY POSTED'' and must have all claimed confidential PII and business information already redacted. DEA will post only the redacted comment on *https://www.regulations.gov* for public inspection.

For easy reference, an electronic copy of this document and supplemental information to this interim final rule (IFR) are available at *https://www.regulations.gov.*

### Request for Hearing or Appearance; Waiver

Pursuant to 21 U.S.C. 811(a), this action is a formal rulemaking ''on the record after opportunity for a hearing.'' Such proceedings are conducted pursuant to the provisions of the Administrative Procedure Act (APA), 5 U.S.C. 551–559.[1] Interested persons, as defined in 21 CFR 1300.01(b), may file requests for a hearing in conformity with the requirements of 21 CFR 1308.44(a) and 1316.47(a), and such requests must:

(1) state with particularity the interest of the person in the proceeding;

(2) state with particularity the objections or issues concerning which the person desires to be heard; and

[1] 21 CFR 1308.41–1308.45; 21 CFR part 1316, subpart D.

(3) state briefly the position of the person with regarding to the objections or issues.

Any interested person may file a waiver of an opportunity for a hearing or to participate in a hearing in conformity with the requirements of 21 CFR 1308.44©, together with a written statement of position on the matters of fact and law involved in any hearing.[2]

All requests for hearings and waivers of participation, together with a written statement of position on the matters of fact and law involved in such hearing, must be sent to DEA using the address information provided above. The decision whether a hearing will be needed to address such matters of fact and law in the rulemaking will be made by the Administrator. If a hearing is needed, DEA will publish a notice of hearing on the proposed rulemaking in the **Federal Register**.[3] Further, once the Administrator determines a hearing is needed to address such matters of fact and law in rulemaking, she will then designate an Administrative Law Judge (ALJ) to preside over the hearing. The ALJ's functions shall commence upon designation, as provided in 21 CFR 1316.52.

In accordance with 21 U.S.C. 811 and 812, the purpose of a hearing would be to determine whether zuranolone meets the statutory criteria for placement in schedule IV.

## Background and Legal Authority

Under the Controlled Substances Act (CSA), as amended in 2015 by the Improving Regulatory Transparency for New Medical Therapies Act (section 2(b) of Pub. L. 114–89), DEA is required to commence an expedited scheduling action with respect to certain new drugs approved by the Food and Drug Administration (FDA). As provided in 21 U.S.C. 811(j), this expedited scheduling is required where both of the following conditions apply: (1) The Secretary of the Department of Health and Human Services (HHS) has advised DEA that a New Drug Application (NDA) has been submitted for a drug that has a stimulant, depressant, or hallucinogenic effect on the central nervous system (CNS), and that it appears that such drug has an abuse potential; and (2) the Secretary of HHS recommends that DEA control the drug in schedule II, III, IV, or V pursuant to 21 U.S.C. 811(a) and (b). In these circumstances, DEA is required to issue an interim final rule (IFR) controlling the drug within 90 days.

Subsection 811(j)(2) states that the 90-day timeframe starts the later of (1) the date DEA receives HHS's scientific and medical evaluation/scheduling recommendation, or (2) the date DEA receives notice of the NDA approval by HHS. Subsection 811(j)(3) specifies that the rulemaking shall become immediately effective as an IFR without requiring DEA to demonstrate good cause therefore. Thus, the purpose of subsection 811(j) is to speed the process by which DEA schedules newly approved drugs that are currently either in schedule I or not controlled (but which have sufficient abuse potential to warrant control) so that such drugs may be marketed without undue delay following FDA approval.[4]

Subsection 811(j)(3) further provides that the IFR shall give interested persons the opportunity to comment and to request a hearing. After the conclusion of such proceedings, DEA must issue a final rule in accordance with the scheduling criteria of 21 U.S.C. 811(b) through (d), and 812(b).

Zuranolone (chemically known as 1-[2-[(3*R*,5*R*,8*R*,9*R*,10*S*,13*S*,14*S*,17*S*)-3-hydroxy-3,13-dimethyl-2,4,5,6,7,8,9,10,11,12,14,15,16,17-tetradecahydro-1*H*-cyclopenta[*a*]phenanthren-17-yl]-2-oxoethyl]pyrazole-4-carbonitrile) is a new molecular entity with CNS activity. Zuranolone is a positive allosteric modulator of gamma-aminobutyric acid type A ($GABA_A$) receptors and an inhibitory neurosteroid substance that shares structural features and a pharmacological mechanism of action with progesterone, alfaxalone (schedule IV), and brexanolone (allopregnanolone, schedule IV).

On December 5, 2022, Sage Therapeutics, Inc. submitted an NDA for zuranolone to FDA. On August 4, 2023, FDA approved the NDA for zuranolone to be marketed as a prescription drug (ZURZUVAE, capsule) for the treatment of post-partum depression. DEA received notification that FDA approved the NDA on the same date. Pursuant to its FDA-approved prescription drug labeling, ZURZUVAE, 50 mg, is to be administered orally once in the evening with fat-consuming food for 14 days. The dose may be reduced for patients who cannot tolerate 50 mg.

## Determination To Schedule Zuranolone

On July 12, 2023, DEA received from HHS a scientific and medical evaluation entitled ''Basis for the Recommendation to Control Zuranolone and its Salts in Schedule IV of the Controlled Substances Act'' and a scheduling recommendation. Pursuant to 21 U.S.C. 811(b) and (c), this document contained an eight-factor analysis of the abuse potential, legitimate medical use, and dependence liability of zuranolone, along with HHS's recommendation to control zuranolone and its salts under schedule IV of the CSA.

In response, DEA reviewed the scientific and medical evaluation and scheduling recommendation provided by HHS, along with all other relevant data, and completed its own eight-factor review pursuant to 21 U.S.C. 811(c). DEA concluded that zuranolone meets the 21 U.S.C. 812(b)(4) criteria for placement in schedule IV of the CSA.

Pursuant to subsection 811(j), and based on HHS's scheduling recommendation, the approval of the NDA by HHS/FDA, and DEA's determination, DEA is issuing this IFR to schedule zuranolone as a schedule IV controlled substance under the CSA.

Included below is a brief summary of each factor as analyzed by HHS and DEA, and as considered by DEA in its scheduling action. Please note that both DEA and HHS analyses are available in their entirety under ''Supporting Documents'' in the public docket for this IFR at *https://www.regulations.gov,* under Docket Number ''DEA1258.'' Full analysis of, and citations to, the information referenced in the summary may also be found in the supporting and related material.

### *1. Its Actual or Relative Potential for Abuse*

Zuranolone is a new molecular entity that has not been marketed in the United States or any country. Thus, evidence regarding its diversion, illicit manufacturing, or deliberate ingestion is currently lacking. DEA notes that there are no reports of law enforcement encounters of zuranolone in the National Forensic Laboratory Information System (NFLIS)-Drug database.[5] Zuranolone has sedative effects and is likely to have abuse potential, similar to schedule IV sedatives such as alprazolam. Thus, it is reasonable to assume that zuranolone may be diverted from legitimate channels, used contrary to or without

[2] 21 CFR 1316.49.

[3] 21 CFR 1308.44(b), 1316.53.

[4] Given the parameters of subsection 811(j), in DEA's view, it would not apply to a reformulation of a drug containing a substance currently in schedules II through V for which an NDA has recently been approved.

[5] NFLIS-Drug is a comprehensive information system that includes data from forensic laboratories that handle more than 96% of an estimated 1 million distinct annual State and local drug analysis cases. NFLIS-Drug includes drug chemistry results from completed analyses only. While NFLIS-Drug data is not direct evidence of abuse, it can lead to an inference that a drug has been diverted and abused. *See* 76 FR 77330, 77332 (Dec. 12, 2011). NFLIS data were queried on August 30, 2023.

medical advice, and capable of creating hazards to the users and to the safety of the community. In human abuse potential studies, zuranolone produced positive subjective responses that are similar to those produced by alprazolam (schedule IV). Zuranolone produces rewarding effects that are comparable to those produced by schedule IV sedatives; therefore, zuranolone is likely to be abused for its sedative effects contrary to medical advice.

*2. Scientific Evidence of Its Pharmacological Effects, If Known*

Zuranolone is a selective neuroactive steroid that potentiates synaptic (γ subunit-containing) and extra synaptic (δ-subunit containing) $GABA_A$ receptor activity. Zuranolone acts on $GABA_A$ receptors to enhance the effects of GABA, a major inhibitory neurotransmitter in the CNS. Zuranolone acts directly through the $GABA_A$ receptor-channel complex to increase the probability that the channel will enter into naturally occurring open states of relatively long duration and allow the influx of chloride. Zuranolone was found to potentiate GABA-evoked current in cells expressing human $GABA_A$ receptor subtypes. HHS noted that these data are consistent with a mechanism of action of zuranolone that is similar to other schedule IV neurosteroids (*e.g.,* brexanolone) as a positive allosteric modulator of $GABA_A$ sites.

In animal studies, zuranolone's effect on the general behavioral profile in male rats showed that it produced behavioral activities, such as decreased activity, ataxia, hypersensitivity to touch and/or sound, and impaired righting reflex at supratherapeutic plasma concentrations. The observations were generally limited to the highest dose test (22.5 mg/kg), although some animals exhibited slight impairments at the lower doses tested (3 and 10 mg/kg).

In a drug discrimination study using male rats trained to discriminate midazolam and saline, intraperitoneally administered zuranolone (0.1, 0.3, 0.5, 1, and 3 mg/kg) produced dose-dependent effects and full substitution to midazolam discriminative stimulus effect at the highest dose tested when considering lever presses over the entire session and not just the first reinforcer (75 percent). However, 3 mg/kg zuranolone produced behavioral impairment, such that only five of ten rodents completed the session. In female rats, intraperitoneally administered zuranolone (0.1, 0.3, 0.5, 1, and 2 mg/kg) also produced dose-dependent effects and full substitution to midazolam discriminative stimulus effect at the highest dose tested when considering lever presses over the entire session and not just the first reinforcer (72.5 percent).

Zuranolone reinforcing properties were assessed by determining whether self-administration behavior was maintained when the drug was substituted for cocaine (schedule II). As stated by HHS in their scientific and medical evaluation, the study found that the selected doses of zuranolone did not maintain robust self-administration in animals with a previous history of cocaine self-administration.

In clinical trials, zuranolone produced significantly greater mean drug liking than placebo. The low (30 mg) and middle (60 mg) doses of zuranolone produced significantly less mean drug liking scores than both alprazolam (schedule IV) doses (1.5 and 3 mg). However, the highest dose of zuranolone produced mean drug liking scores that were similar to both doses of alprazolam (schedule IV).

Zuranolone produced euphoria-related adverse events that are supportive of zuranolone having an abuse potential. However, the abuse-related treatment emergent AE profile of zuranolone was slightly lower than that of alprazolam (a schedule IV benzodiazepine) at a supratherapeutic dose of zuranolone.

Zuranolone produced incidence of euphoria-related adverse events supportive of its abuse potential in animals and humans similar to those of benzodiazepines in schedule IV. These data are consistent with the fact that both drugs share a common mechanism of action involving positive allosteric modulation of the $GABA_A$ receptors.

*3. The State of Current Scientific Knowledge Regarding the Drug or Other Substance*

Zuranolone, chemically known as 1-[2-[(3*R*,5*R*,8*R*,9*R*,10*S*,13*S*,14*S*,17*S*)-3-hydroxy-3,13-dimethyl-2,4,5,6,7,8,9,10,11,12,14,15,16,17-tetradecahydro-1*H*-cyclopenta[*a*]phenanthren-17-yl]-2-oxoethyl]pyrazole-4-carbonitrile, is a new molecular entity.

Zuranolone is a drug product formulated as 20, 25, and 30 mg colored hard-gelatin capsules. The powder is white to off-white in color. Zuranolone is available as an immediate-release formulation and is absorbed with a time to maximum effect of approximately 6 hours and a half-life of 20 hours.

As discussed in the background section, zuranolone has an accepted medical use in the United States.

*4. Its History and Current Pattern of Abuse*

There is no information on the history and current pattern of abuse for zuranolone, since it has not been marketed, legally or illegally, in the United States or any other country. There is no evidence of diversion of zuranolone that has been distributed for research, such as for clinical trials. Data from preclinical and clinical studies indicate that the abuse potential of zuranolone is similar to that of schedule IV sedatives, including benzodiazepines. Consistent with the fact that zuranolone is a new molecular entity, the NFLIS-Drug database had no records of encounters by law enforcement.

In summary, pharmacological data on zuranolone show that it produces abuse-related effects and has an abuse potential similar to that of schedule IV CNS depressants.

*5. The Scope, Duration, and Significance of Abuse*

A search by DEA of the NFLIS-Drug database found no evidence of law enforcement encounters of zuranolone in the United States. Data from preclinical and clinical studies showed that zuranolone has an abuse potential that is similar to that of schedule IV sedatives, including benzodiazepines. Upon availability of zuranolone in the market, it is likely to be abused.

*6. What, if any, Risk There Is to the Public Health*

Zuranolone's abuse potential, similar to that of schedule IV sedatives, is an indication of its public health risk. As such, upon availability for marketing, it is likely to pose risk to public health comparable to schedule IV positive allosteric modulators of the $GABA_A$ receptor such as brexanolone and benzodiazepines. According to evaluation of public health risks conducted by HHS, the most observed adverse effects were somnolence, dizziness, and sedation. An overdose of zuranolone could result in sedation with or without respiratory depression or other severe adverse effects. Two simulated driving studies demonstrated impairment approximately 9 hours after nighttime administration.

Concomitant use with other CNS depressants such as alcohol may potentiate the impairment of psychomotor performance and cognition. HHS noted that zuranolone is not recommended for chronic administration; it is intended for a 14-day treatment course. This may lessen some public health risks compared to

other drugs that are prescribed for longer durations or in larger quantities.

*7. Its Psychic or Physiological Dependence Liability*

Zuranolone's psychic and physiological dependence liability was assessed using data from animal physical dependence studies and clinical evaluations of physical dependence, including measures of withdrawal. As described by HHS, data from a physiologic dependence study conducted in rats demonstrated zuranolone did not induce significant withdrawal-related phenotypes at the doses tested; however, zuranolone produced significant toxic effects in dogs, including convulsions and death in the dog toxicity studies. HHS noted the toxic effects in dogs, such as the early mortalities, may be consistent with withdrawal-type effects observed after cessation of chronic dosing of sedative-hypnotic benzodiazepines.

In clinical trials, when zuranolone was administered at therapeutic doses (≤50 mg/day) for a minimum of five days, it produced mild-to-moderate withdrawal-related effects in healthy individuals upon abrupt drug discontinuation, including the following: insomnia, palpitations, decreased appetite, nightmare, nausea, hyperhidrosis, and paranoia. Similar effects were not evident in the patient population. HHS provided caveats for why this may be the case, such as the withdrawal effects may have been obscured by the symptoms of the underlying condition (post-partum depression and major depressive disorder) or inadequate assessment of withdrawal in the various Phase 3 studies. However, based on available data provided by HHS, the withdrawal-related symptoms produced by zuranolone after abrupt drug discontinuation are similar to those that are clinically known for benzodiazepines in schedule IV.

The data taken together suggest that zuranolone maybe produce physical dependence, and the risk of physical dependence and withdrawal syndrome upon drug discontinuation is expected to be more severe for individuals who take a higher than the therapeutic dose of zuranolone for an extended period of time, which may include convulsions based on the dog toxicity studies.

*8. Whether the Substance Is an Immediate Precursor of a Substance Already Controlled Under the CSA*

Zuranolone is not an immediate precursor of any controlled substance, as defined by 21 U.S.C. 802(23).

*Conclusion:* After considering the scientific and medical evaluation and scheduling recommendation provided by HHS, and its own eight-factor analysis, DEA has determined that these facts and all relevant data constitute substantial evidence of potential for abuse of zuranolone. As such, DEA hereby schedules zuranolone as a controlled substance under the CSA.

**Determination of Appropriate Schedule**

The CSA lists the findings required to place a drug or other substance in any particular schedule (I, II, III, IV, or V).[6] After consideration of the analysis and recommendation of the Assistant Secretary for Health of HHS and review of all available data, the Administrator of DEA, pursuant to 21 U.S.C. 812(b)(4), finds that:

*(1) Zuranolone has a potential for abuse similar to the drugs or other substances in schedule IV.*

Zuranolone, a neuroactive steroid, is a positive allosteric modulator of $GABA_A$ receptors and produces sedation in general behavioral studies. In a drug discrimination study in animals, zuranolone produced dose-dependent substitution for midazolam (schedule IV) when considering the full session (partial substitution when considering the first reinforcer), demonstrating it has GABA agonist properties. Zuranolone produced positive subjective responses and euphoria-related adverse events similar to that of alprazolam (schedule IV), and greater than that of placebo in a human abuse potential study.

Furthermore, data from other clinical studies show that zuranolone produced incidence of euphoria-like adverse events in 5 percent of healthy individuals, including euphoric mood, feeling drunk, feeling of relaxation, feeling abnormal, and inappropriate effect compared to no incidence following placebo. Therefore, zuranolone has the potential for abuse similar to alprazolam, midazolam, methohexital, and other substances in schedule IV.

*(2) Zuranolone has a currently accepted medical use in treatment in the United States.*

FDA approved the NDA for ZURZUVAE (zuranolone) as a treatment for post-partum depression. Thus, zuranolone has a currently accepted medical use in treatment in the United States.

*(3) Abuse of zuranolone may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III but similar to other substances in schedule IV.*

Zuranolone shares a similar pharmacology profile with brexanolone (schedule IV) and benzodiazepines (schedule IV). Data from a rat physical dependence study demonstrated that discontinuation of chronic administration of zuranolone at the doses tested did not produce physical dependence or withdrawal syndrome. In a dog toxicity study, drug discontinuation after chronic administration at supratherapeutic doses produced convulsions similar to that of benzodiazepines. Further, upon abrupt discontinuation in humans at the therapeutic dose (≤50 mg per day), zuranolone produced mild to moderate withdrawal-like effects in healthy individuals no worse than what is clinically known for schedule IV benzodiazepines. HHS concluded that there would be higher risk of developing physical dependence and withdrawal syndrome and more severe effects after abrupt drug discontinuation in individuals that took more than the therapeutic dose or for an extended duration. Withdrawal symptoms from physical dependence may include convulsions. Zuranolone produced positive subjective responses and euphoria-related adverse events and may produce psychic dependence. Zuranolone may lead to physical or psychological dependence similar to benzodiazepines in schedule IV.

Based on these findings, the Administrator concludes that zuranolone warrants control in schedule IV of the CSA.[7]

**Requirements for Handling Zuranolone**

Zuranolone is subject to the CSA's schedule IV regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distributing, dispensing, importing, exporting, research, and conduct of instructional activities, including the following:

1. *Registration.* Any person who handles (manufactures, distributes, reverse distributes, dispenses, imports, exports, engages in research, or conducts instructional activities or chemical analysis with, or possesses) zuranolone must be registered with DEA to conduct such activities pursuant to 21 U.S.C. 822, 823, 957, and 958, and in accordance with 21 CFR parts 1301 and 1312. These registration requirements, however, are not applicable to patients (end users) who possess zuranolone pursuant to a lawful prescription.

[6] 21 U.S.C. 812(b).

[7] 21 U.S.C. 812(b)(4).

2. *Disposal of Stocks.* Any person unwilling or unable to obtain a schedule IV registration must surrender all quantities of currently held zuranolone, or may transfer all quantities of currently held zuranolone to a person registered with DEA. Zuranolone is required to be disposed of in accordance with 21 CFR part 1317, in addition to all other applicable Federal, state, local, and tribal laws.

3. *Security.* Zuranolone is subject to schedule III–V security requirements for DEA registrants and must be handled and stored in accordance with 21 CFR 1301.71–1301.77, pursuant to 21 U.S.C. 823, 821, 871(b). Non-practitioners handling zuranolone must also comply with the employee screening requirements of 21 CFR 1301.90–1301.93. These requirements, however, are not applicable to patients (end users) who possess zuranolone pursuant to a lawful prescription.

4. *Labeling and Packaging.* All labels and packaging for commercial containers of zuranolone must comply with 21 U.S.C. 825 and 958(e), and be in accordance with 21 CFR part 1302.

5. *Inventory.* Every DEA registrant who possesses any quantity of zuranolone must have an initial inventory of all stocks of controlled substances (including zuranolone) on hand on the date the registrant first engages in the handling of controlled substances, pursuant to 21 U.S.C. 827, and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11.

Any person who registers with DEA to handle zuranolone must take an initial inventory of all stocks of controlled substances (including zuranolone) on hand on the date the registrant first engages in the handling of controlled substances, pursuant to 21 U.S.C. 827 and 958(e), and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11(a) and (b).

After the initial inventory, every DEA registrant must take inventory of all controlled substances (including zuranolone) on hand every two years, pursuant to 21 U.S.C. 827, and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11. These requirements, however, are not applicable to patients (end users) who possess zuranolone pursuant to a lawful prescription.

6. *Records and Reports.* DEA registrants must maintain records and submit reports for zuranolone, pursuant to 21 U.S.C. 827, 832(a), and 958(e), and in accordance with 21 CFR 1301.74(b) and (c) and parts 1304, 1312, and in accordance with 21 CFR 1301.74(b) and (c) and parts 1304, 1312, and 1317.

7. *Prescriptions.* All prescriptions for zuranolone, or products containing zuranolone, must comply with 21 U.S.C. 829, and be issued in accordance with 21 CFR parts 1306 and 1311, subpart C.

8. *Manufacturing and Distributing.* In addition to the general requirements of the CSA and DEA regulations that are applicable to manufacturers and distributors of schedule IV controlled substances, such registrants should be advised that (consistent with the foregoing considerations) any manufacturing or distribution of zuranolone may only be for the legitimate purposes consistent with the drug's labeling, or for research activities authorized by the Federal Food, Drug, and Cosmetic Act (FDCA), as applicable, and the CSA.

9. *Importation and Exportation.* All importation and exportation of zuranolone must be in compliance with 21 U.S.C. 952, 953, 957, and 958, and in accordance with 21 CFR part 1312.

10. *Liability.* Any activity involving zuranolone not authorized by, or in violation of, the CSA or its implementing regulations, is unlawful, and may subject the person to administrative, civil, and/or criminal sanctions.

## Regulatory Analyses

### *Administrative Procedure Act*

Section 553 of the APA (5 U.S.C. 553) generally requires notice and comment for rulemakings. However, 21 U.S.C. 811(j) provides that in cases where a certain new drug is (1) approved by HHS, under section 505(c) of the FDCA, and (2) HHS recommends control in CSA schedule II–V, DEA shall issue an IFR scheduling the drug within 90 days. As stated in the legal authority section, the 90-day time frame is the later of: (1) the date DEA receives HHS's scientific and medical evaluation/scheduling recommendation, or (2) the date DEA receives notice of the NDA approval by HHS. Additionally, subsection 811(j) specifies that the rulemaking shall become immediately effective as an IFR without requiring DEA to demonstrate good cause.

### *Executive Orders 12866, 13563, and 14094, Regulatory Review*

In accordance with 21 U.S.C. 811(a), this scheduling action is subject to formal rulemaking procedures performed ''on the record after opportunity for a hearing,'' which are conducted pursuant to the provisions of 5 U.S.C. 556 and 557. The CSA sets forth the procedures and criteria for scheduling a drug or other substance. Such actions are exempt from review by the Office of Management and Budget pursuant to section 3(d)(1) of Executive Order (E.O.) 12866 and the principles reaffirmed in E.O. 13563. E.O. 14094 modernizes the regulatory review process to advance policies that promote the public interest and address national priorities.

### *Executive Order 12988, Civil Justice Reform*

This meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988 to eliminate drafting errors and ambiguity, minimize litigation, provide a clear legal standard for affected conduct, and promote simplification and burden reduction.

### *Executive Order 13132, Federalism*

This rulemaking does not have federalism implications warranting the application of E.O. 13132. The proposed rule does not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government.

### *Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*

This rule does not have tribal implications warranting the application of E.O. 13175. It does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

### *Paperwork Reduction Act*

This proposed action does not impose a new collection of information requirement under the Paperwork Reduction Act, 44 U.S.C. 3501–3521.

### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612) applies to rules that are subject to notice and comment under section 553(b) of the APA. As noted in the above discussion regarding the applicability of the APA, DEA is not required to publish a general notice of proposed rulemaking. Consequently, the RFA does not apply to this IFR.

### *Unfunded Mandates Reform Act of 1995*

In accordance with the Unfunded Mandates Reform Act (UMRA) of 1995, 2 U.S.C. 1501 *et seq.,* DEA has determined and certifies that this proposed action would not result in 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 1 year * * *.'' Therefore, neither a Small Government Agency Plan nor any other action is required under UMRA of 1995.

*Congressional Review Act*

This rule is not a major rule as defined by the Congressional Review Act (CRA), 5 U.S.C. 804. However, pursuant to the CRA, DEA is submitting a copy of this IFR to both Houses of Congress and to the Comptroller General.

**Signing Authority**

This document of the Drug Enforcement Administration was signed on October 25, 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**.

**Scott Brinks,**

*Federal Register Liaison Officer, Drug Enforcement Administration.*

**List of Subjects in 21 CFR Part 1308**

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

For the reasons set out above, DEA amends 21 CFR part 1308 as follows:

## PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

■ 1. The authority citation for 21 CFR part 1308 continues to read as follows:

**Authority:** 21 U.S.C. 811, 812, 871(b), 956(b) unless otherwise noted.

■ 2. In § 1308.14:

a. Add a new paragraph (c)(60) to read as follows:

**§ 1308.14 Schedule IV.**

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(c) * * *

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| (60) Zuranolone ..... | 2420 |

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[FR Doc. 2023–23982 Filed 10–30–23; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### 21 CFR Part 1310

**[Docket No. DEA–1098]**

## Designation of Halides of 4-Anilinopiperidine as List I Chemicals

**AGENCY:** Drug Enforcement Administration, Department of Justice.

**ACTION:** Final rule.

**SUMMARY:** The Drug Enforcement Administration (DEA) is finalizing the modification of the listing of the list I chemical, *N*-phenylpiperidin-4-amine (also known as 4-anilinopiperidine; *N*-phenyl-4-piperidinamine; 4–AP) (hereinafter referred to as 4-anilinopiperidine), to include halides of 4-anilinopiperidine. This rule finalizes the modification of the listing of 4-anilinopiperidine as a list I chemical.

**DATES:** This rule is effective November 30, 2023. Persons currently manufacturing, distributing, importing, or exporting halides of 4-anilinopiperidine or a chemical mixture containing halides of 4-anilinopiperidine, if they are not already registered to handle list I chemicals, must apply on or before November 30, 2023, to continue their business pending final action by DEA on their application.

**FOR FURTHER INFORMATION CONTACT:** Terrence L. Boos, Drug and Chemical Evaluation Section, Diversion Control Division, Drug Enforcement Administration; Telephone: (571) 362–3249.

**SUPPLEMENTARY INFORMATION:** The Drug Enforcement Administration (DEA) is extremely concerned with the recent increase in the illicit manufacture and distribution of fentanyl and fentanyl analogues. Therefore, on April 14, 2023, DEA published a Notice of Proposed Rulemaking (NPRM) to include halides of 4-anilinopiperidine as list I chemicals.[1] This rulemaking finalizes that NPRM.

This action subjects handlers of halides of 4-anilinopiperidine to the regulatory provisions of the Controlled Substances Act (CSA) and its implementing regulations regarding list I chemicals. This rulemaking does not establish a threshold for domestic and international transactions of halides of 4-anilinopiperidine. As such, all transactions involving halides of 4-anilinopiperidine, regardless of size, shall be regulated and are subject to control under the CSA. In addition, chemical mixtures containing halides of 4-anilinopiperidine are not exempt from regulatory requirements at any concentration. Therefore, all transactions of chemical mixtures containing any quantity of halides of 4-anilinopiperidine shall be regulated pursuant to the CSA as list I chemicals.

**Legal Authority**

The CSA gives the Attorney General the authority to specify, by regulation, chemicals as list I chemicals.[2] A ''list I chemical'' is a chemical that is used in manufacturing a controlled substance in violation of the CSA and is important to the manufacture of the controlled substances.[3] The current list of all listed chemicals is published at 21 CFR 1310.02(a). Pursuant to 28 CFR 0.100(b), the Attorney General has delegated his authority to designate list I chemicals to the Administrator of DEA (Administrator). The DEA regulations set forth the process by which DEA may add a chemical as a listed chemical. As set forth in 21 CFR 1310.02(c), the agency may do so by publishing a final rule in the **Federal Register** following a published notice of proposed rulemaking with at least 30 days for public comments.

**Background**

DEA previously found that 4-anilinopiperidine is used in the illicit manufacture of the controlled substance fentanyl (a schedule II substance under the CSA) and fentanyl analogues controlled in schedule I of the CSA, and is important to the manufacture of the controlled substance fentanyl and fentanyl analogues, because it cannot be replaced by other chemicals in its respective synthetic pathways that are used in the illicit manufacture of fentanyl and fentanyl analogues.[4] On this basis, DEA previously specified that 4-anilinopiperidine is a list I chemical.[5]

DEA has now found that halides of 4-anilinopiperidine are also used in the illicit manufacture of schedule I controlled substances, such as *para*-fluorofentanyl, *ortho*-fluorofentanyl, and *para*-chlorofentanyl. Accordingly, this action adds halides of 4-anilinopiperidine to the prior listing of 4-anilinopiperidine and thereby subjects handlers of halides of 4-anilinopiperidine to the regulatory provisions of the CSA and its implementing regulations.

[1] 88 FR 22955 (Apr. 14, 2023).

[2] 21 U.S.C. 802(34).

[3] *Id.*

[4] 85 FR 20822 (Apr. 15, 2020).

[5] *Id.*

This rule does not affect current handlers of 4-anilinopiperidine, including its amides, its carbamates, and its salts, as they are already required to be registered to handle 4-anilinopiperidine. This rule does not establish a threshold for domestic and international transactions of halides of 4-anilinopiperidine. As such, all transactions involving halides of 4-anilinopiperidine, regardless of size, shall be regulated as list I chemicals and are subject to control under the CSA. In addition, chemical mixtures containing halides of 4-anilinopiperidine are not exempt from regulatory requirements at any concentration. Therefore, all transactions of chemical mixtures containing any quantity of halides of 4-anilinopiperidine shall be regulated as list I chemicals pursuant to the CSA.

Fentanyl is a synthetic opioid and was first synthesized in Belgium in the late 1950s. Fentanyl was introduced into medical practice and is approved for medical practitioners in the United States to prescribe lawfully for anesthesia and analgesia. Yet, due to its pharmacological effects, fentanyl can be used as a substitute for heroin, oxycodone, and other opioids. Therefore, despite its accepted medical use in treatment in the United States, the DEA controls fentanyl as a schedule II controlled substance due to its high potential for abuse and dependence.[6]

The unlawful trafficking and distribution of fentanyl and fentanyl analogues in the United States continues to pose an imminent hazard to public safety. Since 2012, fentanyl has shown a dramatic increase in the illicit drug supply as a single substance, in mixtures with other illicit drugs (*i.e.,* heroin, cocaine, and methamphetamine), or in forms that mimic pharmaceutical preparations, including prescription opiates and benzodiazepines.[7]

In recent years, the United States has experienced a significant increase in overdoses and overdose fatalities from fentanyl and fentanyl analogues. According to the Centers for Disease Control and Prevention (CDC), drug-induced overdose deaths involving synthetic opioids (excluding methadone) in the United States increased from 36,359 in 2019, to 56,516 in 2020, and to 70,589 in 2021 (provisional).[8] Further, CDC reports that opioids, mainly synthetic opioids (which includes fentanyl), are predominately responsible for drug overdose fatalities, as the drug overdose death data (109,247) predicted for the 12 month-ending March 2022, synthetic opioids were involved in about 67.3 percent of all drug-induced overdose deaths.[9]

The increase in overdose fatalities involving synthetic opioids coincides with a dramatic increase in law enforcement encounters of fentanyl and fentanyl analogues. According to the National Forensic Laboratory Information System (NFLIS-Drug),[10] reports from forensic laboratories of drug items containing fentanyl and several schedule I fentanyl analogues increased dramatically since 2014, as shown in Table 1.

TABLE 1—ANNUAL REPORTS OF FENTANYL AND HALOGENATED FENTANYL ANALOGUES IDENTIFIED IN DRUG ENCOUNTERS

| Year | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 |
|---|---|---|---|---|---|---|---|---|
| Fentanyl | 5,553 | 15,461 | 37,144 | 61,628 | 89,890 | 107,928 | 124,773 | 156,629 |
| Halogenated Fentanyl Analogues[11] | 1 | 10 | 435 | 2,628 | 2,960 | 1,013 | 743 | 19,831 |

## Role of 4-Anilinopiperidine in the Synthesis of Fentanyl and Fentanyl Analogues

Fentanyl and its analogues are not naturally occurring substances. As such, the manufacture of these substances requires them to be produced through synthetic organic chemistry. Synthetic organic chemistry is the process in which a new organic molecule is created through a series of chemical reactions, which involve precursor chemicals. Through chemical reactions, the chemical structures of precursor chemicals are modified in a desired fashion. These chemical reaction sequences, also known as synthetic pathways, are designed to create a desired substance. Several synthetic pathways to fentanyl and fentanyl analogues have been identified in clandestine laboratory settings, including the original ''Janssen method,'' the ''Siegfried method,'' and the ''Gupta method,'' which are further explained below.

In response to the illicit manufacture of fentanyl using these methods, DEA controlled *N*-phenethyl-4-piperidone (NPP);[12] *N*-(1-benzylpiperidin-4-yl)-*N*-phenylpropionamide (benzylfentanyl), *N*-phenylpiperidin-4-amine (4-anilinopiperidine);[13] and 4-piperidone[14] as list I chemicals. DEA also controlled 4-anilino-*N*-phenethylpiperidine (ANPP)[15] and *N*-phenyl-*N*-(piperidin-4-yl)propionamide (norfentanyl)[16] as schedule II immediate precursors to fentanyl under the CSA.

In 2017, the United Nations Commission on Narcotic Drugs (CND) placed NPP and ANPP in Table I of the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (1988 Convention) in response to the international

[6] 21 U.S.C. 812(c), Schedule II(b)(6); 21 CFR 1308.12(c).

[7] United Nations Office on Drugs and Crime, Global SMART Update Volume 17, March 2017. *https://www.unodc.org/documents/scientific/Global_SMART_Update_17_web.pdf.*

[8] Centers for Disease Control and Prevention, National Center for Health Statistics. National Vital Statistics System, Provisional Mortality on CDC WONDER Online Database. Data are from the final Multiple Cause of Death Files, 2018–2020, and from provisional data for years 2021–2022, as compiled from data provided by the 57 vital statistics jurisdictions through the Vital Statistics Cooperative Program. Accessed at *https://wonder.cdc.gov/mcd-icd10-provisional.html* on August 15, 2022.

[9] Ahmad FB, Rossen LM, Sutton P. Provisional drug overdose death counts. National Center for Health Statistics. 2021. Accessed at *https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm* on May 5, 2022.

[10] The National Forensic Laboratory Information System (NFLIS-Drug) is a national forensic laboratory reporting system that systematically collects results from drug chemistry analyses conducted by Federal, State and local forensic laboratories in the United States. While NFLIS-Drug data is not direct evidence of abuse, it can lead to an inference that a drug has been diverted and abused. *See* 76 FR 77330, 77332 (Dec. 12, 2011). NFLIS-Drug data was queried on August 15, 2022.

[11] Halogenated fentanyl analogues reported to NFLIS-Drug include: *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-fluoroisobutyryl fentanyl, chlorofentanyl, fluoro furanyl fentanyl, fluorobutyryl fentanyl, fluorobutyryl/fluoroisobutyryl fentanyl, fluorofentanyl, fluoroisobutyryl fentanyl, *meta*-fluoro furanyl fentanyl, *ortho*-fluorobutyryl fentanyl, *ortho*-fluoroisobutyryl fentanyl, *ortho*-fluoro acrylfentanyl, *ortho*-fluoro furanyl fentanyl, *ortho*-fluorofentanyl, *ortho*-chlorofentanyl, *para*-chlorofentanyl, *para*-fluoro furanyl fentanyl, *para*-fluoro valeryl fentanyl, *para*-fluorobutyryl fentanyl, and *para*-fluorofentanyl.

[12] 72 FR 20039 (Apr. 23, 2007).

[13] 85 FR 20822 (Apr. 15, 2020).

[14] 88 FR 21902 (Apr. 12, 2023).

[15] 75 FR 37295 (Aug. 30, 2010).

[16] 85 FR 21320 (Apr. 17, 2020).

reintroduction of fentanyl on the illicit drug market.[17] As such, member states of the United Nations were required to regulate these precursor chemicals at the national level. In addition, the People's Republic of China regulated NPP and ANPP on February 1, 2018.[18]

Following the international control of NPP and ANPP under the 1988 Convention, illicit fentanyl manufacturers moved to unregulated precursor chemicals. These included 4-anilinopiperidine, 1-boc-4–AP, and norfentanyl. In response, the CND placed 4-anilinopiperidine, 1-boc-4–AP, and norfentanyl in Table I of the 1988 Convention.[19]

On May 15, 2020, 4-anilinopiperidine became a list I chemical in the United States due to its role in the illicit manufacture of fentanyl.[20] Since that control action, DEA has observed an increase in identifications of certain fentanyl analogues by law enforcement and public health officials. Many of these fentanyl analogues contain a halogen atom on the aniline ring of its respective chemical structure. The presence of the halogen atom suggests that the fentanyl analogue was synthesized from a halogenated precursor chemical. Indeed, halogenated fentanyl precursors have been identified by law enforcement, such as *tert*-butyl 4-((4-fluorophenyl)amino)piperidine-1-carboxylate (*para*-fluoro 1-boc 4–AP). The chemical structure of this precursor defines it as a halide and carbamate of 4-anilinopiperidine. As such, it falls outside of the current definitions of a list I chemical, simply due to the presence of the fluorine (a halogen) atom. Although not previously regulated as a list I chemical, it can be used in the synthesis of fentanyl analogues, such as the schedule I substances *para*-fluorofentanyl, *para*-fluoroisobutyryl fentanyl, *para*-fluorobutyryl fentanyl, and *para*-fluoro furanyl fentanyl.

In addition, fentanyl analogues with both *meta*- and *ortho*-fluoro substitutions have been identified, such as *ortho*-fluorofuranyl fentanyl and *meta*-fluorofuranyl fentanyl. The identification of these substances suggests illicit fentanyl analogue manufacturers attempt to utilize unregulated precursor chemicals to evade law enforcement detection and precursor chemical controls. This strategy allows for the synthesis of a variety of fentanyl analogues by simply moving the fluorine atom around the aniline ring while maintaining the same synthetic methodology used to synthesize fentanyl and fentanyl analogues.

Likewise, other halogenated fentanyl analogues, such as those containing a chlorine atom, have been reported by forensic laboratories. According to NFLIS-Drug, *para*-chlorofentanyl and *ortho*-chlorofentanyl were reported for the first time in 2020. The identification of these substances suggests that illicit fentanyl analogue manufacturers utilize precursor chemicals containing a chlorine atom as an alternative to a fluorine atom in effort to evade law enforcement detection.

**4-Anilinopiperidine**

The original published synthetic pathway to fentanyl, known as the Janssen method, involves the two important precursors, benzylfentanyl and norfentanyl. 4-Piperidone,[21] a list I chemical under the CSA, serves as a precursor chemical to benzylfentanyl, a list I chemical under the CSA,[22] which is converted to norfentanyl, the schedule II immediate precursor in this synthetic pathway. Norfentanyl is then subjected to one simple chemical reaction to complete the synthesis of fentanyl. Norfentanyl is controlled in schedule II of the CSA.[23]

Like the Janssen method, 4-piperidone serves as an early-stage precursor chemical in the Siegfried method. 4-Piperidone is a precursor to NPP, a known fentanyl precursor and list I chemical under the CSA,[24] in the Siegfried method. NPP is then converted to ANPP, the schedule II immediate precursor in this synthetic pathway. ANPP is then subjected to a simple one-step chemical reaction to complete the synthesis of fentanyl. ANPP is controlled as a schedule II immediate precursor under the CSA.[25]

In addition to the Janssen and Siegfried methods, clandestine manufacturers are using other methods to synthesize fentanyl, one of which is known as the Gupta method. 4-Anilinopiperidine, a list I chemical under the CSA,[26] is the key precursor in the Gupta method. 4-Anilinopiperidine serves as an alternative precursor chemical to NPP in the synthesis of ANPP, albeit through a different synthetic process. The resulting ANPP is then used as the immediate precursor chemical in the illicit manufacture of fentanyl.

Recent encounters of precursor chemicals related to 4-anilinopiperidine in chemical structure have occurred. These precursor chemicals contain a halogen atom on the aniline ring of 4-anilinopiperidine. Modifications have included the addition of a fluorine atom, a chlorine atom, or a bromine atom at different positions on the aniline ring of the 4-anilinopiperidine structure. The use of these halogenated 4-anilinopiperidine precursor chemicals in place of 4-anilinopiperidine has resulted in the illicit manufacturing of schedule I fentanyl analogues.

Halogenated 4-anilinopiperidines[27] are commercially available from both domestic and foreign suppliers. DEA is aware of at least 25 domestic suppliers and 14 foreign suppliers. Modified versions of 4-anilinopiperidine, such as *para*-fluoro 1-boc-4–AP, are attractive to illicit manufacturers because they are readily available from chemical suppliers and the lack of regulatory control on these substituted precursor chemicals.

*para*-Fluoro 1-boc-4–AP has been identified in law enforcement encounters in the United States. According to NFLIS-Drug, beginning in 2020, there have been at least nine reports of *para*-fluoro 1-boc-4–AP from forensic laboratories in the United States. A query of DEA's STARLiMS[28] database provided 16 reports of *para*-fluoro 1-boc-4–AP from analyses conducted on submitted drug evidence by DEA forensic laboratories. Of these 16 reports, *para*-fluoro 1-boc-4–AP was the only substance reported in nine exhibits (totaling more than 29 kg), suggesting that these seizures were intended to be used as precursor chemicals in the synthesis of fentanyl

[17] 60th Session of the CND Dec/60/12 (ANPP) and Dec/60/13 (NPP).

[18] *https://www.dea.gov/press-release/2018/01/05/china-announces-scheduling-controls-two-fentanyl-precursor-chemicals.* Accessed March 9, 2022.

[19] In a letter dated May 27, 2022, the United Nations Office on Drugs and Crime, in accordance with Article 12, paragraph 6 of the 1988 Convention, informed the Permanent Mission of the United States of America to the United Nations (Vienna) that the CND decided to place the chemical 4–AP in Table I of the 1988 Convention (CND Dec/65/4) and the chemical 1-boc-4–AP in Table I of the 1988 Convention (CND Dec/65/5) at its 65th Session on March 16, 2022.

[20] 85 FR 20822 (April 15, 2020).

[21] 88 FR 21902 (Apr. 12, 2023).

[22] 85 FR 20822 (Apr. 15, 2020).

[23] 85 FR 21320 (Apr. 17, 2020).

[24] 72 FR 20039 (Apr. 23, 2007).

[25] 75 FR 37295 (Aug. 30, 2010).

[26] 85 FR 20822 (Apr. 15, 2020).

[27] Chemicals included the folowing: *ortho*-fluoro 4–AP, *ortho*-chloro 4–AP, *ortho*-bromo 4–AP, *meta*-fluoro 4–AP, *meta*-chloro 4–AP, *meta*-bromo 4–AP, *para*-fluoro 4–AP, *para*-chloro 4–AP, *para*-bromo 4–AP, *ortho*-fluoro 1-boc-4–AP, *ortho*-chloro 1-boc-4–AP, *ortho*-bromo 1-boc-4–AP, *meta*-fluoro 1-boc-4–AP, *meta*-chloro 1-boc-4–AP, *meta*-bromo 1-boc-4–AP, *para*-fluoro 1-boc-4–AP, *para*-chloro 1-boc-4–AP, and *para*-bromo 1-boc-4–AP.

[28] On October 1, 2014, DEA implemented STARLiMS (a web-based, commercial laboratory information management system) to replace the System to Retrieve Information from Drug Evidence (STRIDE) as its laboratory drug evidence data system of record. STARLiMS data was queried on September 12, 2022.

analogues. Additionally, *para*-fluoro 1-boc-4–AP was reported in combination with *para*-fluorofentanyl in four of the seven exhibits containing a mixture of substances, suggesting that *para*-fluoro 1-boc-4–AP was a precursor chemical involved in the synthesis of *para*-fluorofentanyl, a schedule I substance under the CSA.

As of August 2022, in addition to domestic encounters, the International Narcotics Control Board of the United Nations reported two international transactions of *para*-fluoro 1-boc-4–AP through the Precursors Incident Communication System (PICS) [29] reporting system. These incidents reported to PICS totaled approximately 51 kg and had destinations located in North America.

These recent law enforcement encounters of *para*-fluoro 1-boc-4–AP coincide with the placement of NPP, ANPP, 4-anilinopiperidine, 1-boc-4–AP (*tert*-butyl 4-(phenylamino)piperidine-1-carboxylate), and norfentanyl in Table I of the 1988 Convention, the People's Republic of China regulating NPP and ANPP as of February 1, 2018, and the regulation of benzylfentanyl and proposed control of 4-piperidone as list I chemicals in the United States. The domestic encounters of *para*-fluoro 1-boc-4–AP at ports of entry indicate a change in precursors used in the illicit manufacture of fentanyl to substituted precursor chemicals used in the illicit manufacture of fentanyl analogues in efforts to evade international controls on NPP, ANPP, 4-anilinopiperidine, 1-boc-4–AP, and norfentanyl and additional controls on benzylfentanyl in the United States.

## Regulation of 4-Anilinopiperidine, Including Its Amides, Its Carbamates, Its Halides, Its Salts, and Any Combination Thereof, Whenever the Existence of Such Is Possible, as a List I Chemical

The CSA, specifically 21 U.S.C. 802(34), and its implementing regulations at 21 CFR 1310.02(c), provide the Attorney General with the authority to specify, by regulation, additional precursor or essential chemicals as listed chemicals if they are used in the manufacture of controlled substances in violation of the CSA. Recent law enforcement encounters indicate halides of 4-anilinopiperidine are being used in the illicit manufacture of schedule I fentanyl analogues. This rule modifies the current listing of 4-anilinopiperidine, including its amides, its carbamates, and its salts to include halides of 4-anilinopiperidine. DEA finds that 4-anilinopiperidine, including its amides, its carbamates, its halides, its salts, and any combination thereof, whenever the existence of such is possible, is used in the illicit manufacture of controlled substances, such as fentanyl and fentanyl analogues, and is important to the manufacture of these substances because it cannot be replaced by other chemicals in their respective synthetic pathways that are used in the illicit manufacture of fentanyl and fentanyl analogues.

### Comments Received

As part of this rulemaking, DEA solicited information on any possible legitimate uses of halides of 4-anilinopiperidine unrelated to fentanyl production (including industrial uses) in order to assess the potential economic impact of controlling halides of 4-anilinopiperidine as defined in this rule. DEA has searched information in the public domain for legitimate uses of this chemical, and has not documented a legitimate commercial or industrial use for halides of 4-anilinopiperidine. DEA sought, however, to document any unpublicized use(s) and other proprietary use(s) of halides of 4-anilinopiperidine that are not in the public domain. Therefore, DEA solicited comment on the uses of halides of 4-anilinopiperidine in the legitimate marketplace.

DEA solicited input from all potentially affected parties regarding: (1) The types of legitimate industries using halides of 4-anilinopiperidine; (2) the legitimate uses of halides of 4-anilinopiperidine, if any; (3) the size of the domestic market for halides of 4-anilinopiperidine; (4) the number of manufacturers of halides of 4-anilinopiperidine; (5) the number of distributors of halides of 4-anilinopiperidine; (6) the level of import and export of halides of 4-anilinopiperidine; (7) the potential burden these regulatory controls of halides of 4-anilinopiperidine may have on any legitimate trade; (8) the potential number of individuals/firms that may be adversely affected by these regulatory controls (particularly with respect to the impact on small businesses); and (9) any other information on the manner of manufacturing, distribution, consumption, storage, disposal, and uses of halides of 4-anilinopiperidine by industry and others. DEA invited all interested parties to provide any information on any legitimate uses of halides of 4-anilinopiperidine in industry, commerce, academia, research and development, or other applications. DEA sought both quantitative and qualitative data. DEA did not receive any responses to these specific solicitations, nor did DEA receive any other comments in response to the NPRM.

### Chemical Mixtures of 4-Anilinopiperidine

This rulemaking modifies the current regulations for 4-anilinopiperidine, including its amides, its carbamates, and its salts to include halides of 4-anilinopiperidine. The regulations specify that chemical mixtures containing halides of 4-anilinopiperidine are not exempt from regulatory requirements at any concentration, unless an application for exemption of a chemical mixture is submitted by a manufacturer of halides of 4-anilinopiperidine and the application is reviewed and accepted by DEA under 21 CFR 1310.13 (Exemption by Application Process). The control of chemical mixtures containing any amount of halides of 4-anilinopiperidine is necessary to prevent the extraction, isolation, and use of halides of 4-anilinopiperidine in the illicit manufacture of schedule I fentanyl analogues. This rule modifies the Table of Concentration Limits in 21 CFR 1310.12(c) to reflect the fact that chemical mixtures containing any amount of 4-anilinopiperidine, including its amides, its carbamates, its halides, its salts, and any combination thereof, whenever the existence of such is possible, are subject to the CSA chemical control provisions as list I chemicals.

### Exemption by Application Process

DEA has implemented an application process to exempt mixtures from the requirements of the CSA and its implementing regulations.[30] Under the application process, manufacturers may submit an application for exemption for those mixtures that do not qualify for automatic exemption. Exemption status can be granted if DEA determines that the mixture is formulated in such a way that it cannot be easily used in the illicit production of a controlled substance and that the listed chemical cannot be readily recovered.[31]

### Requirements for Handling List I Chemicals

On May 15, 2020, DEA promulgated regulations which listed 4-anilinopiperidine, including its amides, its carbamates, and its salts, as a list I

[29] PICS is a platform that allows governments to exchange operational and investigative intelligence and to generate strategic intelligence on precursors trafficking. PICS reports were collected up to August 23, 2022.

[30] 21 CFR 1310.13.

[31] 21 U.S.C. 802(39)(A)(vi).

chemical under the CSA. Chemicals that meet the current definition of 4-anilinopiperidine [32] have been, and continue to be, subject to the regulatory provisions of the CSA since May 15, 2020. This rule expands the definitions of 4-anilinopiperidine to include its halides. Halides of 4-anilinopiperidine become subject to the regulatory provisions of the CSA upon the effective date of this rule.

Upon the effective date of this final rule, halides of 4-anilinopiperidine will be subject to all of the regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, importing, and exporting of list I chemicals, just as 4-anilinopiperidine, including its amides, its carbamates, and its salts are currently regulated. Upon the effective date of this final rule, persons potentially handling halides of 4-anilinopiperidine, including regulated chemical mixtures containing halides of 4-anilinopiperidine, will be required to comply with list I chemical regulations, including the following:

*1. Registration.* Any person who manufactures, distributes, imports, or exports halides of 4-anilinopiperidine, including chemical mixtures containing halides of 4-anilinopiperidine, or proposes to engage in the manufacture, distribution, importation, or exportation of halides of 4-anilinopiperidine, including chemical mixtures containing halides of 4-anilinopiperidine, must obtain a registration pursuant to 21 U.S.C. 822, 823, 957, and 958, if they are not already registered to handle list I chemicals. Regulations describing registration for list I chemical handlers are set forth in 21 CFR part 1309. DEA regulations require separate registrations for manufacturing, distributing, importing, and exporting of list I chemicals.[33] Further, a separate registration is required for each principal place of business at one general physical location where list I chemicals are manufactured, distributed, imported, or exported by a person.[34]

DEA notes that under the CSA, ''warehousemen'' are not required to register and may lawfully possess list I chemicals, if the possession of those chemicals is in the usual course of business or employment.[35] Under DEA implementing regulations, the warehouse in question must receive the list I chemical from a DEA registrant and shall only distribute the list I chemical back to the DEA registrant and registered location from which it was received. A warehouse that distributes list I chemicals to persons other than the registrant and registered location from which they were obtained is conducting distribution activities and is required to register as such.[36]

Upon the effective date of this final rule, any person manufacturing, distributing, importing, or exporting halides of 4-anilinopiperidine or a chemical mixture containing halides of 4-anilinopiperidine will become subject to the registration requirement under the CSA for list I chemicals. DEA recognizes, however, that it is not possible for persons who become subject to the registration requirements under this rule to immediately complete and submit an application for registration, and for DEA to immediately issue registrations for those activities. Therefore, to allow any continued legitimate commerce in halides of 4-anilinopiperidine or a chemical mixture containing halides of 4-anilinopiperidine, DEA is updating the listing in 21 CFR 1310.09(p), to include a temporary exemption from the registration requirement for persons desiring to engage in activities with the updated definitions of halides of 4-anilinopiperidine or a chemical mixture containing halides of 4-anilinopiperidine, provided that DEA receives a properly completed application for registration or application for exemption of a chemical mixture under 21 CFR 1310.13 on or before November 30, 2023. The temporary exemption for such persons will remain in effect until DEA takes final action on their application for registration or application for exemption of a chemical mixture.

The temporary exemption applies solely to the registration requirement; all other chemical control requirements, including recordkeeping and reporting, will become effective on the effective date of this final rule. This is necessary because a delay in regulating these transactions could result in increased diversion of chemicals desirable to drug traffickers.

Additionally, the temporary exemption for registration does not suspend applicable Federal criminal laws relating to halides of 4-anilinopiperidine, nor does it supersede State or local laws or regulations. All handlers of halides of 4-anilinopiperidine must comply with applicable State and local requirements in addition to the CSA regulatory controls.

*2. Records and Reports.* Every DEA registrant must maintain records and submit reports with respect to halides of 4-anilinopiperidine pursuant to 21 U.S.C. 830 and in accordance with 21 CFR part 1310.04 and 1310.05. Pursuant to 21 CFR 1310.04, a record must be kept for two years after the date of a transaction involving a listed chemical, provided the transaction is a regulated transaction.

Each regulated bulk manufacturer of a listed chemical must submit manufacturing, inventory, and use data on an annual basis. Existing standard industry reports containing the required information are acceptable, provided the information is separate or readily retrievable from the report.[37]

The CSA and its implementing regulations require that each regulated person must report to DEA any regulated transaction involving an extraordinary quantity of a listed chemical, an uncommon method of payment or delivery, or any other circumstance that the regulated person believes may indicate that the listed chemical will be used in violation of subchapter I of the CSA. In addition, regulated persons must report any proposed regulated transaction with a person whose description or other identifying characteristics DEA has previously furnished to the regulated person, any unusual or excessive loss or disappearance of a listed chemical under the control of the regulated person, and any in-transit loss in which the regulated person is the supplier.[38]

*3. Importation and Exportation.* All importation and exportation of halides of 4-anilinopiperidine or a chemical mixture containing halides of 4-anilinopiperidine must be done in compliance with 21 U.S.C. 957, 958, and 971, and in accordance with 21 CFR part 1313.

*4. Security.* All applicants and registrants must provide effective controls against theft and diversion of list I chemicals in accordance with 21 CFR 1309.71–1309.73.

*5. Administrative Inspection.* Places, including factories, warehouses, or other establishments and conveyances, where registrants or other regulated persons may lawfully hold, manufacture, distribute, or otherwise dispose of a list I chemical or where records relating to those activities are maintained, are controlled premises as defined in 21 U.S.C. 880(a) and 21 CFR 1316.02(c). The CSA allows for administrative inspections of these

[32] 85 FR 20822.

[33] 21 CFR 1309.21.

[34] 21 U.S.C. 822(e)(1); 21 CFR 1309.23(a).

[35] 21 U.S.C. 822(c)(2).

[36] 21 U.S.C. 822(a)(1).

[37] 21 CFR 1310.05(d).

[38] 21 U.S.C. 830(b); 21 CFR 1310.05(a) and (b).

controlled premises as provided in 21 CFR part 1316, subpart A.[39]

*6. Liability.* Any activity involving halides of 4-anilinopiperidine not authorized by, or in violation of, the CSA, would be unlawful, and would subject the person to administrative, civil, and/or criminal action.

**Regulatory Analyses**

*Executive Orders 12866 and 13563, Regulatory Planning and Review, Improving and Regulation and Regulatory Review*

This final rule, which adds halides of 4-anilinopiperidine to the prior listing of the list I chemical 4-anilinopiperidine, was developed in accordance with the principles of Executive orders (E.O.) 12866, 13563, and 14094. E.O. 12866 directs 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 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review as established in E.O. 12866.

E.O. 12866 classifies a ''significant regulatory action,'' requiring review by the Office of Management and Budget (OMB), as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more (adjusted every three years by the Administrator of OIRA [40] 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; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the E.O., as specifically authorized in a timely manner by the Administrator of OIRA in each case.

A review of the 25 domestic suppliers of halides of 4-anilinopiperidine indicates that these entities are not currently registered with DEA to handle list I chemicals. These 25 suppliers are entities that do not also supply 4-anilinopiperidine, as these entities would already be required to register to handle list I chemicals since 4-anilinopiperidine is currently a list I chemical under the CSA. Therefore, the modified definitions of 4-anilinopiperidine in this final rule would potentially affect 25 entities. DEA anticipates that this rule will impose minimal or no economic impact on affected entities; and thus, will not have a significant economic impact on any of the 25 affected small entities. Therefore, DEA concludes this rule is not a significant regulatory action under E.O. 12866. Upon the effective date of this final rule, halides of 4-anilinopiperidine will be subject to all of the regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, importing, and exporting of list I chemicals, just as 4-anilinopiperidine, including its amides, its carbamates, and its salts, is currently regulated. 4-Anilinopiperidine is a precursor chemical used in, and is important to, the illicit manufacture of the schedule II controlled substance fentanyl and schedule I fentanyl analogues. The distribution of illicitly manufactured fentanyl and fentanyl analogues has caused an unprecedented outbreak of thousands of fentanyl-related overdoses in the United States in recent years.

DEA has searched information in the public domain for any legitimate uses of halides of 4-anilinopiperidine, and has not documented a use for halides of 4-anilinopiperidine. DEA requested public comment regarding this estimate; however, no public comment was received during the notice and comment period.

DEA evaluated the costs and benefits of this action.

Costs

DEA believes the market for halides of 4-anilinopiperidine for the legitimate manufacturing of pharmaceutical fentanyl is minimal, because halides of 4-anilinopiperidine are not used to synthesize fentanyl or any schedule II fentanyl analogue currently used in medical practice. As stated above, DEA is not aware of any legitimate uses of halides of 4-anilinopiperidine. Any manufacturer, distributor, importer, or exporter of halides of 4-anilinopiperidine will incur costs. The primary costs associated with this rule would be the annual registration fees for list I chemicals ($3,699 for manufacturers and $1,850 for distributors, importers, and exporters). However, DEA believes that the cost will be minimal.

DEA has identified 25 domestic suppliers of halides of 4-anilinopiperidine. None of these 25 suppliers are registered to handle list I chemicals. It is difficult to estimate the quantity of distribution of halides of 4-anilinopiperidine by these suppliers. It is common for chemical distributors to have items in their catalog while not actually having any material level of sales. Suppliers for the legitimate use of halides of 4-anilinopiperidine are expected to choose the least-cost option, and depending on the circumstances, some suppliers might choose to stop selling the minimal quantities, if any, of halides of 4-anilinopiperidine, rather than incur the registration cost. Because DEA believes the quantities of halides of 4-anilinopiperidine supplied for the legitimate manufacturing of pharmaceutical fentanyl are minimal, DEA estimates that the cost of foregone sales is minimal; thus, the cost of this rule is minimal. DEA requested public comment regarding this estimate; however, no public comment was received during the notice and comment period.

This analysis excludes consideration of any economic impact to those businesses that facilitate the manufacturing and distribution of halides of 4-anilinopiperidine for the manufacturing of illicit fentanyl and fentanyl analogues. As a law enforcement organization and as a matter of principle, DEA believes considering the economic utility of facilitating the manufacture of illicit fentanyl would be improper.

Benefits

Controlling halides of 4-anilinopiperidine is expected to prevent, curtail, and limit the unlawful manufacture and distribution of fentanyl and fentanyl analogues. As a list I chemical, handling of halides of 4-anilinopiperidine requires registration with DEA and various controls and monitoring as required by the CSA. This rule is also expected to assist preventing the possible theft or diversion of halides of 4-anilinopiperidine from any legitimate firms. DEA also believes control is necessary to prevent unscrupulous chemists from synthesizing halides of 4-anilinopiperidine and selling them (as unregulated materials) through the internet and other channels, to individuals who may wish to acquire unregulated intermediary chemicals for the purpose of illicitly manufacturing fentanyl and fentanyl analogues.

[39] 21 U.S.C. 880.

[40] Office of Information and Regulatory Affairs.

In summary, DEA conducted a qualitative analysis of costs and benefits. DEA believes this action will minimize the diversion of halides of 4-anilinopiperidine. DEA believes the market for halides of 4-anilinopiperidine for the legitimate manufacturing of fentanyl or schedule II fentanyl analogues currently used in medical practice is minimal, since halides of 4-anilinopiperidine are not used to synthesize fentanyl or any schedule II fentanyl analogue currently used in medical practice. Therefore, any potential cost as a result of this regulation is minimal.

*Executive Order 12988, Civil Justice Reform*

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988 Civil Justice Reform to eliminate drafting errors and ambiguity, minimize litigation, provide a clear legal standard for affected conduct, and promote simplification and burden reduction.

*Executive Order 13132, Federalism*

This rule does not have federalism implications warranting the application of E.O. 13132. The rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government.

*Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*

This rule does not have tribal implications warranting the application of E.O. 13175. This rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

*Regulatory Flexibility Act*

The Administrator, in accordance with the Regulatory Flexibility Act (5 U.S.C. 601–612), has reviewed this rule and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities. As discussed above, halides of 4-anilinopiperidine or a chemical mixture containing halides of 4-anilinopiperidine shall be subject to all of the regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, importing, and exporting of list I chemicals. Halides of 4-anilinopiperidine are precursor chemicals used in, and important to, the illicit manufacture of the schedule I fentanyl analogues. The distribution of illicitly manufactured fentanyl and fentanyl analogues has caused an unprecedented outbreak of thousands of fentanyl-related overdoses in the United States in recent years. DEA has not identified any legitimate industrial use for halides of 4-anilinopiperidine. Therefore, DEA believes the vast majority, if not all, of halides of 4-anilinopiperidine is used for the illicit manufacturing of schedule I fentanyl analogues. The primary costs associated with this rule are the annual registration fees ($3,699 for manufacturers and $1,850 for distributors, importers, and exporters). DEA has identified 25 domestic suppliers of halides of 4-anilinopiperidine, all of which are not currently registered with DEA to handle list I chemicals. All non-registered domestic suppliers are affected and are estimated to be small entities (based on Small Business Administration size standard for chemical distributors and Statistics of U.S. Business data).[41] It is impossible to know how much halides of 4-anilinopiperidine is distributed by these suppliers. It is common for chemical distributors to have items in their catalog while not actually having any material level of sales. Therefore, DEA estimates the cost of this rule on any affected small entity is minimal. DEA did not receive public comment regarding this estimate. Based on these factors, DEA projects that this rule will not result in a significant economic impact on a substantial number of small entities.

*Unfunded Mandates Reform Act of 1995*

On the basis of information contained in the Regulatory Flexibility Act section above, DEA has determined and certifies pursuant to the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1501 *et seq.,* that this action would not result in 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 for inflation) in any one year . . . .'' Therefore, neither a Small Government Agency Plan nor any other action is required under provisions of UMRA.

*Congressional Review Act*

This rule is not a major rule as defined by the Congressional Review Act (CRA), 5 U.S.C. 804. However, pursuant to the CRA, DEA is submitting a copy of this final rule to both Houses of Congress and to the Comptroller General.

**Signing Authority**

This document of the Drug Enforcement Administration was signed on October 25, 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**.

**Scott Brinks,**

*Federal Register Liaison Officer, Drug Enforcement Administration.*

**List of Subjects in 21 CFR Part 1310**

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

For the reasons set out above, DEA amends 21 CFR part 1310 to read as follows:

## PART 1310—RECORDS AND REPORTS OF LISTED CHEMICALS AND CERTAIN MACHINES; IMPORTATION AND EXPORTATION OF CERTAIN MACHINES

■ 1. The authority citation for 21 CFR part 1310 continues to read as follows:

**Authority:** 21 U.S.C. 802, 827(h), 830, 871(b), 890.

■ 2. In § 1310.02, revise paragraph (a)(33) to read as follows:

**§ 1310.02 Substances covered.**

* * * * *

(a) * * *

[41] *https://www.sba.gov/sites/default/files/2018-07/NAICS%202017%20Table%20of%20Size%20Standards.pdf.*

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| * | * | * | * | * | * | * | |
| (33) *N*-phenylpiperidin-4-amine (4-anilinopiperidine; *N*-phenyl-4-piperidinamine; 4–AP), its amides, its carbamates, its halides, its salts, and any combination thereof, whenever the existence of such is possible | | | | | | | 8335 |
| * | * | * | * | * | * | * | |

* * * * *

■ 3. In § 1310.04, revise paragraph (g)(1)(xiv) to read as follows:

**§ 1310.04 Maintenance of records.**

* * * * *

(g) * * *

(1) * * *

(xiv) *N*-phenylpiperidin-4-amine (4-anilinopiperidine; *N*-phenyl-4-piperidinamine; 4–AP), its amides, its carbamates, its halides, its salts, and any combination thereof, whenever the existence of such is possible.

* * * * *

■ 4. In § 1310.09, revise paragraph (p) to read as follows:

**§ 1310.09 Temporary exemption from registration.**

* * * * *

(p)(1) Each person required under 21 U.S.C. 822 and 21 U.S.C. 957 to obtain a registration to manufacture, distribute, import, or export regulated *N*-phenylpiperidin-4-amine (4-anilinopiperidine; *N*-phenyl-4-piperidinamine; 4–AP), its amides, its carbamates, its halides, its salts, and any combination thereof, whenever the existence of such is possible, including regulated chemical mixtures pursuant to § 1310.12, is temporarily exempted from the registration requirement, provided that DEA receives a properly completed application for registration or application for exemption for a chemical mixture containing halides of 4-anilinopiperidine pursuant to § 1310.13 on or before November 30, 2023. The exemption would remain in effect for each person who has made such application until the Administration has approved or denied that application. This exemption applies only to registration; all other chemical control requirements set forth in the Act and parts 1309, 1310, 1313, and 1316 of this chapter remain in full force and effect.

(2) Any person who manufactures, distributes, imports, or exports a chemical mixture containing *N*-phenylpiperidin-4-amine (4-anilinopiperidine; *N*-phenyl-4-piperidinamine; 4–AP), its amides, its carbamates, its halides, its salts, and any combination thereof, whenever the existence of such is possible, whose application for exemption is subsequently denied by DEA must obtain a registration with DEA. A temporary exemption from the registration requirement will also be provided for those persons whose application for exemption is denied, provided that DEA receives a properly completed application for registration on or before 30 days following the date of official DEA notification that the application for exemption has been denied. The temporary exemption for such persons will remain in effect until DEA takes final action on their registration application.

* * * * *

■ 5. In § 1310.12, in the table in paragraph (c), revise the entry for *N*-phenylpiperidin-4-amine to read as follows:

**§ 1310.12 Exempt chemical mixtures.**

* * * * *

(c) * * *

TABLE OF CONCENTRATION LIMITS

| | DEA chemical code number | Concentration | Special conditions |
|---|---|---|---|
| **List I Chemicals** | | | |
| * | * | * | * |
| *N*-phenylpiperidin-4-amine (4-anilinopiperidine; *N*-phenyl-4-piperidinamine; 4–AP), its amides, its carbamates, its halides, its salts, and any combination thereof, whenever the existence of such is possible. | 8335 | Not exempt at any concentration. | Chemical mixtures containing any amount of 4-anilinopiperidine are not exempt. |
| * | * | * | * |

* * * * *

[FR Doc. 2023–23927 Filed 10–30–23; 8:45 am]

BILLING CODE 4410–09–P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 372**

**[EPA–HQ–TRI–2022–0270; FRL–8741–04–OCSPP]**

**RIN 2070–AK97**

## Changes to Reporting Requirements for Per- and Polyfluoroalkyl Substances and to Supplier Notifications for Chemicals of Special Concern; Community Right-to-Know Toxic Chemical Release Reporting

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is adding per- and polyfluoroalkyl substances (PFAS) subject to reporting under the Emergency Planning and Community Right-to-Know Act (EPCRA) and the Pollution Prevention Act (PPA) pursuant to the National Defense Authorization Act for Fiscal Year 2020 (NDAA) to the list of Lower Thresholds for Chemicals of Special Concern (chemicals of special concern). These PFAS already have a lower reporting activity threshold of 100 pounds. The addition of these PFAS to the list of chemicals of special concern means such PFAS are subject to the same reporting requirements as other chemicals of special concern (*i.e.,* it eliminates the use of the *de minimis* exemption and the option to use Form A and would limit the use of range reporting for PFAS). Removing the availability of these burden-reduction reporting options will result in a more complete picture of the releases and waste management quantities for these PFAS. EPA is removing the availability of the *de minimis* exemption for purposes of the Supplier Notification Requirements for all chemicals on the list of chemicals of special concern. This will help ensure that purchasers of mixtures and trade name products containing such chemicals are informed of their presence in mixtures and products they purchase to better inform any TRI reporting obligations.

**DATES:** This final rule is effective November 30, 2023 and shall apply for the reporting year beginning January 1, 2024 (reports due July 1, 2025).

**ADDRESSES:** The docket for this action, identified by docket identification (ID) number EPA–HQ–TRI–2022–0270, is available online at *https://www.regulations.gov* or in person at the Office of Pollution Prevention and Toxics Docket (OPPT Docket) in the Environmental Protection Agency Docket Center (EPA/DC). All documents in the docket are listed on *https://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Additional instructions on visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

**FOR FURTHER INFORMATION CONTACT:**

*For technical information contact:* Daniel R. Ruedy, Data Gathering and Analysis Division (7406M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–7974; email: *ruedy.daniel@epa.gov.*

*For general information contact:* The Emergency Planning and Community Right-to-Know Hotline; telephone numbers: toll free at (800) 424–9346 (select menu option 3) or (703) 348–5070 in the Washington, DC Area and International; or go to *https://www.epa.gov/home/epa-hotlines.*

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

You may be potentially affected by this action if you manufacture, process, or otherwise use listed PFAS or any chemicals listed under 40 CFR 372.28. The following list of North American Industry Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this action applies to them. Potentially affected entities may include:

- Facilities included in the following NAICS manufacturing codes (corresponding to Standard Industrial Classification (SIC) codes 20 through 39): 311 *, 312 *, 313 *, 314 *, 315 *, 316, 321, 322, 323 *, 324, 325 *, 326 *, 327 *, 331, 332, 333, 334 *, 335 *, 336, 337 *, 339 *, 111998 *, 113310, 211130 *, 212323 *, 212390 *, 488390 *, 512230 *, 512250 *, 5131 *, 516210 *, 519290 *, 541713 *, 541715 * or 811490 *. * Exceptions and/or limitations exist for these NAICS codes.
- Facilities included in the following NAICS codes (corresponding to SIC codes other than SIC codes 20 through 39): 211130 * (corresponds to SIC code 1321, Natural Gas Liquids, and SIC 2819, Industrial Inorganic Chemicals, Not Elsewhere Classified); or 212114, 212115, 212220, 212230, 212290 *; or 2211 *, 221210 *, 221330 (limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce) (corresponds to SIC codes 4911, 4931, and 4939, Electric Utilities); or 424690, 424710 (corresponds to SIC code 5171, Petroleum Bulk Terminals and Plants); 425120 (limited to facilities previously classified in SIC code 5169, Chemicals and Allied Products, Not Elsewhere Classified); or 562112 (limited to facilities primarily engaged in solvent recovery services on a contract or fee basis (previously classified under SIC code 7389, Business Services, NEC)); or 562211 *, 562212 *, 562213 *, 562219 *, 562920 * (limited to facilities regulated under the Resource Conservation and Recovery Act, subtitle C, 42 U.S.C. 6921 *et seq.*) (corresponds to SIC code 4953, Refuse Systems). * Exceptions and/or limitations exist for these NAICS codes.
- Federal facilities.
- Facilities that the EPA Administrator has specifically required to report to TRI pursuant to a determination under EPCRA section 313(b)(2).

A more detailed description of the types of facilities covered by the NAICS codes subject to reporting under EPCRA section 313 can be found at: *https://www.epa.gov/toxics-release-inventory-tri-program/tri-covered-industry-sectors.* To determine whether your facility is affected by this action, you should carefully examine the applicability criteria in part 372, subpart B of title 40 of the Code of Federal Regulations. Federal facilities are required to report under Section 6(a)–(b) of Executive Order 14096 (88 FR 25251 April 21, 2023), Revitalizing Our Nation's Commitment to Environmental Justice for All. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. What action is the Agency taking?*

EPA is adding all PFAS included on the Toxics Release Inventory (TRI) pursuant to sections 7321(b) and 7321(c) of the 2020 NDAA to the list of chemicals of special concern (40 CFR 372.28). EPA maintains a list of PFAS added to the TRI list pursuant to the NDAA at: *https://www.epa.gov/toxics-release-inventory-tri-program/list-pfas-added-tri-ndaa.* The addition of PFAS added to TRI pursuant to sections 7321(b) and (c) of the NDAA to the list of chemicals of special concern aligns reporting requirements for these PFAS with other chemicals of special concern. EPA anticipates this will result in

additional Form R reports being filed for these PFAS due to the removal of the *de minimis* exemption and the option to use Form A. It also limits the use of range reporting, which will capture more specific information for PFAS added pursuant to sections 7321(b) and 7321(c) of the NDAA.

In addition, EPA is removing the availability of the *de minimis* exemption under the Supplier Notification Requirements (40 CFR 372.45) for facilities that manufacture or process any chemicals included on the list of chemicals of special concern.

This action does not make any changes to the article exemption.

*C. What is the Agency's authority for this action?*

This action is issued under EPCRA sections 313, 42 U.S.C. 11023 and 328, 42 U.S.C. 11048. EPCRA is also referred to as Title III of the Superfund Amendments and Reauthorization Act of 1986.

*D. Why is the Agency taking this action?*

EPA is taking this action to increase the data collected for PFAS. Removing the availability of certain burden-reduction reporting options will result in a more complete picture of the releases and waste management quantities for PFAS. This will increase the number of TRI reports on listed PFAS and the amount of information provided on such reports, resulting in more information on the waste management of these chemicals available to the Agency, as well as to the public. EPA expects this information will be a benefit to the public, including communities with environmental justice concerns and public water utilities, as well as inform future Agency actions, including under the Clean Water Act, the Resource Conservation and Recovery Action, the Comprehensive Environmental Response, Compensation, and Liability Act, and the Toxic Substances Control Act. In addition, this action will increase data collected for all chemicals of special concern by eliminating the *de minimis* exemption for purposes of the Supplier Notification Requirements for all chemicals on the list of chemicals of special concern. The elimination of this exemption from Supplier Notification Requirements ensures that purchasers of mixtures and trade name products containing such chemicals are informed of their presence in mixtures and products they purchase.

*E. What are the estimated incremental impacts of this action?*

EPA prepared an updated economic analysis for this action entitled, ''Economic Analysis for the Changes to Reporting Requirements for Per- and Polyfluoroalkyl Substances and to Supplier Notification Requirements for Chemicals of Special Concern; Community Right-to-Know Toxic Chemical Release Reporting,'' which presents an analysis of the costs of the reporting changes for PFAS and other chemicals of special concern based on updated 2022 wage rates and an increase in supplier notification burden estimates (Ref. 1). EPA estimates that this action will result in an additional 623 to 2,015 Form R reports being filed annually. EPA estimates that the costs of this action will be approximately $3,318,492 and $10,733,149 in the first year of reporting and approximately $1,580,214 and $5,111,044 in the subsequent years. In addition, EPA has determined that, of the 486 to 1,333 small businesses affected by this action, none are estimated to incur annualized cost impacts of more than 1% of revenues. Thus, this action is not expected to have a significant adverse economic impact on a substantial number of small entities.

Removing the availability of certain burden-reduction reporting options will result in a more complete picture of the releases and waste management quantities for PFAS. This will increase the number of TRI reports on listed PFAS and the amount of information provided on such reports, resulting in more information on the waste management of these chemicals available to the Agency, as well as to the public.

## II. Background Information

*A. What is EPCRA section 313?*

EPCRA section 313, 42 U.S.C. 11023 (also known as the Toxics Release Inventory (TRI)), requires certain facilities that manufacture, process, or otherwise use listed toxic chemicals in amounts above reporting activity threshold levels to report their environmental releases and other waste management quantities of such chemicals annually. These facilities must also report pollution prevention and recycling data for such chemicals, pursuant to PPA section 6607, 42 U.S.C. 13106.

TRI provides information about releases of toxic chemicals from covered facilities throughout the United States; however, TRI data do not reveal whether or to what degree the public is exposed to listed chemicals. TRI data can, in conjunction with other information, be used as a starting point in evaluating such exposures and the risks posed by such exposures. The determination of potential risk to human health and/or the environment depends upon many factors, including the toxicity of the chemical, the fate of the chemical in the environment, and the amount and duration of human or other exposure to the chemical.

For more information on TRI, visit the TRI website at *https://www.epa.gov/tri.* Note that TRI does not cover all chemicals, facilities, or types of pollution (see *https://www.epa.gov/toxics-release-inventory-tri-program/what-toxics-release-inventory* for information on which chemicals and facilities are regulated under TRI). Additionally, via this website, EPA provides a guidance document entitled ''Factors to Consider When Using Toxics Release Inventory Data'' available at: *https://www.epa.gov/system/files/documents/2022-02/factorstoconsider_approved-by-opa_1.25.22-copy.pdf,* which helps explain some of the uses, as well as limitations, of data TRI collects.

*B. What are PFAS?*

PFAS are synthetic organic compounds that do not occur naturally in the environment. PFAS contain an alkyl carbon chain on which the hydrogen atoms have been partially or completely replaced by fluorine atoms. Definitions of what constitutes ''PFAS'' differ amongst scientific and regulatory bodies. However, in general, the strong carbon-fluorine bonds of PFAS make them resistant to degradation and thus highly persistent in the environment (Refs. 2 and 3). Some of these chemicals have been used for decades in a wide variety of consumer and industrial products (Refs. 2 and 3). Some PFAS have been detected in wildlife indicating that at least some PFAS have the ability to bioaccumulate (Ref. 3). Because of the widespread use of PFAS in commerce and their tendency to persist in the environment, most people in the United States have been exposed to PFAS (Refs. 2, 4 and 5). Some PFAS can accumulate in humans and remain in the human body for long periods of time (*e.g.,* months to years) (Refs. 2 and 3), as a result, several PFAS have been detected in human blood serum (Refs. 2, 3, 4, and 5).

*C. What PFAS have been added to the TRI list?*

On December 20, 2019, the NDAA was signed into law (Pub. L. 116–92, *https://www.congress.gov/public-laws/116th-congress*). The NDAA included

two provisions that automatically add PFAS to the TRI list. First, section 7321(b) of the NDAA added to the TRI list, effective January 1, 2020, 14 chemicals by name and/or Chemical Abstracts Service Registry Number (CASRN) and additional PFAS that meet specific criteria. On June 22, 2020 (85 FR 37354 (FRL–10008–09)), EPA updated the TRI list in the CFR to reflect the 172 non-CBI PFAS added to TRI by section 7321(b) of the NDAA.

Additional PFAS are added to the TRI list on an annual basis by the NDAA. Specifically, PFAS that meet the criteria in section 7321(c) of the NDAA are deemed added to the TRI list on January 1 of the year after specific criteria are met. Through this provision, the NDAA will continue to add PFAS to the TRI list over time as additional PFAS meet the criteria outlined in 7321(c). The criteria of section 7321(c) require the addition to the TRI list of certain PFAS after any one of the following dates:

- *Final Toxicity Value.* The date on which the Administrator finalizes a toxicity value for the PFAS or class of PFAS;
- *Significant New Use Rule.* The date on which the Administrator makes a covered determination for the PFAS or class of PFAS;
- *Addition to Existing Significant New Use Rule.* The date on which the PFAS or class of PFAS is added to a list of substances covered by a covered determination.
- *Addition as an Active Chemical Substance.* The date on which the PFAS or class of PFAS to which a covered determination applies is:
- Added to the list published under section 8(b)(1) of the Toxic Substances Control Act (TSCA) (15 U.S.C. 2601 *et seq.*) and designated as an active chemical substance under TSCA section 8(b)(5)(A); or
- Designated as an active chemical substance under TSCA section 8(b)(5)(B) on the list published under TSCA section 8(b)(1).

EPA updates the TRI list in the CFR to reflect the PFAS added to TRI by section 7321(c) of the NDAA. The first update rule identifying PFAS that met the 7321(c) criteria during 2020 was published on June 3, 2021 (86 FR 29698 (FRL–10022–25)).

To date, section 7321 of the NDAA has added a total of 189 PFAS to the TRI list at: *https://www.epa.gov/tri/PFAS.* A complete list of the PFAS added to the TRI list can be found at: *https://www.epa.gov/toxics-release-inventory-tri-program/list-pfas-added-tri-ndaa.* In addition, the NDAA established a manufacture, processing, or otherwise use reporting threshold of 100 pounds for each of the PFAS added to the TRI list by sections 7321(b) and 7321(c) of the NDAA. In the first year of reporting for the initial 172 listed PFAS, EPA only received 89 reports from 38 facilities covering 43 different PFAS. Similar levels of PFAS reporting were observed in the subsequent year: with 176 PFAS on the TRI list in RY2021, only 42 facilities reported submitted a total of 87 reports covering 43 different PFAS.

## III. Summary of Public Comments on Proposed Rule

Upon publication of the proposed rule on December 5, 2022, EPA provided a 60-day comment period (87 FR 74379 (FRL–8714–03–OCSPP)). EPA received 36 comments on the proposed rule. EPA received comments from citizens, industry groups, non-governmental organizations, and state governments. The majority of comments on the proposed rule addressed EPA's burden estimates, with the majority stating EPA underestimated the burden of listing PFAS as chemicals of special concern and removing the supplier notification de minimis exemption would impose. Several commenters requested EPA lower the activity thresholds for PFAS. Many of the commenters stated that EPA has not demonstrated PFAS meet the criteria to be classified as chemicals of special concern. Many of the commenters stated that eliminating the regulatory exemptions for PFAS will create a more complete picture of PFAS in communities and the environment. After considering the public comments, EPA updated the economic analysis to incorporate 2022 wage rates, include a summary of small entity analysis, and increase the supplier notification burden estimates. Further edits to the analysis were not required because EPA has made no substantive changes as compared with what had been proposed. Summaries of the comments and EPA's responses to the comments appear in the Response to Comment document (Ref. 6) which is in the docket for this rulemaking.

## IV. What changes is EPA making to the TRI reporting requirements?

### *A. Designating PFAS Automatically Added to the TRI List by the 2020 NDAA as Chemicals of Special Concern*

EPA is adding all PFAS included on the TRI list pursuant to sections 7321(b) and 7321(c) of the NDAA (see 40 CFR 372.65(d) and (e)) to the list of chemicals of special concern at 40 CFR 372.28. EPA first created the list of chemicals of special concern to increase the utility of TRI data by ensuring that the data collected and shared through TRI are relevant and topical (Ref. 7). EPA lowered the reporting thresholds for chemicals of special concern because even small quantities of releases of these chemicals can be of concern. The first chemicals that were added to the list of chemicals of special concern were those identified as persistent, bioaccumulative and toxic (PBT) chemicals which, except for the dioxin and dioxin-like compounds category, have reporting thresholds of either 10 or 100 pounds depending on their persistent and bioaccumulative properties (Ref. 7). Chemicals of special concern are also excluded from the *de minimis* exemption, may not be reported on Form A (Alternate Threshold Certification Statement), and have limits on the use of range reporting.

The *de minimis* exemption allows facilities to not consider small concentrations of TRI chemicals not classified as chemicals of special concern in mixtures or other trade name products when making threshold determinations and release and other waste management calculations. The *de minimis* exemption does not apply to the manufacture of a TRI chemical except if that chemical is manufactured as an impurity and remains in the product distributed in commerce, or if the chemical is imported below the appropriate *de minimis* level. The *de minimis* exemption does not apply to a byproduct manufactured coincidentally as a result of manufacturing, processing, otherwise use, or any waste management activities.

The Form A provides facilities that otherwise meet TRI-reporting thresholds the option of certifying on a simplified reporting form provided that they do not exceed 500 pounds for the total annual reportable amount (described subsequently in this document) for that chemical and that their amounts manufactured, processed, or otherwise used do not exceed 1 million pounds. All chemicals of special concern (except certain instances of reporting lead in stainless steel, brass, or bronze alloys) are excluded from Form A eligibility. Form A does not include any information on releases or other waste management. Nor does it include source reduction information or any other chemical-specific information other than the identity of the chemical.

For certain data elements (Part II, Sections 5, 6.1, and 6.2 of Form R), for chemicals not classified as chemicals of special concern, the reportable quantity may be reported either as an estimate or by using the range codes that have been developed. Currently, TRI reporting provides three reporting ranges: 1–10

pounds, 11–499 pounds, and 500–999 pounds.

The availability of these burden reduction tools is inconsistent with a concern for small quantities of the chemicals and the expanded reporting that was sought for chemicals with lower reporting thresholds. In the preamble to the 1999 final rule (Ref 7), EPA outlined the reasons for promulgating the *de minimis* exemption (*e.g.,* that facilities had limited access to information and that low concentrations would not contribute to the activity threshold) and determined that those rationales did not apply to chemicals of special concern. *Id.* at 58670. Among the reasons provided, EPA explained that even minimal releases of persistent bioaccumulative toxic chemicals may result in significant adverse effects and can reasonably be expected to significantly contribute to exceeding the proposed lower threshold. *Id.* EPA also determined that facilities reporting on chemicals of special concern could not avail themselves of Form A reporting because the information provided on Form A is ''insufficient for conducting analyses'' on chemicals of special concern and would be ''virtually useless for communities interested in assessing risk from releases and other waste management'' of such chemicals (*i.e.,* the Form A does not include estimated release and other waste management quantities). *Id.* Lastly, EPA eliminated range reporting for chemicals of special concern because the use of ranges could misrepresent data accuracy for PBT chemicals because the low or the high-end range numbers may not really be that close to the estimated value. *Id.* For the full discussion, see *Persistent Bioaccumulative Toxic (PBT) Chemicals; Lowering of Reporting Thresholds for Certain PBT Chemicals; Addition of Certain PBT Chemicals; Community Right-to-Know Toxic Chemical Reporting* (Refs. 7 and 8)

EPA has determined that PFAS added to EPCRA section 313 by sections 7321(b) and 7321(c) of the 2020 NDAA should be categorized as chemicals of special concern and added to the list in 40 CFR 372.28. The NDAA set a 100-pound annual reporting threshold for PFAS added by sections 7321(b) and 7321(c), which indicates a concern for small quantities of such PFAS. EPA has therefore determined that the availability of certain burden reduction tools (*i.e., de minimis* levels, Form A, and range reporting) is not justified for these chemicals as the availability of these tools is inconsistent with a concern for small quantities.

Further, due to the strength of the carbon-fluorine bonds, many PFAS can be very persistent in the environment (Refs. 2, 3, and 9). Persistence in the environment allows PFAS concentrations to build up over time; thus, even small releases can be of concern. As with PBT chemicals, permitting reporting facilities to continue to rely on the burden reduction tools (*de minimis* levels, Form A, and range reporting) would eliminate reporting on potentially significant quantities of the listed PFAS. As explained in more detail in Unit IV., EPA's rationale for eliminating these burden reduction tools for PBT chemicals (Refs. 7 and 8) applies equally well to PFAS.

The *de minimis* exemption allows facilities to not consider concentrations of TRI listed chemicals in Unit IV., 1% (0.1% for carcinogens) in mixtures or other trade name products they import, process, or otherwise use in making threshold calculations and release and other waste management (including disposal to land and other types of waste management (*i.e.,* energy recovery, recyling, treatment)) determinations. Since the *de minimis* level is based on relative concentration rather than a specific amount, the application of this exemption to PFAS listed under sections 7321(b) and 7321(c) could allow significant quantities of such PFAS to be excluded from TRI reporting by facilities. For example, if a facility imports, processes, or otherwise uses 100,000 pounds of a mixture or trade name product that contains 0.5% of a listed PFAS, then 500 pounds (or five times the reporting threshold) would be disregarded. This exclusion is inconsistent with a concern for small quantities of PFAS. Many PFAS are used in products below the established *de minimis* levels (Refs. 4 and 10), and the continued availability of the exemption for PFAS would permit facilities to discount those uses when determining whether an applicable threshold has been met to trigger reporting.

The Form A provides certain covered facilities the option of submitting a substantially shorter form with a reduced reporting burden (Ref. 11). For example, the Form A does not require facilities to report any information on releases (*e.g.,* releases through fugitive or non-point air emissions, discharges to streams or water bodies) or waste management quantities. Facilities can qualify to file a Form A if the total annual reportable amount for the listed chemical does not exceed 500 pounds, and the amounts manufactured, processed, or otherwise used do not exceed 1 million pounds. The annual reportable amount is equal to the combined total quantities released at the facility (including disposed of within the facility), treated at the facility (as represented by amounts destroyed or converted by treatment processes), recovered at the facility as a result of recycling operations, combusted for the purpose of energy recovery at the facility, and amounts transferred from the facility to off-site locations for the purpose of recycling, energy recovery, treatment, and/or disposal. This means that facilities that are required to report data on PFAS and also qualify to file a Form A will not be providing specific quantity data on up to 500 pounds of a listed PFAS (five times the reporting threshold). For reporting year 2020, approximately 10% of the reporting forms submitted for the listed PFAS were Forms A (*i.e.,* reporting for TRI reflects 93 active reporting forms of which 84 were Forms R and 9 were Forms A). This trend continued with reporting year 2021, in which 9 of the total 87 reporting forms for PFAS were Form A.

While the Form A does provide some general information on the quantities of the chemical that the facility manages as waste, this information may be insufficient for conducting analyses on PFAS and may be less meaningful for communities interested in assessing risk from releases of PFAS. The threshold category for amounts managed as waste does not include quantities released to the environment as a result of remedial actions or catastrophic events not associated with production processes (section 8.8 of Form R). Thus, the waste threshold category in Form A does not include all releases. Given that even small quantities of PFAS may result in elevated concentrations in the environment, EPA believes it would be inappropriate to allow a reporting option that would exclude information on some releases. Thus, removing the availability of the use of Form A for PFAS is consistent with a concern for understanding small quantities of PFAS.

For TRI-listed chemicals, other than chemicals of special concern, releases and off-site transfers for further waste management of less than 1,000 pounds can be reported using ranges or as a whole number. The reporting ranges are: 1–10 pounds; 11–499 pounds; and 500–999 pounds. For larger releases and off-site transfers for further waste management of the toxic chemical, the facility must report the whole number. Use of ranges could reduce data accuracy because the low or the high-end range numbers may not be that close to the estimated value, even taking into account inherent data errors (*i.e.,* errors in measurements and developing

estimates). For PFAS, it is important to have accurate data regarding the amount released even when the quantities are relatively small, since concern may be tied to even small quantities of a substance. This issue was apparent for PFAS for reporting years 2020 and 2021 since much of the data reported was for less than 1,000 pounds.

EPA anticipates that the elimination of these burden reduction tools will increase the amount and quality of data collected for PFAS and is consistent with the concern for small quantities of PFAS (Ref. 1).

*B. Elimination of the Supplier Notification Requirement De Minimis Exemption for Chemicals of Special Concern*

EPA is also eliminating the use of the *de minimis* exemption under the Supplier Notification Requirements at 40 CFR 372.45(d)(1) for all substances on the list of chemicals of special concern. EPA extended the *de minimis* exemption to the supplier notification requirement in its initial TRI reporting rule (53 FR 4500, February 16, 1988 (FRL–3298–2)). The revised text reads as follows:

> If a mixture or trade name product contains no toxic chemical in excess of the applicable *de minimis* concentration as specified in 40 CFR 372.38(a) except for chemicals listed under 40 CFR 372.28 which are excluded from the *de minimis* exemption.

The *de minimis* exemption to the Supplier Notification Requirements allows suppliers to not provide notifications for mixtures or trade name products containing the listed toxic chemicals if the chemicals are present at concentrations below 1% of the mixture (0.1% for carcinogens). The *de minimis* exemption is not a small quantity exemption; it is a small concentration exemption. Therefore, it is possible that significant quantities of chemicals of special concern can be overlooked by reporting facilities if suppliers can use the *de minimis* exemption. For example, if a mixture or trade name product contains 0.9% of a listed PFAS and 100,000 pounds of the product is purchased, the supplier need not provide notification and the purchaser could be unaware of and not account for 900 pounds of PFAS. The impact of this exemption for the PBT chemicals with 10-pound reporting thresholds is even greater. Using the same 100,000-pound example, if mercury were present at 0.9% then that same 900 pounds would be 90 times the mercury reporting threshold.

It is also possible that quantities of chemicals of special concern would be included in supplier notifications by reporting facilities if suppliers cannot use the *de minimis* exemption. For example, if a mixture or trade name product contains 0.9% of a listed PFAS and 1,000 pounds of the product is purchased, the supplier would need to provide notification for 9 pounds of PFAS. This would also impact PBT chemicals with 10-pound reporting thresholds. Using the same 1,000-pound example, if mercury was present at 0.9% then that same 9 pounds would be below the mercury reporting threshold. However, such quantities may become reportable, in aggregate, if a reporting entity receives multiple shipments (including from multiple suppliers) of a given product in a year and performs a threshold activity in excess of the TRI reporting threshold. Further, TRI supplier notification regulations do not require a person to consider the total quantity of the chemical being supplied but rather require the person to consider the concentration of the chemical in the product or mixture. Including a consideration of quantity rather than concentration shipped would complicate as well as reduce the ability of supplier notifications to inform downstream recipients of products and mixtures containing a TRI-listed chemical.

EPA considered whether to include a small quantity exemption in lieu of a *de minimis* exemption for supplier notification. However, EPA is concerned that such an exemption would not provide adequate information to facilities receiving multiple shipments over the course of a year to address TRI reporting requirements that may apply to them, based on the total aggregated quantity received. Without such information on the TRI-listed chemical, the receiving facility may not have sufficient data to inform potential TRI reporting obligations.

Many PFAS are used in products below the established *de minimis* levels (Refs. 4 and 10) which results in users of those products not knowing they are receiving a product that contains a TRI-reportable PFAS. PFAS reports received for the TRI 2020 and 2021 reporting years were mostly from manufacturers and waste disposal facilities which suggests that the *de minimis* exemption may have been used by most users and processors see *https://www.epa.gov/toxics-release-inventory-tri-program/find-understand-and-use-tri.* EPA has concluded that it is important and necessary to eliminate the supplier notification *de minimis* exemption for PFAS added to the TRI list pursuant to sections 7321(b) and 7321(c) of the NDAA because if that exemption were to remain in place the Agency may fail to collect information on amounts of PFAS that significantly exceed the reporting threshold.

In addition, eliminating the use of the *de minimis* exemption for supplier notification purposes for all other chemicals of special concern ensures that potentially significant quantities of such chemicals are not overlooked by reporting facilities. The PBT chemicals and chemical categories that are classified as chemicals of special concern, and are thus also impacted by this change, are as follows:

- Aldrin (CASRN: 309–00–2);
- Benzo[g,h,i]perylene (CASRN: 191–24–2);
- Chlordane (CASRN: 57–74–9);
- Dioxin and dioxin-like compounds category (manufacturing; and the processing or otherwise use of dioxin and dioxin-like compounds category if the dioxin and dioxin-like compounds are present as contaminants in a chemical and if they were created during the manufacturing of that chemical) (TRI Category Code: N150);
- Heptachlor (CASRN: 76–44–8);
- Hexabromocyclododecane category (TRI Category Code: N270);
- Hexachlorobenzene (CASRN: 118–74–1);
- Isodrin (CASRN: 465–73–6);
- Lead (this lower threshold does not apply to lead when it is contained in stainless steel, brass or bronze alloy; (CASRN: 7439–92–1);
- Lead compounds category (TRI Category Code: N420);
- Mercury (CASRN: 7439–97–6);
- Mercury compounds category (TRI Category Code: N458);
- Methoxychlor (CASRN: 72–43–5);
- Octachlorostyrene (CASRN: 29082–74–4);
- Pendimethalin (CASRN: 40487–42–1);
- Pentachlorobenzene (CASRN: 608–93–5);
- Polychlorinated biphenyls (CASRN: 1336–36–3);
- Polycyclic aromatic compounds category (PACs) (TRI Category Code: N590);
- Tetrabromobisphenol A (CASRN: 79–94–7);
- Toxaphene (CASRN: 8001–35–2); and
- Trifluralin (CASRN: 1582–09–8).

When EPA established the chemicals of special concern list, it decided to not remove the *de minimis* exemption eligibility from supplier notification requirements, indicating that the Agency believed that there was sufficient information available on PBT chemicals by suppliers. (Refs. 7 and 8). However, EPA has determined that there are situations where this

information is not available. For example, the Agency has found that there is significant variability in the concentration of PACs in fuels, yet the presence and concentration of PACs in fuel oil is often not provided in supplier notifications or SDSs. Additionally, EPA is aware of metal mixtures and products containing low concentrations of lead (not contained in stainless steel, brass or bronze alloys) whose supplier notifications and SDSs do not state there is lead present in the mixture or product. Further, it is unclear whether downstream purchasers would be made aware of PBT chemicals contained in many products without notification of the presence of such chemicals.

In situations where such information is already available, supplier notifications may already be addressed (*e.g.,* if such information in already included on an SDS) or the burden of a supplier to provide such information is minimal (*i.e.,* if the information is redundant then the burden to provide such known information should be trivial). However, as noted in Unit IV., the quantity information EPA is requiring for *de minimis* concentrations below the concentration threshold may not be provided in SDSs. OSHA maintains a 1% concentration threshold for reporting the presence and concentration of most hazardous chemicals on SDSs (29 CFR part 1910, subpart Z). For chronic hazards (with Carcinogenicity, Germ Cell Mutagenicity, and Reproductive Toxicity), OSHA has established a 0.1% concentration threshold for reporting the presence and concentration of chemicals on SDSs (29 CFR part 1910, subpart Z). EPA notes that there may be other reasons for a chemical's exclusion from an SDS (*e.g.,* a chemical may be in an article that is not covered by SDS requirements but is subject to TRI supplier notification requirements). As described in section 4.3 of the EA (Ref. 1) for this final rule, EPA believes that any potential increase in new supplier reporting is minimal, particularly regarding non-PFAS chemicals of special concern.

In the 1999 proposal to establish a chemical of special concern list, EPA also reasoned that entities subject to TRI supplier notification requirements could retain use of the *de minimis* exemption for PBTs because ''[m]any of the chemicals identified as persistent and bioaccumulative in today's action are not imported, processed, or otherwise used but are manufactured as byproducts'' (Ref. 8). However, the Agency has since learned that several PBT chemicals are not manufactured as byproducts, and those chemicals are known to be processed for distribution to customers. For example, in Reporting Year 2021, the Agency received 55 Forms R for tetrabromobisphenol A (TBBPA). None of those forms indicated that TBBPA had been manufactured as a byproduct. However, some forms indicated the TBBPA is processed, including as an article component. Similarly, for Reporting Year 2021, the Agency received 76 Forms R on polychlorinated biphenyls (PCBs); 64 of those forms did not indicate those PCBs had been manufactured as byproducts, though some forms indicated the PCBs had been processed, including as an article component. Because many PBT chemicals are not manufactured as byproducts and may exist in relatively lower concentrations within products or mixtures, the Agency's initial rationale to allow suppliers to exempt concentrations of PBT chemicals below *de minimis* from supplier notification requirements warrants reconsideration. Therefore, EPA has reassessed this exemption and modified it appropriately to provide TRI facilities that receive products or mixtures containing chemicals of special concern with additional information related to quantities of chemicals of special concern that may contribute to their reporting thresholds. EPA created the de minimis exemption pursuant to the authority provided in EPCRA section 328 (42 U.S.C. 11048) and is adjusting the scope of the exemption under that same authority. EPCRA section 328 provides that EPA has authority to promulgate regulations as may be necessary to carry out this chapter. EPA has concluded that it is important and necessary to eliminate the supplier notification de minimis exemption for all chemicals of special concern because if that exemption were to remain in place the Agency may fail to collect information on amounts of such chemicals that significantly exceed the reporting threshold.

This action reflects EPA's current understanding of chemical activities involving all chemicals of special concern (*i.e.,* both PBTs and PFAS).

### *C. Impact of Listing Certain PFAS on the Chemicals of Special Concern List*

This action revises the regulatory text to add PFAS currently on TRI pursuant to 7321(b) and 7321(c) of the NDAA to the list of chemicals of special concern. Additionally, the regulatory text, as revised by this action, provides that all PFAS added to TRI pursuant to sections 7321(b) and 7321(c), regardless of the date of their addition, are included on the chemicals of special concern list. Thus, as PFAS continue to be added to TRI pursuant to sections 7321(b) and 7321(c), they will also be added to the list of chemicals of special concern as of the date they are added to the TRI. It is likely that some of the substances meeting the criteria in 7321(b) and 7321(c) will be subject to confidential business information claims. For substances subject to such claims, the Agency must follow the process outlined in section 7321(e) of the NDAA.

As with PFAS currently on the TRI list, future PFAS added to the TRI list under 7321(b) and 7321(c) will have a 100-pound reporting threshold, per sections 7321(b)(2)(A) and 7321(c)(2)(B). Congress' use of this low reporting threshold demonstrates a concern for even relatively small quantities of these PFAS. Therefore, EPA has concluded that it is appropriate for all PFAS added to the TRI list under these provisions to be added to the chemicals of special concern list upon listing. If these PFAS were not added to the chemicals of special concern list at the time of their addition to the TRI list, there would be a delay in the reporting requirements while EPA conducts a rulemaking simply to add them to the chemicals of special concern list. This would result in differences in how previously listed PFAS and newly listed PFAS are treated even though they were automatically listed with the same reporting thresholds. The chemicals of special concern designation is a regulatory construct and here, EPA has determined it is appropriate to designate all PFAS added to TRI pursuant to 7321(b) and 7321(c) as chemicals of special concern due to Congress' use of the 100-pound reporting threshold, indicating a concern for even relatively small quantities of PFAS, and PFAS' persistence in the environment and growing evidence showing potential adverse human health effects (Refs. 2, 3, and 9). Further, this regulatory change will provide additional data that will help the Agency to better understand the extent of potential impacts caused by these PFAS. Given that the NDAA set a 100-pound reporting threshold for *all* PFAS added pursuant to sections 7321(b) and 7321(c), EPA has determined that additional rulemakings to designate these chemicals as chemicals of special concern are unnecessary because the rationale for any future rulemakings would remain the same and would result in a delay of reporting requirements. EPA has finalized regulatory text that adds those PFAS added pursuant to 7321(b) and 7321(c) to the chemicals of special

concern list upon their addition to the TRI list.

EPA has decided not to provide a structural definition (*e.g.,* OECD) of PFAS as part of this action, because doing so is outside the scope of this rulemaking. This rulemaking only concerns chemical substances added to the TRI by sections 7321(b) and 7321(c) of the NDAA, neither of which require EPA to provide a definition of PFAS. Section 7321(b) added by name and/or CASRN specific PFAS to the TRI list and sections 7321(b) and (c) identify EPA activities involving PFAS that would cause a PFAS to be added to the TRI list. The activities described by sections 7321(b) and (c) indicate whether they pertain to a PFAS, and thus a separate determination of whether or not the covered activity involves a PFAS is not necessary. EPA is therefore not providing a definition of PFAS for purposes of this rulemaking, and issues relating to the definition of PFAS are outside the scope of this rulemaking. EPA will consider the need for a PFAS definition for a purpose other than the NDAA section 7321(b) and (c) listings, should the need for such a definition arise. As indicated in the proposal for this rulemaking, EPA acknowledges there is another rulemaking underway to list PFAS additions for NDAA 7321(d), and the Agency expects that rulemaking to clarify the status of those listed PFAS as chemicals of special concern.

## V. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not itself physically located in the docket. For assistance in locating these other documents, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.


1. USEPA. Economic Analysis for the Changes to TRI Reporting for PFAS. October 2023.
2. USEPA. Our Current Understanding of the Human Health and Environmental Risks of PFAS. U.S. Environmental Protection Agency, Washington, DC. *https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas.*
3. ATSDR. Agency for Toxic Substances and Disease Registry. Toxicological Profile for Perfluoroalkyls. May 2021. *https://www.atsdr.cdc.gov/toxprofiles/tp200.pdf.*
4. ATSDR. Agency for Toxic Substances and Disease Registry. Per- and Polyfluoroalkyl Substances (PFAS) and Your Health. PFAS in the U.S. Population. *https://www.atsdr.cdc.gov/pfas/health-effects/us-population.html.*
5. Centers for Disease Control and Prevention, U.S. Department of Health and Human Services. National Report on Human Exposure to Environmental Chemicals. Updated March 2022. Accessed [insert date]. *https://www.cdc.gov/exposurereport/.*
6. USEPA. Response to Comment document. October 2023.
7. USEPA. Final Rule: Persistent Bioaccumulative Toxic (PBT) Chemicals; Lowering of Reporting Thresholds for Certain PBT Chemicals; Addition of Certain PBT Chemicals; Community Right-to-Know Toxic Chemical Reporting. **Federal Register**. 64 FR 58666, October 29, 1999 (FRL–6389–11).
8. USEPA. Proposed Rule: Persistent Bioaccumulative Toxic (PBT) Chemicals; Lowering of Reporting Thresholds for Certain PBT Chemicals; Addition of Certain PBT Chemicals; Community Right-to-Know Toxic Chemical Reporting. **Federal Register**. 64 FR 688, January 5, 1999 (FRL–6389–11).
9. National Institute of Environmental Health Sciences. Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS). *https://www.niehs.nih.gov/health/topics/agents/pfc/index.cfm.*
10. Kotthoff, et al. 2015. Perfluoroalkyl and polyfluoroalkyl substances in consumer products. Environmental Science and Pollution Research 22:14546–14559.
11. USEPA. Toxics Release Inventory Form A. *https://ordspub.epa.gov/ords/guideme_ext/guideme_ext/guideme/file/ry_2021_form_a.pdf.*
12. USEPA. Supporting Statement for an Information Collection Request (ICR) ''Rule-Related Amendment; Changes to Reporting Requirements for Per- and Polyfluoroalkyl Substances; Community Right-to-Know Toxic Chemical Release Reporting; Final Rule (RIN 2070–AK97).'' EPA ICR No.2724.02; OMB Control No. 2070–0225. July 2023.


## VI. Statutory and Executive Orders Reviews

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

### *A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review*

This action is a ''significant regulatory action'' as defined in Executive Order 12866 (58 FR 51735, October 4, 1993), as amended by Executive Order 14094 (88 FR 21879, April 11, 2023). Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket. EPA prepared an economic analysis of the potential impacts associated with this action. This analysis, ''Economic Analysis for the Changes to TRI Reporting for PFAS'' (Ref. 1) is also available in the docket and summarized in Unit E.1.

### *B. Paperwork Reduction Act (PRA)*

The information collection activities in this rule will be submitted to OMB for approval under the PRA, 44 U.S.C. 3501 *et seq*. The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR No. 2724.02 and the OMB Control No. 2070–0225. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here (Ref. 12). The information collection requirements are not enforceable until OMB approves them.

Currently, the facilities subject to the reporting requirements under EPCRA section 313 and PPA section 6607 may use either EPA Toxic Chemicals Release Inventory Form R (EPA Form 1B9350–1), or EPA Toxic Chemicals Release Inventory Form A (EPA Form 1B9350–2). The Form R must be completed if a facility manufactures, processes, or otherwise uses any listed chemical above threshold quantities and meets certain other criteria. For the Form A, EPA established an alternative threshold for facilities with low annual reportable amounts of a listed toxic chemical. A facility that meets the appropriate reporting thresholds, but estimates that the total annual reportable amount of the chemical does not exceed 500 pounds per year, can take advantage of an alternative manufacture, process, or otherwise use threshold of 1 million pounds per year of the chemical, provided that certain conditions are met, and submit the Form A instead of the Form R. In addition, respondents may designate the specific chemical identity of a substance as a trade secret pursuant to EPCRA section 322 (42 U.S.C. 11042) and 40 CFR part 350. OMB has approved the reporting and recordkeeping requirements related to Forms A and R, supplier notification, and petitions under OMB Control number 2070–0212 (EPA ICR No. 2613.04) and those related to trade secret designations under OMB Control 2050–0078 (EPA ICR No. 1428.12). As such, this ICR is intended to amend the existing ICR to include the following additional details:

- *Respondents/affected entities:* Facilities covered under EPCRA section 313 that manufacture, process or otherwise use listed PFAS (See Unit I.A.).

• *Respondent's obligation to respond:* Mandatory (EPCRA section 313).

• *Frequency of response:* Annual.

• *Total estimated number of respondents:* 623 to 2,015.

• *Total estimated burden:* 43,843 and 111,768 burden hours in the first year and approximately 22,244 and 71,946 burden hours in the steady state. Burden is defined at 5 CFR 1320.3(b).

• *Total estimated cost:* Approximately $3,318,492 and $10,733,149 in the first year of reporting and approximately $1,580,214 and $5,111,044 in the steady state (per year) includes $0 annualized capital or operation & maintenance costs.

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 OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

*C. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA, 5 U.S.C. 601 *et seq.* The small entities subject to the requirements of this action are primarily classified within the manufacturing and waste management industry sectors. The Agency has determined that of the 623 to 2,015 entities estimated to be impacted by this action, 486 to 1,333 are small businesses; no small governments or small organizations are expected to be affected by this action. The average cost per small firm is $7,413 (at a 3% discount rate) or $7,520 (at a 7% discount rate). All small businesses affected by this action are estimated to incur annualized cost impacts of less than 1%. Even under a worst-case scenario comparing compliance costs to average revenue of firms with between 10 (smallest number required to report) and 14 employees instead of comparing compliance costs to the weighted average revenue of small firms, there are still no costs that exceed the 1% impact threshold. Thus, this action is not expected to have a significant adverse economic impact on a substantial number of small entities. A more detailed analysis of the impacts on small entities is provided in EPA's economic analysis (Ref. 1).

*D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. EPA did not identify any small governments that would be impacted by this action. EPA's economic analysis indicates that the total cost of this action is estimated to be from $3,318,492 and $10,733,149 in the first year of reporting and from $1,580,214 and $5,111,044 in subsequent reporting years (Ref. 1).

*E. Executive Order 13132: Federalism*

This action does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it will not have substantial direct effects 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.

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

This action does not have tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000) because it will not have substantial direct effects on tribal governments, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. It does not have substantial direct effects on tribal government because this action relates to toxic chemical reporting under EPCRA section 313, which primarily affects private sector facilities. 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 (62 FR 19885, April 23, 1997) as applying only to regulatory actions considered significant under section 3(f)(1) of Executive Order 12866 and 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 Executive Order 13045.

Although this action does not concern an environmental health or safety risk, the data collected as a result of this action will provide information about releases to the environment that could be used to inform the public on potential exposures to toxic chemical releases, pursuant to the right-to-know principles. EPA also believes that the information obtained as a result of this action could be used by government agencies, researchers, and others to identify potential problems, set priorities, and take appropriate steps to reduce any potential exposures and related human health or environmental risks identified as a result of increased knowledge of exposures to PFAS.

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

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution or use of energy and has not otherwise been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

*I. National Technology Transfer and Advancement Act (NTTAA)*

This action does not involve technical standards under the NTTAA section 12(d), 15 U.S.C. 272.

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

EPA finds that it is not practicable to perform an environmental justice analysis because it lacks data on the exact locations of every exposure source. EPA was unable to perform an environmental justice analysis because it lacks data on the exact location of every exposure source based on reporting activity. The purpose of this action is to require reporting activity.

However, this regulatory action makes changes to the reporting requirements for PFAS that will result in more information being collected and provided to better evaluate exposures and the risks posed by such exposures. The determination of potential risk to human health and/or the environment depends upon many factors, including the toxicity of the chemical, the fate of the chemical in the environment, and the amount and duration of human or other exposure to the chemical. This action does not directly address human health or environmental risks. However,

the action will increase the level of information available to assess environmental protection for all affected populations without having any disproportionate and adverse human health or environmental effects on any population, including any community with environmental justice concerns. Specifically, changes to the reporting requirements for PFAS will provide more information on releases and waste management of PFAS. By requiring reporting of this additional information, EPA will be providing communities across the U.S. (including communities with environmental justice concerns) with access to data which they may use to seek lower exposures and consequently reductions in chemical risks for themselves and their children. This information can also be used by government agencies and others to identify potential problems, set priorities, and take appropriate steps to reduce any potential risks to human health and the environment. Therefore, informational benefits, of the action, including behavioral changes such as consumers avoiding specific products, may have positive impact on the human health and environmental impacts on all communities, including communities with environmental justice concerns.

*K. Congressional Review Act (CRA)*

This action is subject to the CRA, 5 U.S.C. 801 *et seq.,* 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).

**List of Subjects in 40 CFR Part 372**

Environmental protection, Community right-to-know, Reporting and recordkeeping requirements, and Toxic chemicals.

Dated: October 18, 2023.

**Michal Freedhoff,**

*Assistant Administrator, Office of Chemical Safety and Pollution Prevention.*

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

## PART 372—TOXIC CHEMICAL RELEASE REPORTING: COMMUNITY RIGHT-TO-KNOW

■ 1. The authority citation for part 372 continues to read as follows:

**Authority:** 42 U.S.C. 11023 and 11048.

**§ 372.22 [Amended]**

■ 2. Amend § 372.22(c) by removing ''§ 372.25, § 372.27, § 372.28, or § 372.29'' and adding in its place ''§§ 372.25, 372.27, or 372.28''.

**§ 372.25 [Amended]**

■ 3. Amend § 372.25 by:

■ a. In the introductory text, remove ''Except as provided in § 372.27, § 372.28, and § 372.29'' and add in its place ''Except as provided in §§ 372.27 and 372.28''; and

■ b. In paragraphs (f), (g), and (h), remove ''§ 372.27, § 372.28, or § 372.29'' and add in its place ''§§ 372.27 or 372.28''.

■ 4. In § 372.28, amend table 1 to paragraph (a)(1) by adding the entry ''Per- and polyfluoroalkyl substances'' alphabetically to read as follows:

**§ 372.28 Lower thresholds for chemicals of special concern.**

* * * * *

(a) * * *

(1) * * *

TABLE 1 TO PARAGRAPH (a)(1)

| Chemical name | CAS No. | Reporting threshold (in pounds) |
|---|---|---|
| * * * * * | * | * |
| Per- and polyfluoroalkyl substances (Individually listed per- and polyfluoroalkyl substances added by 15 U.S.C. 8921(b)(1) and (c)(1)). (EPA periodically updates the lists of covered chemicals at § 372.65(d) and (e) to reflect chemicals that have been added by 15 U.S.C. 8921). | see § 372.65(d) and (e) ..... | 100 |
| * * * * * | * | * |

**§ 372.29 [Removed]**

■ 5. Remove § 372.29.

**§ 372.30 [Amended]**

■ 6. Amend § 372.30 by:

■ a. In paragraph (a), remove ''in § 372.25, § 372.27, § 372.28, or § 372.29 at'' and add in its place ''in §§ 372.25, 372.27, or 372.28 at''; and

■ b. In paragraphs (b)(1), (b)(3) introductory text, (b)(3)(i), and (b)(3)(iv), remove ''§ 372.25, § 372.27, § 372.28, or § 372.29'' and add in its place ''§§ 372.25, 372.27, or 372.28''.

**§ 372.38 [Amended]**

■ 7. Amend § 372.38 by:

■ a. In paragraph (a)(2), remove ''except for purposes of § 372.45(d)(1)''; and

■ b. In paragraphs (b), (c), (d), (f), (g) and (h), remove ''§ 372.25, § 372.27, § 372.28, or § 372.29'' and add in its place ''§§ 372.25, 372.27, or 372.28''.

■ 8. Amend § 372.45, by revising paragraph (d)(1) to read as follows:

**§ 372.45 Notification about toxic chemicals.**

* * * * *

(d) * * *

(1) If a mixture or trade name product contains no toxic chemical in excess of the applicable *de minimis* concentration as specified in § 372.38(a), except for chemicals listed in § 372.28(a), which are excluded from the *de minimis* exemption.

* * * * *

[FR Doc. 2023–23413 Filed 10–30–23; 8:45 am]

BILLING CODE 6560–50–P

# Proposed Rules

Federal Register
Vol. 88, No. 209
Tuesday, October 31, 2023

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

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2023–2136; Project Identifier MCAI–2023–00759–T]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus SAS Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to supersede Airworthiness Directive (AD) 2019–16–11, which applies to certain Airbus SAS Model A300 F4–600R series airplanes. AD 2019–16–11 requires repetitive high frequency eddy current (HFEC) inspections of the aft lower deck cargo door (LDCD) frame forks; a one-time check of the LDCD clearances; a one-time detailed visual inspection of hooks, eccentric bushes, and x-stops; and corrective actions if necessary. Since the FAA issued AD 2019–16–11, it has been determined that the threshold for the (repetitive) HFEC inspection needs to be corrected, and the LDCD frame forks modified. This proposed AD would continue to require the actions in AD 2019–16–11 and would require correcting the HFEC inspection threshold and modifying the LDCD frame forks and prohibit the installation of affected LDCDs under certain conditions, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). The FAA is proposing this AD to address the unsafe condition on these products.

**DATES:** The FAA must receive comments on this proposed AD by December 15, 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–2023–2136; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

*Material Incorporated by Reference:*

- For the EASA AD identified in this NPRM, you may contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this material on the EASA website *ad.easa.europa.eu.* It is also available at *regulations.gov* under Docket No. FAA–2023–2136.
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

**FOR FURTHER INFORMATION CONTACT:** Dan Rodina, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3225; email *dan.rodina@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–2136; Project Identifier MCAI–2023–00759–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

### Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Dan Rodina, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3225; email *dan.rodina@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

### Background

The FAA issued AD 2019–16–11, Amendment 39–19714 (84 FR 45061, August 28, 2019) (AD 2019–16–11), for certain Airbus SAS Model A300 F4–605R and F4–622R airplanes. AD 2019–16–11 was prompted by an MCAI originated by EASA, which is the Technical Agent for the Member States of the European Union. EASA issued AD 2018–0266, dated December 11, 2018, to correct an unsafe condition.

AD 2019–16–11 requires repetitive HFEC inspections of the aft LDCD frame forks; a one-time check of the LDCD clearances; a one-time detailed visual inspection of hooks, eccentric bushes,

and x-stops; and corrective actions if necessary. The FAA issued AD 2019–16–11 to address cracked or ruptured aft LDCD frames, which could allow loads to be transferred to the remaining structural elements. This condition could lead to the rupture of one or more vertical aft LDCD frames, which could result in reduced structural integrity of the aft LDCD.

AD 2019–16–11 previously superseded AD 2018–20–06 Amendment 39–19440 (83 FR 49265, October 1, 2018). AD 2018–20–06 superseded AD 2016–25–03 Amendment 39–18729 (81 FR 93801, December 22, 2016).

**Actions Since AD 2019–16–11 Was Issued**

Since the FAA issued AD 2019–16–11, EASA superseded EASA AD 2018–0266, dated December 11, 2018, and issued EASA AD 2023–0117, dated June 13, 2023 (EASA AD 2023–0117) (also referred to as the MCAI), to correct an unsafe condition for certain Airbus SAS Model A300 F4–605R and F4–622R airplanes. The MCAI states that based on more detailed stress analyses, it has been determined that the threshold for the (repetitive) HFEC inspection could be extended from 12,500 flight hours to 26,455 flight hours for those affected parts installed on an LDCD that has been modified or replaced. It was also determined that an incorrect HFEC inspection threshold had been defined for the affected parts that have not been modified or replaced. Additional widespread fatigue damage analysis determined that all frame forks of affected LDCDs are susceptible to crack development, which compromises the structural integrity of the LDCD and therefore of the airplane.

The FAA is proposing 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–2023–2136.

**Explanation of Retained Requirements**

Although this proposed AD does not explicitly restate the requirements of AD 2019–16–11, this proposed AD would retain all of the requirements of AD 2019–16–11. Those requirements are referenced in EASA AD 2023–0117, which, in turn, is referenced in paragraph (g) of this proposed AD.

**Related Service Information Under 1 CFR Part 51**

EASA AD 2023–0117 specifies procedures for repetitive HFEC inspections for cracks of the aft LDCD frame forks; a one-time check of the LDCD clearances; a one-time detailed visual inspection for signs of wear on the hooks, eccentric bushes, and x-stops; and corrective actions if necessary. In addition, EASA AD 2023–0117 specifies procedures for modifying frame forks that have not been reinforced. EASA AD also prohibits the installation of affected LDCDs under certain conditions. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

**FAA's Determination**

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

**Proposed AD Requirements in This NPRM**

This proposed AD would retain all requirements of AD 2019–16–11. This proposed AD would require accomplishing the actions specified in EASA AD 2023–0117 described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

**Explanation of Required Compliance Information**

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate EASA AD 2023–0117 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2023–0117 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 2023–0117 does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2023–0117. Service information required by EASA AD 2023–0117 for compliance will be available at *regulations.gov* under Docket No. FAA–2023–2136 after the FAA final rule is published.

**Costs of Compliance**

The FAA estimates that this AD, if adopted as proposed, would affect 58 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|---|
| Retained actions from AD 2019–16–11 | 15 work-hours × $85 per hour = $1,275 | $0 | $1,275 | $73,950. |
| New proposed actions | Up to 38 work-hours × $85 per hour = $3,230. | 850 | Up to $4,080 | Up to $236,640. |

The FAA has received no definitive data on which to base the cost estimates for certain on-condition repairs specified in this proposed 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**

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

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive 2019–16–11, Amendment 39–19714 (84 FR 45061, August 28, 2019); and

■ b. Adding the following new Airworthiness Directive:

**Airbus SAS:** Docket No. FAA–2023–2136; Project Identifier MCAI–2023–00759–T.

**(a) Comments Due Date**

The FAA must receive comments on this airworthiness directive (AD) by December 15, 2023.

**(b) Affected ADs**

This AD replaces AD 2019–16–11, Amendment 39–19714 (84 FR 45061, August 28, 2019) (AD 2019–16–11).

**(c) Applicability**

This AD applies to Airbus SAS Model A300 F4–605R and F4–622R airplanes, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2023–0117, dated June 13, 2023 (EASA AD 2023–0117).

**(d) Subject**

Air Transport Association (ATA) of America Code: 52, Doors.

**(e) Unsafe Condition**

This AD was prompted by a report of two adjacent frame forks that were found cracked on the aft lower deck cargo door (LDCD) of two airplanes during scheduled maintenance, and a determination that certain compliance times need to be revised. The FAA is also issuing this AD to address the susceptibility of the frame forks of affected LDCDs to develop cracks, which could lead to additional rupture of one or more LDCD frame forks, compromising the structural integrity of the LDCD and therefore 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 2023–0117.

**(h) Exceptions to EASA AD 2023–0117**

(1) Where EASA AD 2023–0117 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where Table 2 of EASA AD 2023–0117 refers to the effective date of EASA AD 2015–0152R1, dated May 23, 2017, this AD requires using November 5, 2018 (the effective date of AD 2018–20–06, Amendment 39–19440 (83 FR 49265, October 1, 2018).

(3) Where Table 2 of EASA AD 2023–0117 refers to the effective date of EASA AD 2015–0152, dated July 24, 2015, this AD requires using January 26, 2017 (the effective date of AD 2016–25–03, Amendment 39–18729 (81 FR 93801, December 22, 2016).

(4) Where paragraph (6) of EASA AD 2023–0117 specifies ''before next flight, contact Airbus for approved corrective action instructions, and within the compliance time specified therein, accomplish those instructions accordingly,'' this AD requires replacing those words with ''repair cracking before further flight using a method approved by the Manager, International Validation Branch, FAA; or EASA; or Airbus SAS's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.''

(5) This AD does not adopt the ''Remarks'' section of EASA AD 2023–0117.

**(i) No Reporting Requirement**

Although the service information referenced in EASA AD 2023–0117 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

**(j) Additional AD Provisions**

The following provisions also apply to this AD:

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

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

(3) *Required for Compliance (RC):* Except as required by paragraphs (h)(4) and (j)(2) of this AD, if any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

**(k) Additional Information**

For more information about this AD, contact Dan Rodina, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3225; email *dan.rodina@faa.gov.*

**(l) Material Incorporated by Reference**

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2023–0117, dated June 13, 2023.

(ii) [Reserved]

(3) For EASA AD 2023–0117, 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 service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

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

Issued on October 20, 2023.

**Ross Landes,**

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

[FR Doc. 2023–23724 Filed 10–30–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2023–1037; Project Identifier AD–2023–00511–T]**

**RIN 2120–AA64**

## Airworthiness Directives; The Boeing Company Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Supplemental notice of proposed rulemaking (SNPRM).

**SUMMARY:** The FAA is revising a notice of proposed rulemaking (NPRM) to supersede Airworthiness Directive (AD) 2020–26–08. AD 2020–26–08 applies to The Boeing Company Model 787–8, 787–9, and 787–10 airplanes powered by Rolls-Royce Trent 1000 engines. This action revises the NPRM by proposing replacement of an additional upper splitter fairing assembly. The FAA is proposing this AD to address the unsafe condition on these products. Since these actions would impose an additional burden over those in the NPRM, the FAA is requesting comments on this SNPRM.

**DATES:** The FAA must receive comments on this SNPRM by December 15, 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–2023–1037; 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 SNPRM, any comments received, and other information. The street address for Docket Operations is listed above.

*Material Incorporated by Reference:*

- For service information identified in this SNPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Boulevard, 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* by searching for and locating Docket No. FAA–2023–1037.

**FOR FURTHER INFORMATION CONTACT:** Tak Kobayashi, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3553; email: *takahisa.kobayashi@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–2023–1037; Project Identifier AD–2023–00511–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may again revise 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 proposed AD.

### Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this SNPRM 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 SNPRM, 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 SNPRM. Submissions containing CBI should be sent to Tak Kobayashi, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3553; email: *takahisa.kobayashi@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

### Background

The FAA issued an NPRM to amend 14 CFR part 39 by adding an AD to supersede AD 2020–26–08, Amendment 39–21363 (85 FR 83755, December 23, 2020) (AD 2020–26–08). AD 2020–26–08 applies to The Boeing Company Model 787–8, 787–9, and 787–10 airplanes powered by Rolls-Royce Trent 1000 engines. AD 2020–26–08 requires repetitive inspections of the inner fixed structure (IFS) forward upper fire seal and thermal insulation blankets in the forward upper area of the thrust reverser (TR) for damage and applicable on-condition actions.

The NPRM published in the **Federal Register** on May 25, 2023 (88 FR 33851). The NPRM was prompted by a determination that a new upper splitter fairing assembly is needed to prevent damage to the fire seal and thermal insulation blanket. In the NPRM, the FAA proposed to continue to require the actions specified in AD 2020–26–08 and proposed to require determining if an affected part number of the upper splitter fairing assembly is installed on the engine, replacing an affected upper splitter fairing assembly part number with a new upper splitter fairing assembly part number, inspecting the IFS forward upper fire seal and thermal insulation blanket for any damage, and

applicable on-condition actions. This NPRM also proposed to prohibit the installation of affected parts.

**Actions Since the NPRM Was Issued**

Since the FAA issued the NPRM, the FAA identified an additional affected upper splitter fairing assembly part number (P/N) that must be replaced to address the unsafe condition. The NPRM proposed to require, among other actions, replacing upper splitter fairing assembly P/N KH60375. However, as explained in the ''Request to Add Part Number'' discussion below, P/N KH11560 is also subject to the unsafe condition.

**Comments**

The following discussion presents the comments received on the NPRM and the FAA's response.

**Support**

The Air Line Pilots Association, International supported the NPRM without change.

**Request To Add a Part Number**

Boeing requested that the FAA revise all references of P/N KH60375 to both P/N KH60375 and KH11560. Boeing stated that P/N KH11560 is the original approved configuration of the upper splitter fairing and is still in use in service; P/N KH60375 is the configuration introduced after P/N KH11560.

The FAA agrees. Upper splitter fairing assembly P/N KH11560 is similar in design to P/N KH60375 and does not have a design feature to address the unsafe condition. Although Rolls Royce Alert Service Bulletin Trent 1000 72–AK759, dated July 28, 2022 (which is the service information referenced in Boeing Alert Requirements Bulletin B787–81205–SB720007–00 RB, Issue 001, dated December 12, 2022), only specifies removing and replacing upper splitter fairing assembly P/N KH60375, the FAA contacted Boeing and confirmed that those same procedures can also be used to remove and replace P/N KH11560. The FAA has revised paragraphs (i)(1) and (2) of this proposed AD to refer to both P/N KH60375 and P/N KH11560. In addition, the FAA added paragraph (j)(2) to this proposed AD to clarify that although the service information referenced in Boeing Alert Requirements Bulletin B787–81205–SB720007–00 RB, Issue 001, dated December 12, 2022, does not specify both part numbers, this AD requires removing existing upper splitter fairing assembly P/N KH60375 or P/N KH11560. Lastly, the FAA revised the parts installation prohibition in paragraph (k) of this proposed AD to refer to both P/N KH60375 and P/N KH11560.

**Request To Clarify the Parts Installation Prohibition**

An individual requested that the FAA change the part installation prohibition in paragraph (k) of the proposed AD from the airframe level to the engine level. The commenter stated that operators of airplanes powered by Trent 1000 engines continue to comply with European Union Aviation Safety Agency (EASA) AD 2019–0099 [1] and that engines removed as part of the de-pair requirement of the EASA AD do not always have a long lead time for accomplishing the upper splitter fairing modification and do not always undergo a shop visit. The commenter further requested that the FAA allow the compliance time for the retained inspections in paragraph (g) of this proposed AD to ''restart'' if an engine with upper splitter fairing assembly P/N KH99185 is replaced by another engine with upper splitter fairing assembly P/N KH60375.

The FAA disagrees with the changes to the proposed AD requested by the commenter. Paragraph (k) of this proposed AD is intended to address a rotability issue: an operator might take an affected part from another airplane or from an operator's spare parts and unknowingly install it on an airplane or engine without the affected part, which would introduce the unsafe condition onto that airplane or engine. The final configuration intended by this proposed AD is an airplane with both engines that have an airworthy upper splitter fairing assembly installed.

Paragraph (k)(1) of this proposed AD would impose the parts installation prohibition on airplanes with original airworthiness certificate or original export certificate of airworthiness issued after the effective date of this AD, except for airplanes listed in Boeing Alert Requirements Bulletin B787–81205–SB720007–00 RB, Issue 001, dated December 12, 2022. This proposed prohibition at the airplane level would prevent introducing the unsafe condition onto airplanes that have the final configuration intended by the AD at the time of airplane delivery. Therefore, the FAA has not revised paragraph (k)(1) of this proposed AD.

However, the FAA has revised paragraph (k)(2) of this proposed AD to simplify the installation prohibition for airplanes on which it is determined no affected parts are installed during the actions required by paragraph (i)(1) of this proposed AD.

**Request To Clarify Terminology**

Boeing requested the FAA correct the text in paragraph (j) of the proposed AD from ''the original issue date of Requirements Bulletin B787–81205–SB720007–00 RB'' to ''the issue 001 date of Requirements Bulletin B787–81205–SB720007–00 RB.'' Boeing stated that table in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin B787–81205–SB720007–00 RB, Issue 001, dated December 12, 2022, does not use the phrase quoted in the proposed AD.

The FAA agrees and has revised paragraph (j) of this proposed AD accordingly.

**Request To Fix Typographical Error**

Boeing requested the FAA correct the phrase under ''Differences between This proposed AD and the Service Information'' in the NPRM from ''all Boeing Model 787–7, –8, and –9 airplanes'' to ''all Boeing Model 787–8, –9, and –10 airplanes.'' Boeing stated this is a typographical error because the applicable Boeing airplanes are Model 787–8, –9, and –10.

The FAA agrees and has revised the preamble text accordingly.

**FAA's Determination**

The FAA is proposing this AD after determining the unsafe condition described previously is likely to exist or develop in other products of the same type design. Certain changes described above expand the scope of the NPRM. As a result, it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this SNPRM.

**Related Service Information Under 1 CFR Part 51**

The FAA reviewed Boeing Alert Requirements Bulletin B787–81205–SB720007–00 RB, Issue 001, dated December 12, 2022. This service information specifies replacing the upper splitter fairing assembly with a new upper splitter fairing assembly with ramp fairing incorporated and doing a general visual inspection of the IFS forward upper fire seal and thermal insulation blanket of the left and right TR halves for any damage. This service information also specifies applicable on-condition actions, including replacing the IFS forward upper fire seal and thermal insulation blanket of each TR half if damage is found. The procedures

[1] EASA subsequently revised its AD and issued EASA AD 2019–0099R2, dated September 6, 2019. As a result, the FAA issued AD 2020–05–01, Amendment 39–21102 (85 FR 13727, March 10, 2020).

in the service information apply to each affected engine.

The FAA also reviewed Boeing Alert Requirements Bulletin B787–81205–SB780041–00, Issue 002, dated December 21, 2021. This service information contains procedures for repetitive inspections of the IFS forward upper fire seal and thermal insulation blanket of the left and right TR halves for any damage. This service information also specifies applicable on-condition actions, including replacing the IFS forward upper fire seal and thermal insulation blanket of each TR half if damage is found. The procedures in the service information apply to each affected engine.

This proposed AD would also require Boeing Alert Requirements Bulletin B787–81205–SB780041–00 RB, Issue 001, dated March 31, 2020, which the Director of the Federal Register approved for incorporation by reference as of January 27, 2021 (85 FR 83755, December 23, 2020).

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 SNPRM**

This proposed AD would retain all requirements of AD 2020–26–08. Accomplishing the new actions proposed in this AD would terminate the requirements of AD 2020–26–08.

This proposed AD would require accomplishing the actions specified in the service information already described, except as discussed under ''Differences Between this Proposed AD and the Service Information'' and except for any differences identified as exceptions in the regulatory text of this proposed AD. This proposed AD would also prohibit the installation of affected parts. With this SNPRM, the FAA is proposing replacement of an additional upper splitter fairing assembly. For information on the procedures and compliance times, see this service information at *regulations.gov* under Docket No. FAA–2023–1037.

**Differences Between This Proposed AD and the Service Information**

The effectivity of Boeing Alert Requirements Bulletin B787–81205–SB720007–00 RB, Issue 001, dated December 12, 2022, is limited to Model 787–8, –9 and –10 airplanes having certain line numbers. However, the applicability of this proposed AD includes all Boeing Model 787–8, –9, and –10 airplanes with Rolls-Royce Trent 1000 engines installed. Because the affected upper splitter fairing assembly are rotable parts, the FAA has determined that these parts could later be installed on airplanes that were initially delivered with acceptable upper splitter fairing assembly, thereby subjecting those airplanes to the unsafe condition. The FAA has determined that the Accomplishment Instructions in Boeing Alert Requirements Bulletin B787–81205–SB720007–00 RB, Issue 001, dated December 12, 2022, can be applied to airplanes outside the effectivity of the service information if an affected part is installed on those airplanes. This proposed AD includes an inspection or records review to determine if an affected part is installed.

**Costs of Compliance**

The FAA estimates that this AD, if adopted as proposed, would affect 13 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|---|
| Inspection (retained actions from AD 2020–26–08). | 2 work-hours × $85 per hour = $170 per inspection cycle. | $0 | $170 per inspection cycle ..... | $2,210 per inspection cycle. |
| Inspection or records review (new proposed action). | 1 work-hour × $85 per hour = $85. | 0 | $85 ..... | $1,105. |
| Replacement of each upper splitter fairing assembly (new proposed action). | 71 work-hours × $85 per hour = $6,035. | 230,000 | $236,035 ..... | $3,068,455. |
| Inspection (new proposed action). | 2 work-hours × $85 per hour = $170. | 0 | $170 ..... | $2,210. |

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

ON-CONDITION COSTS

| Action | Labor cost | Parts cost | Cost per product |
|---|---|---|---|
| Fire seal replacement ..... | 2 work-hours × $85 per hour = $170 per TR half. | $1,383 per TR half ..... | $1,553 per TR half (4 TR halves per airplane). |
| Thermal insulation blanket replacement. | 1 work-hour × $85 per hour = $85 per TR half. | $18,214 per TR half ..... | $18,299 per TR half. |

According to the manufacturer, some of the costs of this proposed AD may be covered under warranty by Goodrich, thereby reducing the cost impact on affected operators. The FAA does not control warranty coverage for affected operators. As a result, the FAA has included all known costs in the cost estimate.

**Authority for This Rulemaking**

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

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under

that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

**Regulatory Findings**

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

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) 2020–26–08, Amendment 39–21363 (85 FR 83755, December 23, 2020); and

■ b. Adding the following new AD:

**The Boeing Company:** Docket No. FAA–2023–1037; Project Identifier AD–2023–00511–T.

**(a) Comments Due Date**

The FAA must receive comments on this airworthiness directive (AD) by December 15, 2023.

**(b) Affected ADs**

This AD replaces AD 2020–26–08, Amendment 39–21363 (85 FR 83755, December 23, 2020) (AD 2020–26–08).

**(c) Applicability**

This AD applies to The Boeing Company Model 787–8, 787–9, and 787–10 airplanes, certificated in any category, with Rolls-Royce Trent 1000 engines installed.

**(d) Subject**

Air Transport Association (ATA) of America Code 72, Turbine/turboprop engine.

**(e) Unsafe Condition**

This AD was prompted by reports of Rolls-Royce Trent 1000 powered airplanes having damage to the thrust reverser inner fixed structure (IFS) forward upper fire seal and damage to thermal insulation blankets in the forward upper area of the thrust reverser (TR). The FAA is issuing this AD to address the damage to the IFS forward upper fire seal and the thermal insulation blankets of the TR due to airflow through structural gapping that could occur at the interface between the leading edge of the IFS and the engine splitter structure during flight. Failure of the IFS forward upper fire seal could cause the loss of seal pressurization and degrade the ability to detect and extinguish an engine fire, resulting in an uncontrolled fire. Damage to the TR insulation blanket could result in thermal damage to the TR inner wall, the subsequent release of engine exhaust components, and consequent damage to critical areas of the airplane. Furthermore, damage to the TR inner wall and IFS forward upper fire seal could compromise the integrity of the firewall and its ability to contain an engine fire, resulting in an uncontrolled fire.

**(f) Compliance**

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

**(g) Retained Actions, With Additional Service Information, Revised Affected Airplanes, and New Terminating Action**

This paragraph restates the requirements of paragraph (g) of AD 2020–26–08, with additional service information, revised affected airplanes, and new terminating action. For airplanes with an original airworthiness certificate or original export certificate of airworthiness issued on or before the effective date of this AD and for airplanes listed in the ''Effectivity'' section of Boeing Alert Requirements Bulletin B787–81205–SB720007–00 RB, Issue 001, dated December 12, 2022: Except as specified by paragraph (h) of this AD, at the applicable times specified in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin B787–81205–SB780041–00 RB, Issue 001, dated March 31, 2020, or Boeing Alert Requirements Bulletin B787–81205–SB780041–00, Issue 002, dated December 21, 2021, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin B787–81205–SB780041–00 RB, Issue 001, dated March 31, 2020, or Boeing Alert Requirements Bulletin B787–81205–SB780041–00, Issue 002, dated December 21, 2021. Accomplishing the actions required by paragraph (i)(2) of this AD terminates the actions required by this paragraph.

**Note 1 to paragraph (g):** Guidance for accomplishing the actions required by paragraph (g) of this AD can be found in Boeing Alert Service Bulletin B787–81205–SB780041–00, Issue 001, dated March 31, 2020, which is referred to in Boeing Alert Requirements Bulletin B787–81205–SB780041–00 RB, Issue 001, dated March 31, 2020; or in Boeing Alert Service Bulletin B787–81205–SB780041–00, Issue 002, dated December 21, 2021, which is referred to in Boeing Alert Requirements Bulletin B787–81205–SB780041–00, Issue 002, dated December 21, 2021.

**(h) Retained Exceptions to Service Information Specifications for Paragraph (g) of This AD, With Additional Service Information**

This paragraph restates the exceptions specified in paragraph (h) of AD 2020–26–08, with additional service information. Where Boeing Alert Requirements Bulletin B787–81205–SB780041–00 RB, Issue 001, dated March 31, 2020, or Boeing Alert Requirements Bulletin B787–81205–SB780041–00, Issue 002, dated December 21, 2021, uses the phrase ''the Issue 001 date of Requirements Bulletin B787–81205–SB780041–00 RB,'' this AD requires using January 27, 2021, (the effective date of AD 2020–26–08).

**(i) New Required Actions**

(1) For airplanes with original airworthiness certificate or original export certificate of airworthiness issued on or before the effective date of this AD and for airplanes listed in the ''Effectivity'' section of Boeing Alert Requirements Bulletin B787–81205–SB720007–00 RB, Issue 001, dated December 12, 2022: Within 7 years after the effective date of this AD, or within 7 years after the date of issuance of the original airworthiness certificate or original export certificate of airworthiness, whichever occurs later, inspect the airplane to determine the part number of the upper splitter fairing assembly installed on each engine. A review of airplane maintenance records is acceptable in lieu of this inspection if the part number of the upper splitter fairing assembly can be conclusively determined from that review. For engines on which no upper splitter fairing assembly part number (P/N) KH60375 or P/N KH11560 is installed, the actions required by paragraph (g) of this AD are no longer required for that engine.

(2) If, during any inspection or records review required by paragraph (i)(1) of this AD, an upper splitter fairing assembly P/N KH60375 or P/N KH11560 is found on any engine of an airplane: Except as specified by paragraph (j) of this AD, at the applicable times specified in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin B787–81205–SB720007–00 RB, Issue 001, dated December 12, 2022, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements

Bulletin B787–81205–SB720007–00 RB, Issue 001, dated December 12, 2022, for each affected engine. Accomplishing the actions required by this paragraph on all affected engines of an airplane terminates the actions required by paragraph (g) of this AD for that airplane.

**Note 2 to paragraph (i)(2):** Guidance for accomplishing the actions required by paragraph (i)(2) of this AD can be found in Boeing Alert Service Bulletin B787–81205–SB720007–00, Issue 001, dated December 12, 2022, which is referred to in Boeing Alert Requirements Bulletin B787–81205–SB720007–00 RB, Issue 001, dated December 12, 2022.

**(j) Exceptions to Service Information Specifications for Paragraph (i)(2) of This AD**

(1) Where the ''Compliance Time column of table 5 in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin B787–81205–SB720007–00 RB, Issue 001, dated December 12, 2022, uses the phrase ''the Issue 001 date of Requirements Bulletin B787–81205–SB720007–00 RB,'' this AD requires using ''the effective date of this AD.''

(2) Where the service information referenced in Boeing Alert Requirements Bulletin B787–81205–SB720007–00 RB, Issue 001, dated December 12, 2022, specifies to remove the existing upper splitter fairing assembly P/N KH60375, this AD requires removing the existing upper splitter fairing assembly P/N KH60375 or P/N KH11560.

**(k) Parts Installation Prohibition**

(1) For airplanes with an original airworthiness certificate or original export certificate of airworthiness issued after the effective date of this AD, except for airplanes listed in Boeing Alert Requirements Bulletin B787–81205–SB720007–00 RB, Issue 001, dated December 12, 2022: As of the effective date of this AD, no person may install an engine with an upper splitter fairing assembly P/N KH60375 or P/N KH11560 on any airplane.

(2) For airplanes with original airworthiness certificate or original export certificate of airworthiness issued on or before the effective date of this AD and for airplanes listed in Boeing Alert Requirements Bulletin B787–81205–SB720007–00 RB, Issue 001, dated December 12, 2022, on which, during the actions required by paragraph (i)(1) of this AD, no upper splitter fairing assembly P/N KH60375 or P/N KH11560 was installed on both engines: After accomplishing the inspection or records review required by paragraph (i)(1) of this AD, no person may install an engine with an upper splitter fairing assembly P/N KH60375 or P/N KH11560 for replacement of an engine on those airplanes.

**(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 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 (m) 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, 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.

**(m) Related Information**

For more information about this AD, contact Tak Kobayashi, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3553; email: *takahisa.kobayashi@faa.gov.*

**(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 this AD specifies otherwise.

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

(i) Boeing Alert Requirements Bulletin B787–81205–SB720007–00 RB, Issue 001, dated December 12, 2022.

(ii) Boeing Alert Requirements Bulletin B787–81205–SB780041–00, Issue 002, dated December 21, 2021.

(4) The following service information was approved for IBR on January 27, 2021 (85 FR 83755, December 23, 2020).

(i) Boeing Alert Requirements Bulletin B787–81205–SB780041–00 RB, Issue 001, dated March 31, 2020.

(ii) [Reserved]

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

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

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

Issued on October 19, 2023.

**Caitlin Locke,**

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

[FR Doc. 2023–23520 Filed 10–30–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2023–2138; Project Identifier MCAI–2023–00870–T]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus SAS Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for certain Airbus SAS Model A318, A319, A320, and A321 airplanes. This proposed AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. This proposed AD would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). The FAA is proposing this AD to address the unsafe condition on these products.

**DATES:** The FAA must receive comments on this proposed AD by December 15, 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–2023–2138; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except

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

*Material Incorporated by Reference:*

• For material that is proposed for IBR in this NPRM, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this material on the EASA website at *ad.easa.europa.eu.* It is also available at *regulations.gov* under Docket No. FAA–2023–2138.

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

**FOR FURTHER INFORMATION CONTACT:** Timothy Dowling, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3367; email *Timothy.P.Dowling@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–2023–2138; Project Identifier MCAI–2023–00870–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

## Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Timothy Dowling, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3367; email *Timothy.P.Dowling@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

## Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2023–0138, dated July 13, 2023 (also referred to as the MCAI), to correct an unsafe condition for all Airbus SAS Model A318–111, A318–112, A318–121, A318–122, A319–111, A319–112, A319–113, A319–114, A319–115, A319–131, A319–132, A319–133, A319–151N, A319–153N, A319–171N, A320–211, A320–212, A320–214, A320–215, A320–216, A320–231, A320–232, A320–233, A320–251N, A320–252N, A320–253N, A320–271N, A320–272N, A320–273N, A321–111, A321–112, A321–131, A321–211, A321–212, A321–213, A321–231, A321–232, A321–251N, A321–251NX, A321–252N, A321–252NX, A321–253N, A321–253NX, A321–271N, A321–271NX, A321–272N and A321–272NX airplanes. Model A320–215 airplanes are not certificated by the FAA and are not included on the U.S. type certificate data sheet; this proposed AD therefore does not include those airplanes in the applicability. Airplanes with an original airworthiness certificate or original export certificate of airworthiness issued after May 12, 2023 must comply with the airworthiness limitations specified as part of the approved type design and referenced on the type certificate data sheet; this proposed AD therefore does not include those airplanes in the applicability. The MCAI states that new airworthiness limitations have been developed.

EASA AD 2023–0138 specifies that it requires tasks (limitations) related to the lower deck cargo compartment (LDCC) fire protection system (FPS) already in Airbus A318/A319/A320/A321 ALS Part 3 Certification Maintenance Requirements (CMR), Revision 08, that is required by EASA AD 2022–0091 dated May 20, 2022 (which corresponds to FAA AD 2023–04–06, Amendment 39–22353 (88 FR 13665, March 6, 2023) (AD 2023–04–06)), and that incorporation of EASA AD 2023–0138 invalidates (terminates) prior instructions for those tasks. This proposed AD therefore would terminate the limitations for task numbers: 262300–00001–2–C, 262300–00001–3–C, 262300–00002–2–C, 262300–00004–2–C, 262300–00005–2–C, 262300–00006–2–C, 262300–00007–2–C, and 262300–00008–1–C, as required by paragraph (o) of AD 2023–04–06. The EASA AD 2023–0138 also requires new tasks related to the air stop valve and cargo compartment fire extinguisher, respectively.

The FAA is proposing this AD to address safety-significant latent failures (that are not annunciated), which, in combination with one or more other specific failures or events, could result in a hazardous or catastrophic failure condition. You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–2138.

## Related Service Information Under 1 CFR Part 51

The FAA reviewed EASA AD 2023–0138, which specifies new or more restrictive airworthiness limitations. 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**.

## FAA's Determination

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

## Proposed AD Requirements in This NPRM

This proposed AD would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, which are specified in EASA AD 2023–0138 described previously, as incorporated by reference. Any differences with EASA AD 2023–0138 are identified as exceptions in the regulatory text of this proposed AD.

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

**Explanation of Required Compliance Information**

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate EASA AD 2023–0138 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2023–0138 through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in EASA AD 2023–0138 does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2023–0138. Service information required by EASA AD 2023–0138 for compliance will be available at *regulations.gov* by searching for and locating Docket No. FAA–2023–2138 after the FAA final rule is published.

**Airworthiness Limitation ADs Using the New Process**

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

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

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

**Costs of Compliance**

The FAA estimates that this AD, if adopted as proposed, would affect 1,680 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate. Therefore, the agency estimates the average total cost per operator to be $7,650 (90 work-hours × $85 per work-hour).

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

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

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

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

**Airbus SAS:** Docket No. FAA–2023–2138; Project Identifier MCAI–2023–00870–T.

**(a) Comments Due Date**

The FAA must receive comments on this airworthiness directive (AD) by December 15, 2023.

**(b) Affected ADs**

This AD affects AD 2023–04–06, Amendment 39–22353 (88 FR 13665, March 6, 2023) (AD 2023–04–06)

**(c) Applicability**

This AD applies to Airbus SAS airplanes, identified in paragraphs (c)(1) through (4) of this AD, certificated in any category, with an original airworthiness certificate or original export certificate of airworthiness issued on or before May 12, 2023.

(1) Model A318–111, –112, –121, and –122 airplanes.

(2) Model A319–111, –112, –113, –114, –115, –131, –132, –133, –151N, –153N, and –171N airplanes.

(3) Model A320–211, –212, –214, –216, –231, –232, –233, –251N, –252N, –253N, –271N, –272N, and –273N airplanes.

(4) Model A321–111, –112, –131, –211, –212, –213, –231, –232, –251N, –252N, –253N, –271N, –272N, –251NX, –252NX, –253NX, –271NX, and –272NX.

**(d) Subject**

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

**(e) Unsafe Condition**

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address safety-significant latent failures (that are not annunciated), which, in combination with one or more other specific failures or events, could result in a hazardous or catastrophic failure condition.

**(f) Compliance**

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

**(g) Requirements**

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2023–0138, dated July 13, 2023 (EASA AD 2023–0138).

**(h) Exceptions to EASA AD 2023–0138**

(1) This AD does not adopt the requirements specified in paragraphs (1) and (2) of EASA AD 2023–0138.

(2) Paragraph (3) of EASA AD 2023–0138 specifies revising ''the approved AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after the effective date of this AD.

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA 2023–0138 is at the applicable ''associated thresholds'' as incorporated by the requirements of paragraph (3) of EASA AD 2023–0138, or within 90 days after the effective date of this AD, whichever occurs later.

(4) This AD does not adopt the provisions specified in paragraphs (4) of EASA AD 2023–0138.

(5) This AD does not adopt the ''Remarks'' section of EASA AD 2023–0138.

**(i) Provisions for Alternative Actions and Intervals**

After the existing maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections), and intervals are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2023–0138.

**(j) Terminating Action for Certain Tasks Required by AD 2023–04–06**

Accomplishing the actions required by this AD terminates the corresponding requirements of AD 2023–04–06 for the tasks identified in the service information referenced in EASA AD 2023–0138 only.

**(k) Additional AD Provisions**

The following provisions also apply to this AD:

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

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

**(l) Additional Information**

For more information about this AD, contact Timothy Dowling, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3367; email *Timothy.P.Dowling@faa.gov.*

**(m) Material Incorporated by Reference**

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2023–0138, dated July 13, 2023.

(ii) [Reserved]

(3) For EASA AD 2023–0138, 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 at *ad.easa.europa.eu.*

(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 October 26, 2023.

**Caitlin Locke,**

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

[FR Doc. 2023–23989 Filed 10–30–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF JUSTICE

## Drug Enforcement Administration

## 21 CFR Part 1301

**[Docket No. DEA–1144]**

**RIN 1117–AB84**

## Controlled Substance Destruction Alternatives to Incineration

**AGENCY:** Drug Enforcement Administration, Department of Justice.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** The Drug Enforcement Administration (DEA) is seeking information about destruction processes which may be used to render controlled substances to a non-retrievable state. DEA invites comment from stakeholders in the controlled substance disposal industry, as well as registrants engaged in the destruction and disposal of controlled substances in their possession or inventory, to the questions provided below.

**DATES:** Electronic comments must be submitted, and written comments must be postmarked, on or before January 2, 2024. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after 11:59 p.m. Eastern Time on the last day of the comment period.

**ADDRESSES:** To ensure proper handling of comments, please reference ''RIN 1117–AB84/Docket No. DEA–1144'' on all correspondence, including any attachments.

• *Electronic comments:* DEA encourages that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type comments directly into the comment field on the web page or to attach a file containing comments. Please go to *http://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon completion of your submission, you will receive a Comment Tracking Number for your comment generated by *http://www.regulations.gov.* Please be aware that submitted comments are not

instantaneously available for public view on *http://www.regulations.gov*. If you have received a Comment Tracking Number, your comment has been successfully submitted, and there is no need to resubmit the same comment.

• *Paper comments:* Paper comments that duplicate the electronic submission are discouraged. Should you wish to mail a paper comment *in lieu of* submitting a comment electronically, it should be sent via regular or express mail to: Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. Hand-delivered comments will not be accepted.

**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:**

**Posting of Public Comments**

Please note that all comments received in response to this docket are considered part of the public record. The Drug Enforcement Administration (DEA) will make all comments available for public inspection online at *http://www.regulations.gov.* Such information includes personal or business identifiers (such as name, address, state or Federal identifiers, etc.) voluntarily submitted by the commenter. Generally, all information voluntarily submitted by the commenter, unless clearly marked as Confidential Information in the method described below, will be publicly posted. Comments may be submitted anonymously. The Freedom of Information Act applies to all comments received.

Commenters submitting comments which include personal identifying information (PII), confidential, or proprietary business information that the commenter does not want made publicly available should submit two copies of the comment. One copy must be marked ''CONTAINS CONFIDENTIAL INFORMATION'' and should clearly identify all PII or business information the commenter does not want to be made publicly available, including any supplemental materials. DEA will review this copy, including the claimed PII and confidential business information, in its consideration of comments. The second copy should be marked ''TO BE PUBLICLY POSTED'' and must have all claimed confidential PII and business information already redacted. DEA will post only the redacted comment on *http://www.regulations.gov* for public inspection.

For easy reference, an electronic copy of this document and a plain language summary of this advanced notice of proposed rulemaking are available at *http://www.regulations.gov.*

**Legal Authority**

DEA implements and enforces the Comprehensive Drug Abuse Prevention and Control Act of 1970, often referred to as the Controlled Substances Act (CSA) and the Controlled Substances Import and Export Act, as amended.[1] DEA publishes the implementing regulations for these statutes in 21 CFR parts 1300 to end. These regulations are designed to ensure a sufficient supply of controlled substances for medical, scientific, and other legitimate purposes, and to deter the diversion of controlled substances for illicit purposes.

As mandated by the CSA, DEA establishes and maintains a closed system of control for the manufacturing, distribution, and dispensing of controlled substances. DEA's regulations require that persons involved in the manufacture, distribution, research, dispensing, import, export, and disposal and destruction of controlled substances register with DEA (unless exempt), keep track of all stocks of controlled substances, and maintain records to account for all controlled substances received, distributed, or otherwise disposed of.

The CSA authorizes the DEA Administrator (Administrator), by delegation from the Attorney General,[2] to register an applicant to manufacture, distribute, or dispense controlled substances if such registration is determined to be consistent with the public interest.[3] The CSA further authorizes the Administrator to promulgate regulations necessary and appropriate to execute the functions of the CSA relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances.[4]

**Background**

On December 29, 2022, the President signed the Consolidated Appropriations Act, 2023.[5] In a related report issued by the United States Senate Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies, Congress encouraged DEA to engage in substantive conversations with industry stakeholders on alternatives to incineration that meet the non-retrievable standard.[6]

DEA regulations do not specify a particular required means for destruction of controlled substances. Instead, DEA regulations establish a result, by requiring registrants to dispose of controlled substances in their inventory using a method of destruction that permanently alters that controlled substance's physical or chemical condition or state through irreversible means, and thereby renders the controlled substance unavailable and unusable for all practical purposes.[7] The registrants are able to choose any method of destruction that satisfies this standard.

In an effort to identify chemical and technological methods of destruction of controlled substances other than incineration which may meet the disposal requirements of DEA registrants, and to promote the public exchange of technology and process development information, DEA invites comment to the questions provided in this advanced notice of proposed rulemaking (ANPRM).

**History**

Congress amended the CSA to include the Secure and Responsible Drug Disposal Act of 2010 (SRDDA).[8] In 2014, DEA published a final rule entitled, ''Disposal of Controlled Substances,'' that implemented the provisions of the SRDDA and established parameters for registrants to safely and securely dispose of controlled substances that remain in their inventory.[9]

**Non-Retrievable Standard of Destruction**

In the final rule, DEA defined the term ''non-retrievable,'' and implemented it as the standard of destruction to be achieved by registrants that dispose of and destroy controlled substances from their inventory.[10] A controlled substance is considered non-retrievable when it cannot be transformed to a physical or chemical condition or state as a controlled substance or controlled substance analogue.[11] Specifically, the rule provides that the method of destruction used shall be consistent with the purpose of rendering all of the

[1] 21 U.S.C. 801–971.
[2] 21 U.S.C. 871; 28 CFR 0.100(b).
[3] 21 U.S.C. 823.
[4] 21 U.S.C. 821.
[5] Public Law 117–328, 136 Stat. 4459.
[6] 117 Cong. Rec. S7921 (2022).
[7] 21 CFR 1300.05
[8] Public Law 111–273, 124 Stat. 2858.
[9] 79 FR 53520 (Sept. 9, 2014).
[10] 21 CFR 1300.05; 21 CFR part 1317.
[11] 21 CFR 1300.05.

controlled substances to a non-retrievable state in order to prevent diversion and protect the public health and safety.[12] The rule also provides that controlled substances in a registrant's inventory shall be destroyed in compliance with applicable Federal, State, tribal, and local laws and regulations.[13]

DEA established the non-retrievable standard as the intended final result of a registrant's disposal and destruction process in order to prevent the potential diversion of controlled substances into illegitimate channels. DEA believes the permanent and irreversible alteration of controlled substances is the cornerstone of the non-retrievable standard.[14]

In the final rule, in order to allow public and private entities to develop a variety of destruction methods that are secure, convenient, and responsible, DEA explained that it would not require a particular method of destruction, so long as the desired result of non-retrievability is achieved, and the method is consistent with preventing the diversion of controlled substances.[15]

**Comments Requested**

DEA is aware that since the publication of the final rule in 2014, various chemical and technological processes have been developed and employed to render controlled substances non-retrievable. In the final rule, DEA stated its intent that methods of destruction should remain current with continuously changing technology.[16] DEA now invites stakeholders engaged in the destruction and disposal of controlled substances to respond to the questions provided in this ANPRM. If proprietary information is included in the response, please submit two copies, and clearly indicate which copy ''Contains Confidential Information'', and which is the redacted version ''To Be Publicly Posted'' to ensure the correct information is posted on *Regulations.gov*. See Submitting Public Comments section, above.

**ANPRM Questions**

Please identify destruction methods or technology currently being utilized or developed to render the controlled substances non-retrievable. For each method or technology identified, please include:

1. If known, the potential users of this method or technology.

2. A detailed description of the method of destruction or technical process utilized to achieve the non-retrievable standard. Does this method or technology involve incineration at any point to attain the non-retrievable standard?

3. The controlled substance(s) to which the method of destruction or technology to render the controlled substance(s) non-retrievable may be applicable.

4. If known, list any controlled substances that will not be rendered non-retrievable by this method.

5. The volume or throughput (per hour) required to render the controlled substance non-retrievable.

6. The registrant's anticipated cost to execute, implement, or utilize the method of destruction or technology discussed above.

7. The analytical process utilized to evaluate the effectiveness of the method of destruction or technology. Provide the analytical results validating attainment of the non-retrievable standard.

8. The characteristics or constituents of any by-products or waste generated through the process used to render the controlled substance non-retrievable. Provide the waste profile sheet or similar documentation showing analytical results of the by-products or waste generated.

9. The disposal process of the by-products or waste generated.

10. The Federal, state, or local regulatory requirements associated with the disposal process and/or disposal of the by-products or waste.

**Regulatory Analysis**

This ANPRM was developed in accordance with the principles of Executive Order (E.O.) 12866, ''Regulatory Planning and Review,'' E.O. 13563, ''Improving Regulation and Regulatory Review,'' and E.O. 14094, ''Modernizing Regulatory Review.'' Since this action is an ANPRM, it does not create or propose to create any new requirements. Therefore, this regulatory action is not significant under section 3(f) of E.O. 12866.

Furthermore, the requirements of the Regulatory Flexibility Act do not apply to this action because, at this stage, it is an ANPRM and not a ''rule'' as defined in 5 U.S.C. 601. Following review of the comments received in response to this ANPRM, if DEA proceeds with a notice of proposed rulemaking regarding this matter, DEA will conduct all relevant analyses as required by statute or Executive Order.

**Signing Authority**

This document of the Drug Enforcement Administration was signed on October 26, 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**.

**Scott Brinks,**

*Federal Register Liaison Officer, Drug Enforcement Administration.*

[FR Doc. 2023–23984 Filed 10–30–23; 8:45 am]

**BILLING CODE 4410–09–P**

[12] 21 CFR 1317.90(c).

[13] 21 CFR 1317.90(a).

[14] 79 FR 53520, 53527.

[15] *Id.* at 53522.

[16] *Id.* at 53548.

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### 24 CFR Parts 115 and 125

**[Docket No. FR–6355–P–01]**

**RIN 2529–AB07**

### Removing Criminal Conviction Restrictions for Testers in FHIP- and FHAP-Funded Testing Programs

**AGENCY:** Office of Fair Housing and Equal Opportunity, HUD.

**ACTION:** Proposed rule.

**SUMMARY:** Through this proposed rule, the U.S. Department of Housing and Urban Development (HUD) seeks to eliminate the tester restrictions for Fair Housing Initiatives Program (FHIP) grantees and for Fair Housing Assistance Program (FHAP) agencies that forbid FHIP and FHAP recipients from using fair housing testers with prior felony convictions or convictions of crimes involving fraud or perjury. This proposed rule would make HUD's programs as inclusive as possible for people with criminal records, consistent with Secretary Marcia Fudge's April 12, 2022 Memorandum, ''Eliminating Barriers That May Unnecessarily Prevent Individuals with Criminal Histories from Participating in HUD Program,'' and ensure that FHIP and FHAP funded entities are able to fully investigate criminal background screening policies that are potentially discriminatory under federal civil rights laws by using testers with actual criminal backgrounds.

**DATES:** Comment due date: January 2, 2024.

**ADDRESSES:** Interested persons are invited to submit comments regarding

this proposed rule. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

*Note:* To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

*No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

*Public Inspection of Comments.* All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–402–3055 (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 all comments submitted are available for inspection and downloading at *www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Demetria McCain, Principal Deputy Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, 451 7th Street SW, Room 5250, Washington, DC 20410–8000, telephone number 202 402–7861 (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.*

**SUPPLEMENTARY INFORMATION:**

## I. Background

On April 12, 2022, Secretary Marcia Fudge directed HUD to ''review our programs and put forth changes that ensure that our funding recipients are as inclusive as possible of individuals with criminal histories.'' [1] Two HUD programs, the Fair Housing Initiative Program (FHIP) and the Fair Housing Assistance Program (FHAP) fund local private and governmental agencies who further enforcement of the Fair Housing Act. Current regulations forbid these entities from using these program funds for fair housing testing that involves testers with prior felony convictions or convictions of crimes involving fraud or perjury. The applicable regulations containing these restrictions can be found at 24 CFR 125.107(a) (the FHIP regulation) and 24 CFR 115.311(b) (the FHAP regulation).

### *A. Fair Housing Initiatives Program (FHIP)*

In 1987, Congress established the FHIP to strengthen the Department's enforcement of the Fair Housing Act and to further fair housing. This program funds, among other things, ''testing'' activities undertaken by fair housing organizations and other private non-profits designed to enhance enforcement of the Fair Housing Act.

Testing refers to the use of an individual or individuals (''testers'') who, without a bona fide intent to rent or purchase a house, apartment, or other dwelling, pose as prospective renters or purchasers for the purpose of gathering information that may indicate whether a housing provider is complying with fair housing laws.

### *B. History of the FHIP and its Testing Guidelines*

Section 561 of the Housing and Community Development Act of 1987 (Section 561) established the FHIP as a temporary program, and specifically required HUD to ''establish guidelines for testing activities funded under the private enforcement initiative of the fair housing initiatives program.'' Section 561 noted the purpose of the guidelines was ''to ensure that investigations in support of fair housing enforcement efforts [. . .] shall develop credible and objective evidence of discriminatory housing practices.'' In the FHIP's first iteration, the enabling law imposed a sunset on the ''demonstration period'' for September 30, 1989.[2]

In 1988, HUD proposed regulations for the demonstration period that, among many other requirements, forbid testers under the FHIP from having ''prior felony convictions or convictions of crimes involving fraud or perjury.'' This restriction followed a proposed requirement for a ''formal recruitment process designed to obtain a pool of credible and objective persons to serve as testers.'' [3]

The Department's FHIP regulations for the demonstration period were finalized in 1989 at 24 CFR part 125, and contained a section titled ''Guidelines for private enforcement testing'' (previously codified at § 125.405). The Guidelines contained numerous prescriptive requirements about how eligible testing was to be designed and conducted (*e.g.,* allowing testing only in response to a ''bona fide allegation''), including the requirement for a ''formal recruitment process designed to obtain a pool of credible and objective persons to serve as testers,'' followed by a restriction on testers having felony convictions or convictions of crimes involving fraud or perjury.[4] The 1989 final rule for the demonstration period describes comments both in support and in opposition of the proposed guidelines. None of the comments pertained specifically to the conviction restrictions for testers. Accordingly, HUD did not discuss that particular portion of the guidelines in the final rule.

Section 953 of the Cranston-Gonzalez National Affordable Housing Act (November 28, 1990) extended the FHIP sunset to September 30, 1992. Then in 1992, Congress made the FHIP program permanent through the Housing and Community Development Act of 1992 that codified the FHIP provisions in the Fair Housing Act at 42 U.S.C. 3616a.[5]

[1] ''Eliminating Barriers That May Unnecessarily Prevent Individuals with Criminal Histories from Participating in HUD Programs'' *available at https://www.hud.gov/sites/dfiles/Main/documents/Memo_on_Criminal_Records.pdf.*

[2] Section 561(e).

[3] 53 FR 25581 (July 7, 1988).

[4] 54 FR 6492, 6501 (Feb. 10, 1989).

[5] Public Law 102–550, October 28, 1992, 106 Stat. 3672.

The guidelines section at 24 CFR 125.405 that had been established in 1989 changed significantly when regulations for the permanent program were issued in 1995, but the tester conviction restriction remained.[6] As explained in the 1994 proposed rule, ''the passage of section 905 establishes FHIP as a permanent program, and with the expiration of the demonstration period, the requirement for testing guidelines is removed. The revised § 125.405 [retitled ''Testers''] proposed here would remove the testing guidelines, but would still require that testers must not have prior felony convictions or convictions of crimes involving fraud or perjury, and that they receive training or be experienced in testing procedures and techniques.'' [7]

HUD did not provide an explanation for why it chose to retain the tester restriction in the 1994 final rule. Like with the 1989 final rule, HUD received comments in support of and in opposition to removing most of the testing guidelines, but none of the comments discussed the tester conviction portion that remained. The operative section was moved to 24 CFR 125.07—Testers: [8] ''The following requirements apply to testing activities funded under the FHIP: a) Testers must not have prior felony convictions or convictions of crimes involving fraud or perjury.'' This language has not changed since 1995.

*C. The Fair Housing Assistance Program (FHAP)*

While the FHIP funds private non-profits to assist in enforcement of the Fair Housing Act and substantially equivalent local laws, the FHAP funds State and local governmental agencies to do the same. Section 817 of the Fair Housing Act, 42 U.S.C. 3616, provides that the Secretary may reimburse State and local fair housing enforcement agencies that assist the Secretary in enforcing the Act. HUD has implemented section 817 at subpart C of 24 CFR part 115, which sets forth the requirements for participation in the FHAP. Under the FHAP, a State or local agency is certified for participation if the Department determines that the agency adequately enforces a law or laws that provide rights, procedures, remedies, and judicial review provisions that are substantially equivalent to the federal Fair Housing Act.[9]

*D. History of the FHAP and its Testing Guidelines*

In 1980, the Carter administration asked Congress to authorize funding for HUD to assist State and local agencies in enforcing fair housing laws, citing limitations that localities had in processing fair housing complaints. This request was approved by Congress in Public Law 96–103 (FY1980 Appropriations Act for HUD), which marked the establishment of the FHAP.[10] That same year, HUD issued an interim final rule that established ''the eligibility criteria for participants in the Fair Housing Assistance Program (FHAP) and the minimum standards which specific project proposals must meet.'' [11] HUD issued subsequent rules for the FHAP in 1982, 1988, and 1989. None of these initial rules addressed fair housing testing in any way.[12] The interim and final rules in 1996 mention testing only to note that any ordinances that include ''anti-testing provisions'' would prevent a jurisdiction from achieving substantially equivalent status.[13] In 2005, HUD first addressed the criminal backgrounds of FHAP testers in FHAP regulations.

The proposed rule in 2005 and final rule in 2007 created a new definition of testing [14] and included a new section on testing, which read in part: ''The following requirements apply to testing activities funded under the FHAP: [. . .] Testers must not have prior felony convictions or convictions of any crimes involving fraud or perjury.'' [15] There was no commentary about this restriction from the public or HUD in these rules.

*E. Basis for Tester Restrictions*

As is explained above, in 1987, Congress required HUD to establish guidelines for the FHIP demonstration period that would help ensure that FHIP grantees' investigations developed ''credible evidence'' of discriminatory housing practices. While HUD has never been explicit, it presumably first enacted the restrictions on testers' criminal histories and then continued them in subsequent rulemakings because of the idea that certain criminal convictions would undermine a tester's credibility in testifying in court to what the tester witnessed under Rule 609 of the Federal Rules of Evidence (FRE) 609, which provides that certain criminal convictions may be admitted to attack witness's ''character for truthfulness.'' [16]

Specifically, in civil cases where the witness is not the defendant, FRE 609 requires the admission of evidence of two categories of criminal convictions: (1) a crime punishable by death or imprisonment for more than one year, and (2) any conviction of a crime involving dishonesty or false statement. However, both categories are subject to a number of exceptions that limit admissibility.[17]

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[6] 60 FR 58452, 58453 (Nov. 27, 1995).

[7] 59 FR 44596–01 (Aug. 29, 1994) (''The Department considered two factors to be significant and determinative in the decision to eliminate testing guidelines from the regulation. First, in the original authorizing statute for FHIP, Congress specifically limited the requirement for testing guidelines to the demonstration period; and second, Congress did not include this requirement in its permanent authorization of FHIP by section 905.'')

[8] In addition to the conviction restrictions, 24 CFR 125.107 also imposes these requirements on testers: (b) Testers must receive training or be experienced in testing procedures and techniques, and (c) Testers and the organizations conducting tests, and the employees and agents of these organizations may not: (1) Have an economic interest in the outcome of the test, without prejudice to the right of any person or entity to recover damages for any cognizable injury; (2) Be a relative of any party in a case; (3) Have had any employment or other affiliation, within one year, with the person or organization to be tested; or (4) Be a licensed competitor of the person or organization to be tested in the listing, rental, sale, or financing of real estate.

[9] *See* 42 U.S.C. 3610(f); 24 CFR part 115.

[10] *See* The Fair Housing Act: HUD Oversight, Programs, and Activities, Congressional Research Service R44557 (April 7, 2021) (citing U.S. Department of Housing and Urban Development, *FY1980 Budget Justifications,* p. Q–2 and Pub. L. 96–103) *available at sgp.fas.org/crs/misc/R44557.pdf.*

[11] 45 FR 31880 (May 14, 1980).

[12] *Id.;* 47 FR 8991 (March 3, 1982); 53 FR 34668 (Sept. 7, 1988); 54 FR 20094 (May 9, 1989).

[13] 61 FR 7674 (Feb. 28, 1996); 61 FR 41282 (Aug. 7, 1996).

[14] ''Testing refers to the use of an individual or individuals (''testers'') who, without a bona fide intent to rent or purchase a house, apartment, or other dwelling, pose as prospective renters or purchasers for the purpose of gathering information that may indicate whether a housing provider is complying with fair housing laws.'' 70 FR 28748 (May 18, 2005); 72 FR 19070 (Apr. 16, 2007); currently codified at 24 CFR 115.100(c).

[15] 70 FR 28748 (May 18, 2005); 72 FR 19070 (Apr. 16, 2007); currently codified at 24 CFR 115.311(b). Unlike the FHIP criminal conviction restriction, the FHAP restriction was not proceeded by any reference to credibility.

[16] FRE 609(a). Also, twenty-four states have local rules of evidence with substantially similar provisions to FRE 609. 6 Weinstein's Federal Evidence Article VI (2021).

[17] Specifically, although FRE 609(a)(1)(A) requires the admission of a crime that was punishable by death or by imprisonment for more than one year (what is often categorized as a felony), this requirement is explicitly subject to Rule 403. Rule 403 says that a court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Although FRE 609(a)(2) requires admission of any crime if the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement (*i.e.,* crimes of dishonesty), evidence of the conviction is admissible only if its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect, if the conviction is older than 10 years. *See* FRE 609(b). Also under both categories, juvenile convictions are explicitly not admissible. 609(d). Nor are convictions that

Continued

*F. How HUD's Conviction Restrictions Are Overbroad, Outdated, and Unnecessary*

Notably*, the disqualifying convictions covered by HUD's regulations are much broader than those in FRE–609. For example, unlike 609,* HUD's current regulations always disqualify testers for prior convictions, even those that are over 10 years old and have little or no probative value. In addition, HUD's current regulations do not have explicit carve outs for testers whose convictions have been the subject of a pardon, annulment, certificate of rehabilitation or similar findings of innocence. Moreover, HUD's current regulations may disqualify testers with certain juvenile convictions.

More broadly, even with respect to convictions that could be admissible under FRE 609, HUD now sees no reason to categorically bar those who conduct testing using FHIP or FHAP funds from employing testers with such convictions. Those entities may reasonably conclude that the prospect of admissibility under FRE 609 in litigation is of little consequence.[18]

*Based on HUD's experience investigating fair housing complaints, testers today generally* audio and/or video record their testing experiences, meaning that the recordings—not the testers' testimony—are of utmost importance in most fact-finding hearings.[19] Recording fair housing tests has become ubiquitous as cost of devices and technology has gone down and the utility of such recordings has become evident. Such recording is not only relatively inexpensive, it is also explicitly legal: Federal law and state law in many states allow a party to a communication like a telephone call to record without the knowledge or consent of other parties.[20] In many cases, sharing recorded evidence of fair housing testing facilitates early resolution and settlement, negating the need to interrogate tester credibility. And in housing discrimination cases that go to trial, the main role of testers as witnesses is to introduce the recorded evidence of the interaction, not to recount their experience in detail. In short, testing evidence often speaks for itself and a tester merely needs to be credible enough for the judge or jury to believe their testimony that the recording being presented is an authentic recording of the events at issue in the case.

In addition, other requirements in these regulations that will continue to apply to testers help ensure that testers are objective, credible, and well qualified, regardless of their criminal backgrounds. For example, testers still must be trained in testing procedures and techniques.[21] Testers cannot have an economic interest in the outcome of the test;[22] be a relative or acquaintance of any party in the case;[23] have had a recent employment history or other affiliation with the person or organization to be tested;[24] or be a competitor (or licensed competitor) of the person or organization to be tested.[25]

HUD also observes that FRE 609 itself is not always applied even where a crime of conviction comes under its potential application. First, fair housing cases using testers are not only heard in federal courts; they are also heard in state courts, which sometimes have different rules of evidence. At least one state (Montana) has chosen to adopt a Rule 609 variation that *prohibits* admission of evidence that a witness has been convicted of a crime for the purpose of attacking the credibility of a witness, explaining that ''[t]he Commission does not accept as valid the theory that a person's willingness to break the law can automatically be translated into willingness to give false testimony'' and that conviction evidence has ''low probative value in relation to credibility.'' [26] And even in Federal courts, while no survey appears to have been conducted to see the frequency with which judges admit prior convictions to impeach witnesses in civil matters, one survey done in the criminal context has shown that ''federal judges do not routinely admit prior convictions to impeach criminal defendants.'' [27] Judges sometimes exclude or find unpersuasive prior criminal convictions of witnesses in civil matters, preferring to focus on more reliable indicators of credibility tied to the facts of the case at hand.[28] Ultimately, HUD believes it is better left to FHIP and FHAP funded entities to decide whether to hire a tester with criminal convictions, as they are in the best position to know and be able to weigh the risk that a testers' former criminal convictions will be admitted—and matter—in their local courts, and based on the kind of testing that will be done.

*Indeed, HUD recognizes that many FHIP and FHAP funded entities now have an affirmative need to hire testers with criminal histories, who in cases that are of great priority to HUD may actually be better positioned to help those entities uncover discrimination.*[29] When the restrictions on testers' criminal histories were first promulgated as a demonstration regulation in 1989, housing providers were unlikely to conduct criminal background checks on prospective applicants.[30] Since then, landlords have increasingly implemented policies and practices to screen applicants based on their criminal backgrounds—including those with felony convictions and convictions involving fraud or perjury.[31]

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have been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of innocence. 609(b).

[18] Several fair housing organizations from across the country recently wrote HUD noting that ''[p]eople with conviction histories commonly testify credibly in civil matters, and organizations can make individual determinations, consistent with HUD and EEOC guidance, as to the facts or circumstances surrounding the proposed tester's criminal conduct and whether these facts would be likely to present barriers to credibility. . . . Critically, the vast majority of fair housing testers never testify at trial at all, nor is eliciting trial testimony a primary purpose of testing. Instead, test results often serve as the basis to start a broader investigation and enforcement strategy and provide helpful data to guide education efforts. Even when cases do go to litigation, only a very small percentage go to trial and a smaller percentage still involve the testimony of a tester.''

[19] *See also, id.,* noting that ''39 of the 50 states allow for single party consent to record, which means that tests are audio recorded in most states, removing any doubt about the veracity of accounts.''

[20] *See, e.g.,* Recording Phone Calls and Conversations: 50-State Survey, available at *https://www.justia.com/50-state-surveys/recording-phone-calls-and-conversations/.*

[21] 24 CFR 115.311(c); 24 CFR 125.107(b).

[22] 24 CFR 115.311(d)(1); 24 CFR 125.107(c)(1).

[23] 24 CFR 115.311(d)(2); 24 CFR 125.107(c)(2).

[24] 24 CFR 115.311(d)(3) (prohibiting any such affiliation within five years of the testing); 24 CFR 125.107(c)(3) (prohibiting any such affiliation within one year of the testing).

[25] 24 CFR 115.311(d)(4); 24 CFR 125.107(c)(4)(specifying such ''licensed'' competitors are barred from conducting testing).

[26] Mont. Code Ann. Rule 26–10–609.

[27] Ric Simmons, *An Empirical Study of Rule 609 and Suggestions for Practical Reform,* 59 B.C. L. Rev. 993 (2018).

[28] *See, e.g., Sanchez* v. *Jiles,* No. CV 10–09384 MMM (OPx) ''Final Order on Motions In Limine'' 2012 U.S. Dist. LEXIS 200372 (C.D. Cal. June 14, 2012) (finding felony convictions involving fraud and forgery to not highly relevant to the plaintiff's witness's credibility and ordering that defendants not introduce it into evidence); 3 Federal Rules of Evidence Manual § 609.03 (2022).

[29] HUD has been contacted by fair housing organizations urging reform of the 24 CFR 105.107 because its restrictions prevent fair housing centers from testing for certain types of criminal background discrimination by preventing them from employing testers with felonies to test the entire application process.

[30] *See* David Thatcher, Law & Social Inquiry Volume 33, Issue 1, 12, Winter 2008 (explaining the upward trend since the 1990s in criminal background checks, including that no ''how to'' landlord books reviewed in a literature review prior to 1990 suggested conducting criminal background checks on tenants whereas all ''how to'' books suggested such checks as of the article's publication in 2008).

[31] *See, e.g., id.* at 12 (describing a 2005 survey of large landlords which revealed that 80 percent screened prospective tenants for criminal histories).

In 2016, HUD issued a memo explaining how these kinds of admissions policies and practices may be discriminatory under the Fair Housing Act.[32] One way landlords may discriminate is by using a criminal records policy as a cover (or pretext) for intentional discrimination because of a protected class. For example, a landlord may tell Black applicants that they are being rejected because of their criminal record but accept white applicants with the same or similar record. The real reason for the rejection is the person's race, even though the landlord is saying the reason is the person's criminal record.[33] Another example of how a landlord may violate the Fair Housing Act is if a landlord has a criminal records policy that disproportionately excludes people of a certain protected class, and that policy is not necessary to achieve a substantial, legitimate, nondiscriminatory interest, or if there is a less discriminatory policy that can achieve that interest.[34]

Testers with actual criminal records ranging from misdemeanor to felony convictions are in certain circumstances the best suited to obtain evidence of what modern-day criminal record screening practices are and whether these policies are being applied in a discriminatory way because of a protected characteristic. For example, testers with no criminal histories cannot submit actual applications to test a criminal records screening policy where the landlord runs a typical computer-based ''background check'' on its applicants; they are limited to investigating discrimination that occurs pre-application. Testers without criminal backgrounds can inquire about what a criminal records policy is at a property, reveal a fabricated history, and ask whether they would be accepted or rejected. However, only testers with real criminal records will be able to submit an application to obtain evidence of what the policy is in practice at the admission stage [35] and whether the policy is being applied (after the application is submitted) in a discriminatory manner. Absent a change in regulation, FHIP and FHAP funded entities do not have the option of conducting testing using HUD funds that investigates modern criminal records policies through the application phase.[36]

Finally, HUD's current regulation disproportionately excludes people of color from opportunities to work for FHIP- and FHAP-funded entities, even as it serves questionable value in ensuring credible evidence. These issues are particularly problematic in the context of a fair housing investigation, where sometimes people with criminal records are best able to investigate discriminatory activity, and where a factfinder is particularly unlikely to find a tester's criminal records to undermine their credibility (as in the common case where testing evidence is audio and/or video recorded and speaks for itself).

### *G. Removing the Tester Conviction Restrictions Is Legally Permissible*

Outside of the considerations discussed above, removing these restrictions is legally permissible. As HUD has previously noted, the original authorizing statute for the FHIP specifically limited the requirement for testing guidelines to the demonstration period. Congress did not include this requirement in its permanent authorization of the FHIP. HUD maintains the position that it took in 1994 that HUD is not required by any statute to have regulations containing testing restrictions for the permanent FHIP.[37] Nor are these restrictions statutorily required for the FHAP.

## II. This Proposed Rule

This rule proposes to amend the regulations in 24 CFR part 115 and 125 for the reasons discussed above.

At 24 CFR 115.311, the proposed regulatory text would delete paragraph (b), which wholly contains the tester background restriction but no other content.

At 24 CFR 125.107, the proposed regulatory text would delete paragraph (a) which wholly contains the tester background restriction but no other content.

HUD seeks comments on these proposals.

## III. Findings and Certifications

### *Regulatory Review—Executive Orders 12866, 13563, and 14094*

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' Executive Order 13563 also directs that, where

[32] *See* Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (April 4, 2016) (''While having a criminal record is not a protected characteristic under the Fair Housing Act, criminal history-based restrictions on housing opportunities violate the Act if, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another (*i.e.,* discriminatory effects liability). Additionally, intentional discrimination in violation of the Act occurs if a housing provider treats individuals with comparable criminal history differently because of their race, national origin or other protected characteristic (*i.e.,* disparate treatment liability).'')

[33] The Fair Housing Act prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status or national origin. 42 U.S.C. 3601 *et seq.*

[34] *See id.* (explaining that achieving resident safety and/or protecting property may be substantial and legitimate interests, assuming they are the actual reasons for the policy, but that a housing provider must be able to prove through reliable evidence that its policy or practice of making housing decisions based on criminal history actually assists in protecting resident safety and/or property).

[35] *See, e.g.,* June 10, 2022 Memorandum directed to FHIP and FHAP funded entities highlighting the different ways in which criminal records policies may violate the Act, and explaining that a housing provider may have a policy in writing that differs from a policy in practice, and that fully ''[i]dentif[ing] all policies, including written and unwritten policies or practices'' is an important first step in investigating the potential discriminatory effects of a policy. Without having testers that go through the entire application process, it is difficult to find out whether there is a difference between what a tester is told the policy is and what the policy is in practice.

[36] *See, e.g.,* Locked Out: Criminal Background Checks as a Tool for Discrimination, available at *https://lafairhousing.org/wp-content/uploads/2021/12/Criminal_Background_Audit_FINAL.pdf.* This report demonstrates how a FHIP grantee was able to uncover evidence that criminal records policies were being used as pretext for intentional discrimination by showing that landlords used the criminal backgrounds of black testers to treat those testers less favorably at the pre-application stage compared to white testers, even though the black and white testers had similar (but made-up) criminal backgrounds. The investigation found that paired white testers were quoted more lenient criminal records policies than black testers, were encouraged to apply where black testers were discouraged, and were uniquely told that exceptions would be made to the landlord's criminal records policies. These investigations were not able to see if landlords were discriminating *after* applications were submitted, however, because the criminal histories of the testers were not real. If this FHIP grantee was able to use paired testers with *actual* similar criminal backgrounds, it would have the ability to investigate the discriminatory use of a criminal records policy beyond just the pre-application stage.

[37] See footnote 7 (citing 59 FR 44596–01 (Aug. 29, 1994)). Of note, even if HUD had taken the position that 561(c)(2) of the 1987 Act was still in effect, that section of the Act only required, generally, for HUD to ''establish guidelines for testing activities funded under the private enforcement initiative of the fair housing initiatives program . . . to ensure that investigations in support of fair housing enforcement efforts . . . develop credible and objective evidence of discriminatory housing practices.'' § 561(c)(2) of the Housing and Community Development Act of 1987. It did not require restricting testers based on their criminal history in order to ensure credible and objective evidence.

relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. Executive Order 14094 entitled ''Modernizing Regulatory Review'' (hereinafter referred to as the ''Modernizing E.O.'') amends section 3(f) of Executive Order 12866 (Regulatory Planning and Review), among other things.

The proposed rule would revise 24 CFR parts 115 and 125 to remove fair housing tester restrictions. The revised regulations would allow FHIP and FHAP funded entities the ability to use HUD funds to compensate testers with felony convictions and convictions for crimes involving fraud or perjury. This rule was not subject to OMB review. This rule is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866 and is not an economically significant regulatory action.

*Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4; approved March 22, 1995) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This proposed rule would not impose any Federal mandates on any state, local, or Tribal Government, or on the private sector, within the meaning of the UMRA.

*Environmental Review*

This proposed rule is a policy document that sets out fair housing and nondiscrimination standards and provides for assistance in enforcing fair housing and nondiscrimination. Accordingly, under 24 CFR 50.19(c)(3), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

*Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule would remove tester restrictions from the FHIP and FHAP regulations which prohibit fair housing testers with prior convictions of a felony, fraud, or perjury. This will not create an undue burden on small entities, instead it will allow FHIP and FHAP funded entities the ability to use testers with felony convictions and convictions for crimes involving fraud or perjury. Identifying potential discriminatory screening policies will positively impact small entities and assist with maintaining compliance with the Fair Housing Act. Accordingly, it is HUD's determination that this proposed rule will not have a significant economic impact on a substantial number of small entities.

*Executive Order 13132, Federalism*

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments or is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This rule would not have Federalism implications and would not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive order.

**List of Subjects**

*24 CFR Part 115*

Administrative practice and procedure, Aged, Fair housing, Grant programs—housing and community development, Individuals with disabilities, Intergovernmental relations, Mortgages, Reporting and recordkeeping requirements.

*24 CFR Part 125*

Fair housing, Grant programs—housing and community development, Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, HUD proposes to amend 24 CFR 115 and 125 as follows:

## PART 115—CERTIFICATION AND FUNDING OF STATE AND LOCAL FAIR HOUSING ENFORCEMENT AGENCIES

■ 1. The authority citation for part 115 continues to read as follows:

**Authority:** 42 U.S.C. 3601–19 and 42 U.S.C. 3535(d).

**§ 115.311 [Amended]**

■ 2. In § 115.311, remove paragraph (b), redesignate paragraph (c) as paragraph (b), and redesignate paragraphs (d) through (d)(4) as paragraphs (c) through (c)(4).

## PART 125—FAIR HOUSING INITIATIVES PROGRAM

■ 3. The authority citation for part 125 continues to read as follows:

**Authority:** 42 U.S.C. 3535(d), 3616 note.

**§ 125.107 [Amended]**

■ 4. In § 125.107, remove paragraph (a), redesignate paragraph (b) as paragraph (a), and redesignate paragraphs (c) through (c)(4) as paragraphs (b) through (b)(4).

**Demetria McCain,**

*Principal Deputy, Assistant Secretary for Fair Housing and Equal Opportunity.*

[FR Doc. 2023–23678 Filed 10–30–23; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF THE TREASURY

## Bureau of the Fiscal Service

## 31 CFR Part 323

**[FISCAL–2023–0002]**

**RIN 1530–AA28**

## Disclosure of Records

**AGENCY:** Bureau of the Fiscal Service, Department of the Treasury.

**ACTION:** Notice of proposed rulemaking with request for comment.

**SUMMARY:** The Bureau of the Fiscal Service within the Department of the Treasury (Fiscal Service or Treasury) proposes to adopt regulations to implement statutory requirements under the SECURE 2.0 Act of 2022 requiring Treasury to provide information on applicable savings bonds to states. A state receiving the information with respect to an applicable savings bond may use the information to locate the owner of the bond pursuant to Treasury's regulations and the state's own standards and requirements under abandoned property rules and regulations of the state. Regulations adopted by Treasury are required to protect the privacy of savings bond owners, prevent fraud, and ensure that any information disclosed to a state under these rules shall be used solely to locate savings bond owners.

**DATES:** Comments on the proposed rule must be received by November 30, 2023.

**ADDRESSES:** Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions on the website for submitting comments.
- *Mail:* Department of the Treasury, Bureau of the Fiscal Service, Attn:

Marcia Goodnight, Retail Securities Services. Bureau of the Fiscal Service, Warehouse and Operations Center, Dock 1. 257 Bosley Industrial Park Drive, Parkersburg, WV 26101.

The fax and email methods of submitting comments on rules to Fiscal Service have been decommissioned.

*Instructions:* All submissions received must include the agency name (Bureau of the Fiscal Service) and docket number FISCAL–2023–0002 for this rulemaking. In general, comments received will be published on *regulations.gov* without change, including any business or personal information provided. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comments or supporting materials that you consider confidential or inappropriate for public disclosure. In accordance with the U.S. government's eRulemaking Initiative, Fiscal Service publishes rulemaking information on *www.regulations.gov. Regulations.gov* offers the public the ability to comment on, search, and view publicly available rulemaking materials, including comments received on rules.

**FOR FURTHER INFORMATION CONTACT:** Marcia Goodnight, Retail Securities Services, at *RetailSecurityServicesComments@fiscal.treasury.gov;* or Lela Anderson, Attorney-Advisor, at 304–480–8692.

**SUPPLEMENTARY INFORMATION:**

## I. Background

On December 29, 2022, the SECURE 2.0 Act of 2022 [1] (SECURE Act) became law and added subsection (f) to 31 U.S.C. 3105 mandating that Treasury share certain savings bond information with states for the purpose of locating savings bond owners. Under new subsection (f), Treasury is required to ''provide each state, in digital or other electronic form, with information describing any applicable savings bond which has an applicable address that is within such state, including (i) the name and applicable address of the registered owner; and (ii) the name and applicable address of any registered co-owner or beneficiary.'' [2] ''Applicable address'' is defined to include the registered address for the registered owner of the savings bond or the last-known address for the registered owner available to the Secretary.[3] ''Applicable savings bond'' is defined to include a savings bond which is more than three years past its final maturity date, in paper or electronic form, and has not been redeemed.[4]

Treasury is required by new subsection (f)(2) to prescribe regulations or guidance as necessary to carry out the purposes of subsection (f), including rules to protect the privacy of the owners of applicable savings bonds, prevent fraud, and ensure that any information provided to a state is used solely for the purposes of the new subsection (f).[5] Regulations or guidance issued by Treasury must not have the effect of prohibiting, restricting, or otherwise preventing a state from obtaining the information described above.

## II. Summary of Proposed Rule Amendments

*Proposed Amendments to Part 323 ''Disclosure of Records.''*

Fiscal Service would add the proposed regulations to its disclosure of records regulations adopted under the Freedom of Information Act (FOIA).[6] Fiscal Service would maintain the current FOIA regulations found in part 323 by moving the existing provisions in sections 323.1–323.5 into a new subpart A. A new subpart B would contain the proposed regulations to implement the SECURE Act requirements to provide records containing applicable savings bond information to states. Subpart B would include definitions necessary to implement the proposed regulations, including proposed requirements for a state to receive applicable savings bond information, proposed instructions for the use of information, and proposed liability statements. Separating the two different statutory authorities, FOIA and the SECURE Act, by subpart is intended to assist the public in identifying the two separate authorities under which an individual or a state may request a disclosure of records or information.

Treasury believes the new disclosure of applicable savings bond information requirements is closely associated with the purpose of the existing FOIA disclosure regulations. While the SECURE Act only allows for disclosure of certain information to states, rather than to the public at large, a savings bond owner could look to a single regulation, part 323, to determine the various ways in which their savings bond information could be disclosed.

*A. Subpart A, § 323.1*

As noted above, subpart A will contain the existing regulations that implement FOIA for Fiscal Service currently found at part 323. Accordingly, the proposal would make a technical modification to the first sentence of 323.1 to identify the subpart rather than the part.

*B. Purpose of the Proposed Regulations, Subpart B, § 323.10*

Within the new subpart B, this new section briefly describes the purpose of the new regulatory provisions, namely to implement the SECURE Act.

*C. Rules Governing Sharing of Applicable Savings Bond Information With States, Subpart B, § 323.11*

Definitions

Treasury proposes to amend part 323 by adding a new provision, to be found at 31 CFR 323.11, to include the definitions and regulations necessary to provide states the information required by the SECURE Act. In addition, the proposed amendments would add new provisions to help protect savings bond customers from fraud and help to ensure the security of the records and information contained therein provided to states.

The SECURE Act amended 31 U.S.C 3105 by adding subsection (f), which requires Treasury to provide, in digital or other electronic form, each state with information describing any applicable savings bond that has an applicable address that is within such state. ''Applicable address'' is defined in the statute as the registered address for the registered owner, co-owner, or beneficiary of the savings bond or the last-known address for the foregoing if it is available to Treasury.[7]

Treasury proposes to define ''last-known address'' to mean an address available to Fiscal Service after a reasonable search of its records. While the level of effort dedicated to the search could be expressed in various degrees, a ''reasonable'' search balances the goals of efficiency and effectiveness. An exhaustive search, for example, would be unduly costly and burdensome on Fiscal Service, given the breadth of our systems of records, and unlikely to significantly change the results of the search. ''Record'' is broadly defined to include any data and documentation containing savings bond information. In defining it in this way, Fiscal Service can more readily protect savings bond owners from unauthorized disclosure of their information, as any

[1] Public Law 117–32.

[2] 31 U.S.C. 3105(f)(1)(A).

[3] 31 U.S.C. 3105 (f)(1)(C).

[4] 31 U.S.C. 3105 (f)(6).

[5] 31 U.S.C. 3105(f)(2).

[6] 31 CFR part 323.

[7] 31 U.S.C. 3105(f)(1)(C).

information currently held within Treasury will become a record once disclosed. The term ''State'' is also broadly defined to include United States territories, possessions, and the District of Columbia, as well as the 50 states. This definition is consistent with available registered addresses over the lifetime of the savings bond program.

Requests for Records

Subsection 323.11(b) of the proposed regulations provides that each state may request the applicable savings bond records from Fiscal Service. Upon request, the state must enter into an information-sharing agreement with Fiscal Service to receive and access the requested records. This agreement would require a state to make representations regarding protecting the savings bond records from disclosure, including security requirements for receiving and storing the records. These security requirements are necessary to minimize the risk of misuse or misappropriation of information or fraudulent activity.

Use of Records

Subsection 323.11(c) of the proposed regulations outlines how the records or information contained therein may be used by states, in compliance with the SECURE Act. As stated at 31 U.S.C. 3105(f), Treasury regulations are required to ensure that applicable savings bond information provided to a state will be used solely to carry out the purpose of locating the owner of the savings bond.[8] In accordance with this statutory requirement, the proposed regulation provides that the applicable savings bond information cannot be used to escheat bond ownership to state. Treasury has determined that the use of the applicable savings bond information for this purpose would be an unauthorized use of the information under the SECURE Act. The purpose of the SECURE Act is for Treasury to provide the information regarding applicable savings bonds to states to assist Treasury in locating the owner of the bonds. The SECURE Act does not allow the states to use the provided bond records and information to escheat the bonds, which would strip the bond owners of any rights to the redemption or continued ownership of their savings bonds.

Under the proposed regulation, in order to protect the savings bond owner's privacy, any applicable savings bond information provided to states cannot be released to the public or any third party without Fiscal Service's express written approval. This requirement will also be incorporated into the information-sharing agreement described above. The requirement to obtain such approval from Fiscal Service is also intended to ensure that the release of savings bond records or the information therein does not subject Fiscal Service customers to fraud risk. In recent years, Fiscal Service has taken steps that have reduced the opportunities for fraud. However, Fiscal Service believes that making records of matured, unredeemed savings bonds available to the public would create an unacceptable risk of fraud. Fiscal Service will continue to monitor savings bond fraud and consider implementing further risk-mitigation strategies, which may eventually allow for certain savings bonds records to be distributed publicly.

Finally, under proposed section 323.11(c), Treasury will not be responsible for any loss, liability, cost, or expense that results from a state's misuse or distribution of records regarding applicable savings bonds or any information contained therein. Any breach of savings bond records or information provided to a state under the proposed regulations could result in fraudulent activity, breach of privacy for a savings bond owner, and financial loss for bond owners. The proposed regulations require each state that receives information under the proposed regulations to bear the responsibility for any costs associated with the state's misuse or distribution of, or failure to adequately protect, any records or information.

## III. Request for Comments

We invite interested persons to submit comments on any aspect of the proposed regulation, including the following questions:

1. How would you expect your savings bond information to be used by the states?

2. How would you expect your savings bond information to be protected by the states?

3. Do you have any specific fraud-related concerns?

4. Are the proposed requirements related to the terms under which Treasury would share information with states reasonable? Should any further requirements applicable to states be added, either in the regulation or in the proposed information-sharing agreement, to fulfill the statutory purposes or the objectives described above?

## IV. Procedural Requirements

*A. Request for Comment on Plain Language*

Executive Order 12866 requires each agency in the Executive branch to write regulations that are simple and easy to understand. We invite comments on how to make the proposed rule clearer. For example, you may wish to discuss: (1) whether we have organized the material to suit your needs; (2) whether the requirements of the rule are clear; or (3) whether there is something else we could do to make the rule easier to understand.

*B. Executive Order 12866*

This proposed rule is not a significant regulatory action as defined in E.O. 12866, dated September 30, 1993, as amended.

*C. Administrative Procedure Act (APA)*

Because this proposed rule relates to United States securities, which are contracts between Treasury and the owner of the security, this rule falls within the contract exception to the APA, 5 U.S.C. 553(a)(2). Treasury is voluntarily seeking public comment to assist the agency in assessing the impact of the proposed rule.

*D. Regulatory Flexibility Act*

This proposed rule relates to matters of public contract and procedures for United States securities. Since a notice of proposed rulemaking is not required, the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* do not apply. This rule will not have a significant economic impact on a substantial number of small entities. Treasury is voluntarily seeking public comments in order to consider a range of views on records sharing before issuing the final rule.

*E. Paperwork Reduction Act*

The provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* and its implementing regulations, 5 CFR part 1320, do not apply to this proposed rule because there are no new or revised recordkeeping or reporting requirements.

**List of Subjects in 31 CFR Part 323**

Archives and records, Freedom of information, Privacy, Savings bonds.

Accordingly, for the reasons set forth in the preamble, Treasury proposes to amend title 31 part 323 of the Code of Federal Regulations as follows:

[8] 31 U.S.C. 3105(f)(2).

## PART 323—DISCLOSURE OF RECORDS

■ 1. The authority citation for part 323 continues to read as follows:

**Authority:** 80 Stat. 379; sec. 3, 60 Stat. 238, as amended; 5 U.S.C. 201, 552.

■ 2. Add subpart A before § 323.1;
■ 3. Revise the first sentence of § 323.1; and
■ 4. Add subpart B after § 323.5.

The additions and revision read as follows:

## PART 323—DISCLOSURE OF RECORDS

**Authority:** 80 Stat. 379; sec. 3, 60 Stat. 238, as amended; 5 U.S.C. 201, 552.

### Subpart A—Freedom of Information Act

**Authority:** 80 Stat. 379; sec. 3, 60 Stat. 238, as amended; 5 U.S.C. 201, 552.

#### § 323.1 Purpose of regulations

The regulations of this subpart are issued to implement 5 U.S.C. 552(a)(2) and (3). * * *

* * * * *

### Subpart B—SECURE 2.0 Act of 2022

Sec.
323.10 Purpose of Subpart.
323.11 Rules governing sharing of applicable savings bond information with states.

**Authority:** 31 U.S.C. 3105(f).

#### § 323.10 Purpose of Subpart

The regulations of this subpart are issued to implement the SECURE Act 2.0 of 2022, 31 U.S.C. 3105(f). The requirements of 31 U.S.C. 3105(f) are additionally met through the publication of a new Routine Use in the applicable Fiscal Service System of Record Notice.

#### § 323.11 Rules governing sharing of applicable savings bond information with states.

(a) Definitions. For purposes of this section:

*Applicable address* has the meaning set forth in 31 U.S.C. 3105(f)(1)(C).

*Applicable savings bond* has the meaning set forth in 31 U.S.C. 3105(f)(6).

*Last-known address* means the full street address, if available, found after a reasonable search of Fiscal Service records.

*Name* means the full registered name of the owner, co-owner, or beneficiary of an applicable savings bond, as it appears on the savings bond inscription.

*Record* means data or documentation, whether in paper, digital, or other electronic form, containing or composed of information describing any applicable savings bond which has an applicable address within a state, including the name and registered address or last-known address of the registered owner, co-owner, or beneficiary, as further defined in 31 U.S.C. 3105(f)(1).

*Registered address* means the address included in the savings bond inscription.

*State* means the fifty states, the District of Columbia, American Samoa, the Federated States of Micronesia, Guam, the United States Virgin Islands, the Marshall Islands, the Commonwealth of the Northern Mariana Islands, Palau, and the Commonwealth of Puerto Rico.

(b) Requests for records. Records will be made available to states in compliance with 31 U.S.C. 3105(f) and this subpart, upon request by a state to Fiscal Service. Prior to receiving access to records, each state, through an authorized state representative, must enter into an information-sharing agreement with Fiscal Service using a form that will be provided by Fiscal Service. Such agreements may contain, among other things, requirements that Treasury deems necessary or appropriate to ensure the security of the information.

(c) Use of records. Any records or any information made available to a state under this subpart (1) must be used only for the purpose of locating the owner of an applicable savings bond, (2) must not be used to escheat savings bond ownership to a state, and (3) must not be released by a state to the public or any third party, unless explicitly approved in writing, in advance, by Treasury.

(d) Liability. Treasury is not liable for any loss, liability, cost, or expense that may result from a state's receipt, use, or distribution of records or any information contained therein. A state receiving records under this subpart shall indemnify Treasury for any loss, liability, cost, or expense associated with the state's receipt, use, or distribution of, or failure to adequately protect, records or any information contained therein.

By the Department of the Treasury.

**David Lebryk,**

*Fiscal Assistant Secretary.*

[FR Doc. 2023–23314 Filed 10–30–23; 8:45 am]

**BILLING CODE P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 1

**[WC Docket Nos. 17–108, 17–287, 11–42; DA 23–996; FR ID 181657]**

### Wireline Competition Bureau Seeks Comment on Petitions Seeking Reconsideration of the RIF Remand Order

**AGENCY:** Federal Communications Commission.

**ACTION:** Notification; request for comments.

**SUMMARY:** In this document, the Wireline Competition Bureau of the Federal Communications Commission (Commission) seeks comment on petitions for reconsideration of the *RIF Remand Order* filed by Common Cause, et al.; INCOMPAS; Public Knowledge; and the County of Santa Clara, et al. The petitioners request that Commission reconsider its decision in the *RIF Remand Order,* reverse or vacate that *Order,* and initiate a rulemaking proceeding to address the concerns raised by the D.C. Court of Appeals pertaining to the Commission's 2018 *RIF Order.* In addition to the issues raised in the petitions, the Commission invites comment on how the issues under consideration in WC Docket No. 23–320 bear on this proceeding.

**DATES:** Comments are due on or before December 14, 2023, and reply comments are due on or before January 17, 2024.

**ADDRESSES:** You may submit comments, identified by WC Docket Nos. 17–108, 17–287, 11–42 by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing ECFS: *https://www.fcc.gov/ecfs/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.

Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no

longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, 35 FCC Rcd 2788 (2020). *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*

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

**FOR FURTHER INFORMATION CONTACT:** Wireline Competition Bureau, Competition Policy Division, Chris Laughlin, at (202) 418–1580, *Openinternet2023@fcc.gov.*

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's document (*Public Notice*) in WC Docket Nos. 17–108, 17–287, 11–42, DA 23–996, issued and released on October 19, 2023. The full text of this document is available on the Commission's website at *https://docs.fcc.gov/public/attachments/DA-23-996A1.pdf.* To request materials in accessible formats for people with disabilities (*e.g.,* Braille, large print, electronic files, audio format, etc.), send an email to *FCC504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice).

*Ex Parte Rules.* This proceeding shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must: (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made; and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenters written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with § 1.1206(b) of the Commission's rules. In proceedings governed by § 1.49(f) of the rules or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Federal Communications Commission.

**Jodie May,**

*Division Chief, Competition Policy Division, Wireline Competition Bureau.*

[FR Doc. 2023–23932 Filed 10–30–23; 8:45 am]

**BILLING CODE 6712–01–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### 50 CFR Part 17

**[Docket No. FWS–R4–ES–2023–0171; FF09E21000 FXES1111090FEDR 234]**

**RIN 1018–BE88**

## Endangered and Threatened Wildlife and Plants; Endangered Species Status for Oblong Rocksnail (Leptoxis compacta)

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to list the oblong rocksnail (*Leptoxis compacta*), a freshwater snail native to the Cahaba River in Alabama, as an endangered 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 oblong rocksnail. After a review of the best available scientific and commercial information, we find that listing the species is warranted. If we finalize this rule as proposed, it will 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 January 2, 2024. 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 December 15, 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–2023–0171, 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–2023–0171, 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.fws.gov/office/alabama-ecological-services,* at *https://ecos.fws.gov/ecp/species/2809,* and at *https://www.regulations.gov* under Docket No. FWS–R4–ES–2023–0171.

**FOR FURTHER INFORMATION CONTACT:** Bill Pearson, Field Supervisor, Alabama Ecological Services Field Office, 1208 Main Street, Daphne, AL 36526; telephone 251–441–5870. 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 No. FWS–R4–ES–2023–0171 on *https://*

*www.regulations.gov* for a document that summarizes this proposed rule.

**SUPPLEMENTARY INFORMATION:**

**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; and

(d) Historical and current population levels, and current and projected trends.

(2) Threats and conservation actions affecting the species, including:

(a) Factors that may affect 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 the species.

(d) Past and ongoing conservation measures for the species, its habitat, or both.

(3) Additional information concerning the historical and current status of this species.

(4) Specific information on:

(a) The amount and distribution of oblong rocksnail habitat;

(b) Any areas occurring within the range of the species in the Cahaba River watershed that should be included in a critical habitat designation because they (i) are occupied at the time of listing and contain the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection, or (ii) are unoccupied at the time of listing and are essential for the conservation of the species.

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 (16 U.S.C. 1533(b)(1)(A)) 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 (16 U.S.C. 1533(b)(2)) directs that the Secretary shall designate critical habitat on the basis of the best scientific information 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 new information that may become available after this proposal publishes. Based on the new information we receive (and, if relevant, any comments on that new information), we may conclude that the species is threatened instead of endangered, or we may conclude that the species does not warrant listing as either an endangered species or a threatened 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) (16 U.S.C. 1533(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 June 21, 2016, we were petitioned by the Center for Biological Diversity and The Cahaba Riverkeeper to list the oblong rocksnail. On December 20, 2017, we published in the **Federal Register** (82 FR 60362) our determination that the petition presented substantial information indicating that listing may be warranted. This proposed rule constitutes our 12-month finding on that petition.

**Peer Review**

A species status assessment (SSA) team prepared an SSA report for the oblong rocksnail (Service 2022, entire). The SSA team was composed of Service biologists, and the report was prepared in consultation with species experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act (16 U.S.C. 1531 *et seq.*), we solicited independent scientific review of the information contained in the oblong rocksnail SSA report. We sent the SSA report to six independent peer reviewers and received two 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 two peer reviewers on the draft SSA report. We

reviewed all comments 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 clarifications in terminology and other editorial suggestions. We revised the SSA report to include information provided by reviewers about recent oil spill occurrences within the oblong rocksnail's range. Otherwise, no substantive changes to our analysis and conclusions within the SSA report were deemed necessary, and peer reviewer comments are addressed in version 1.0 of the SSA report.

## I. Proposed Listing Determination

*Background*

A thorough review of the taxonomy, life history, and ecology of the oblong rocksnail (*Leptoxis compacta*) is presented in the SSA report (version 1.0; Service 2022, pp. 1–4).

The oblong rocksnail is a non-air-breathing, freshwater pleurocerid snail native to the Cahaba River, near Birmingham, Alabama. Oblong rocksnails are grazers and occur on large slabs and bedrock, typically toward the middle of the river. These large flat rocks provide the substrate on which periphyton (algae attached to hard surfaces), which the rocksnail uses for food, can grow (Miller-Way and Way 1989, p. 193; Johnson et al. 2013, p. 248). In general, periphyton availability, substrate composition, and water velocity are important components in determining habitat suitability of pleurocerid snails (Stewart and Garcia 2002, p. 178). Periphyton, which contains higher concentrations of limiting nutrients like nitrogen than other food sources, is more easily scraped from hard substrates by rocksnails (White 1978, pp. 73–74; McMahon et al. 1974, p. 392; Brown 2001, p. 305).

Pleurocerid snails are dioecious (*i.e.,* have separate sexes) and generally reach sexual maturity in the wild after 1 or 2 years (Aldridge 1982, p. 197; Whelan 2013, p. 73). Observations of wild *Leptoxis* snails indicate that eggs are often laid on vertical surfaces or undersides of rocks without siltation or much vegetation (Whelan et al. 2015, p. 88). Warming temperatures in spring (April–May) appear to serve as a cue to begin and end egg laying; oviposition in laboratory conditions ceased when the daily maximum water temperature reached 29 degrees Celsius (84 degrees Fahrenheit) (Whelan et al. 2012, p. 3). Pleurocerid snails live between 2 and 6 years, depending on the species, but the specific lifespan is not known for the oblong rocksnail (Whelan 2013, p. 73).

The species was declared extinct in 2000 (Neves et al. 1997, p. 62; Turgeon et al. 1998, p. 65; Bogan 2000, entire), as it had not been seen in more than 70 years despite repeated surveys (Whelan et al. 2012, p. 1), but was rediscovered in 2011 (Whelan et al. 2012, entire). The best available information indicates that the oblong rocksnail currently occupies approximately 11 percent of its known historical range in the Cahaba River. The species has been extirpated from 44.4 river miles (71.5 kilometers (km)) and is currently found at only a few sites along 5.6 river miles (9 km) of the Cahaba River from Old Marvel Slab upstream to Booth's Ford (Wright et al. 2020, p. 6). Additional survey efforts have failed to locate the species at other sites within the historical range. The sites where the species is currently found are all above the Fall Line, which divides the Piedmont from the Coastal Plain. Due to higher gradients, streams above the Fall Line are generally swift and have rock substrates, while streams below the Fall Line are generally slower, have soft substrates, and have lower gradients (Cahaba River Basin Clean Water Partnership (CRBCWP) 2013, p. 11). The oblong rocksnail's currently occupied range is restricted to the lower range of suitable habitat before the habitat changes at the Fall Line.

*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 oblong rocksnail viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency is the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years); redundancy is the ability of the species to withstand catastrophic events (for example, droughts, large pollution events); and representation is the ability of the species to adapt to both near-term and long-term changes in its physical and biological environment (for example, climate conditions, pathogens). In general, species viability will increase with increases in resiliency, redundancy, and representation (Smith et al. 2018, p. 306). Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We then used this information to inform our regulatory decision.

The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket FWS–R4–ES–2023–0171 on *https://www.regulations.gov.*

*Summary of Biological Status and Threats*

In this discussion, we review the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability. 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

Oblong rocksnails need large, flat boulders and bedrock for feeding and reproduction. The river channel should be relatively free of fine sediment and with flows sufficient to maintain clean-swept rock surfaces for attachment, egg-laying, and periphyton growth. Pleurocerid snails, as a group, are sensitive to changes in water quality parameters such as sodium chloride (salt), potassium, nickel, zinc, and pollutants. Streams that have minimal levels of these constituents are considered suitable, while those habitats with levels outside of the appropriate ranges are considered less suitable. Further, nutrient enrichment needs to remain low enough not to result in algal blooms, which can create a toxic cycle that decreases oxygen and food resources for snails. For further information about life stages and resource needs, see chapter 2 of the SSA report (Service 2022, pp. 3–4).

For the oblong rocksnail to maintain viability, it must be able to withstand and bounce back from both stochastic events (resiliency) and catastrophic events (redundancy), as well as adapt to changing environmental conditions (representation). Snail abundance must be sufficient for genetic diversity to be maintained and for the overall population in the stream reach to recover from stochastic events. Abundance should be stable or increasing for populations to be resilient. Surveys to date have not estimated numbers of oblong rocksnails; however, the species appears to be abundant within the presently occupied reach within the Cahaba River mainstem, except at the northernmost site where numbers are low (Wright et al. 2020, entire). A resilient population of oblong rocksnails must be reproducing and recruiting young individuals into the population. We have no data on reproduction or recruitment of the extant population but based on the short (approximately 2–6 years) probable lifespan of rocksnails, we assume that presence of snails at locations where it has been detected in the recent past indicates recruitment is occurring within the population.

For redundancy, the oblong rocksnail needs to occupy sufficient stream length and in enough tributaries such that stochastic and catastrophic events that could affect the population in the mainstem do not eliminate the entire population of the species. Occupying branches of a river network (dendritic networking) increases habitat diversity and allows the species to repopulate from those tributaries should a spill, flood, drought, or other catastrophic event create unsuitable habitat conditions in the Cahaba mainstem. Because the currently occupied reach is relatively short and only within the mainstem, increasing the complexity of the occupied area will increase redundancy by preventing the oblong

rocksnail from being eliminated by a single catastrophic event.

Influences on Viability

Water Quality Impairment

Water quality impairment for the oblong rocksnail occurs when there are adverse changes in water quality parameters, as well as impacts from contaminants and sedimentation, and catastrophic spills. Water quality in the Cahaba River has been and is currently affected by point and nonpoint sources, and these sources may be chronic or catastrophic in nature. Nonpoint sources of water quality impairment for the Cahaba River include urban runoff from the metropolitan area of Birmingham and stormwater runoff from roads and agricultural activities. Point sources include industrial sources and municipal effluents. Point source discharges and land surface runoff (nonpoint pollution) can cause nutrification, decreased dissolved oxygen (DO) concentrations, increased acidity and conductivity, and other changes in water chemistry that are known to impact aquatic snails such as the oblong rocksnail (Gibson et al. 2016, pp. 1, 32–34; Gibson et al. 2018, pp. 239, 247, 249). Oblong rocksnails are sensitive to water quality impairment as they breathe via gills, which may allow toxicants in the water to be readily absorbed (Gibson et al. 2018, p. 251). They also need high oxygen in the water to breathe, so reduced DO levels will affect respiration and overall snail condition. Increased acidity and conductivity can affect shell production and maintenance. It is difficult for the oblong rocksnail to move large distances; thus, the species is not able to survive stochastic or catastrophic water quality events by moving to an unimpaired location.

Contaminants

The upper Cahaba River is home to municipal wastewater facilities, industrial facilities, and coal mines which contribute contaminants, including metals, hydrocarbons, pesticides, and other potentially harmful organic and inorganic compounds to the stream. These chemical contaminants contribute significantly to the current declining status of freshwater mollusk (like the oblong rocksnail) species nationwide (Augspurger et al. 2007, p. 2025), and within the Cahaba River (Wright et al. 2020, p. 2).

In Alabama, chloride is a common chemical used in oil and gas production, pesticide application, wastewater treatment plant effluent, urban runoff, and mining (Gibson et al. 2018, p. 240). Studies of the toxicity of chloride revealed that a sister species of the oblong rocksnail, the round rocksnail (*Leptoxis ampla*), exhibited sensitivity to chloride at concentrations 250 times less than current criteria set by the U.S. Environmental Protection Agency (EPA), and at lower-than-average background levels in almost all watersheds in Alabama, including the Cahaba River watershed (Gibson et al. 2018, p. 247). Thus, the current EPA water quality criterion for chloride may not be sufficient for the survival of the oblong rocksnail. Further, the round rocksnail was the most sensitive mollusk species tested, likely indicating species in the genus *Leptoxis* are more sensitive overall to contaminants. Rocksnails are also sensitive to potassium, nickel, zinc, and sodium dodecyl sulfate (a common surfactant in household detergents), and several of these chemicals do not have regulated standards (Wang et al. 2013, entire; Gibson et al. 2016, p. 30; Wang et al. 2017, p. 786; Gibson et al. 2018, pp. 249–250).

There are six large municipal wastewater treatment plants in the upper Cahaba River drainage, several with documented elevated ammonia levels (EPA 2002, p. 35). Mollusks are also highly sensitive to ammonia (Augspurger et al. 2003, p. 2569), and non-pulmonate snails, like the oblong rocksnail, have been shown to be extremely sensitive to ammonia because they readily absorb it from the water via their gills (EPA 2013, p. 56; Besser et al. 2016, p. 33). The State of Alabama has not yet adopted EPA's ammonia criteria that are protective of the needs of these mollusks (EPA 2013, p. 67; Haslbauer 2020, pers. comm.).

Sedimentation

The upper Cahaba River watershed, which drains a large part of Birmingham, is rapidly urbanizing; between 1992 and 2011, urban cover has increased from 9.4 percent to 35.7 percent due to expansion of the metropolitan area (Dosdogru et al. 2020, p. 2). Sources of sedimentation include, but are not limited to, several aspects of urbanization: deforestation, road maintenance, impoundments, and impervious surfaces (EPA 2021, unpaginated).

Excessive sediments are believed to impact riverine snails requiring clean, hard shoal stream and river bottoms by making the habitat unsuitable for feeding or reproduction. In 2002, the EPA reported on the Cahaba River: ''Because of excessive sedimentation, habitat evaluation scores in the middle reach were affected and fell into the suboptimal to marginal range. Quite apparent is the filling of crevices or spaces between the natural rock substrates by sediments thus affecting both fish and benthic macroinvertebrates'' (EPA 2002, p. 31). The middle reach of the Cahaba River is also where snails were most abundant when the EPA (2002, pp. 19–20) conducted eight different studies in the Cahaba River in spring 2002. Impacts from decades of excessive sedimentation deteriorated oblong rocksnail habitat such that it is currently confined to only a small portion of the Cahaba River. These impacts from sedimentation affect oblong rocksnail food sources by abrading or suffocating periphyton attached to underwater surfaces. Sedimentation also affects snail respiration, growth, reproductive success, and survival (Waters 1995, pp. 5–7, 74–78, 79–118).

Catastrophic Spills

Coalbed methane extraction in the watershed results in saline production-water that historically was discharged directly to receiving channels of the Cahaba River. Saline waters are toxic to snails, including the oblong rocksnail. While coalbed methane wells are common in the Cahaba River basin, there were approximately 400 wells in 2008 (EPA 2011, pp. 3–22), at present no discharges of this type go directly to the Cahaba (O'Neil 2021, pers. comm.). It is anticipated that future discharges of this type would require a permit to ensure integrity of the Cahaba. It is still possible a spill could occur from these sources; however, the probability of such an event, and its volume and nature, are unknown at this time. Pipelines remain one of the safest ways to transport fuel in the United States with a very low failure rate (Belvederesi et al. 2018, p. 1), and the majority of spills are small (National Oceanic and Atmospheric Administration (NOAA) 2020, entire). Despite all of this, spills do occur along pipelines and can have significant environmental consequences to waterways, wildlife, and people (Belvederesi et al. 2018, p. 1).

Two major oil and gas transmission lines cross the Cahaba River and its tributaries at several points ranging from 2.2 to 11 miles (3.7 to 18 km) above known oblong rocksnail locations. The area around the Cahaba River is considered a high consequence area (HCA) (Pipeline and Hazardous Material Safety Administration (PHMSA) 2021b, p. 5). These HCAs are designated areas where a release could have significant adverse consequences, in this case to highly sensitive ecological areas

(Belvederesi et al. 2018, p. 6), and the HCA designation confers additional oversight by the U.S. Department of Transportation's PHMSA to ensure integrity of pipelines in these areas.

Of the 11 counties crossed by these major pipelines in the State of Alabama, 5 counties have experienced oil spills associated with these pipelines or their infrastructure since 2005; these spills ranged in size from 3 to upwards of 7,000 barrels (125 to 293,999 gallons). The largest spill in Shelby County occurred in 2016 within a mile (≤1.6 km) of the Cahaba River upstream of the occupied area. Fortunately for the oblong rocksnail and the Cahaba River ecosystem, the spill was diverted to a retention pond and did not reach the portion of the river where the oblong rocksnail occurs (Birmingham Watch 2016, p. 1).

Climate Change

We examined climate change on the Cahaba River through 2050, as detailed by Dosdogru et al. (2020, entire). Overall, the study projected more potential for flood and drought events (extreme weather events). Increasing summer temperatures lead to high stream evapotranspiration rates and thus lower overall flows, which reduce dissolved oxygen needed for oblong rocksnail respiration and metabolic activity. High flows during storm events increase soil erosion and muddy stream flows (Dosdogru et al. 2020, p. 14), increasing sedimentation and associated impacts to rocksnails. During droughts, nearly all the flow of the Cahaba River can disappear, leaving snails exposed. During drought events, nearly all the flow of the Cahaba River is removed at the Birmingham water intake and only a portion is returned downstream as treated wastewater (Service 2013, p. 2), exposing oblong rocksnails to higher concentrations of potentially harmful chemicals (see ''Contaminants,'' above). Furthermore, developmental cues, rates of egg development, and juvenile growth are all strongly impacted by temperature regimes (Olden and Naiman 2010, p. 90), and projected increases in temperature can impact successful oblong rocksnail reproduction.

Based on adaptive capacity attributes identified using the approach described by Thurman et al. (2020, entire), oblong rocksnail cannot move large distances when conditions become unfavorable (*e.g.,* when water quality deteriorates, or the system experiences drought or flooding), given its limited dispersal ability and reliance on chance events to carry dispersers downstream. Flashy flows from flooding storm events may present opportunities that carry individuals to other downstream sites, but they could also carry them beyond the small reach of currently suitable habitat to unsuitable habitat below the Fall Line. Prolonged droughts can lower the water levels such that wetted habitat becomes limited or disappears, leaving the non-air-breathing oblong rocksnail unable to escape these conditions and prone to exposure to contaminants or desiccation.

*Current Condition*

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 effect of identified threats and conservation actions on the species. To assess the current and future condition of the species, we evaluated 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 effect of the factors and replaces a standalone cumulative-effects analysis. Below, we describe the 3Rs—resiliency, representation, and redundancy—as they relate to oblong rocksnail viability.

Resiliency

The resiliency, or ability of the extant oblong rocksnail population to withstand stochastic events, was determined by analyzing three population factors (abundance, reproduction/recruitment, and occupied stream length/complexity) and two habitat factors (substrate and flowing water, and water quality). These factors are described below.

Abundance

While there are no numeric abundance estimates for the oblong rocksnail, we assume that because the population is detectable at multiple sites along 5.6 miles (approximately 9 km) of the Cahaba River, we consider the species locally abundant wherever it occurs.

Reproduction and Recruitment

We assume that the recent detections of oblong rocksnail at occupied sites indicates recruitment is currently occurring within the population.

Occupied Stream Length/Stream Complexity

The oblong rocksnail currently occupies 5.6 miles (approximately 9 km) of the historical 44.4 miles (71.5 km) of the Cahaba River and is not known to occupy any tributaries. This limited occupied area and lack of stream complexity could make the species more susceptible to stochastic and catastrophic events.

Substrate and Flowing Water

The oblong rocksnail occupies a reach of the Cahaba River that is downstream of the confluence with several large tributaries. Currently, the volume and flow of water in this reach is sufficient to maintain clean-swept hard surfaces in the main channel of the Cahaba River and support periphyton, such that the oblong rocksnail can attach, feed, and lay eggs, thus supporting oblong rocksnail persistence.

Water Quality

Past water quality issues affected oblong rocksnail habitat such that it was once thought extinct. However, over the past 30 years, the Cahaba River's water quality has improved in the range of the oblong rocksnail. The Clean Water Act (33 U.S.C. 1251 *et seq.*) imposed water quality standards and reduced contaminants from urban runoff, industrial facilities, and municipal wastewater, which has resulted in suitable water quality in the currently occupied reach. At present, the Cahaba River's water quality appears sufficient to support known sites.

Representation

The oblong rocksnail has limited representation, as it is only found in one population with limited overall genetic diversity. The loss of genetic variation due to its range contraction may have negatively impacted its long-term survival and overall adaptive capacity (Wright et al. 2020, p. 10). Evidence suggests the oblong rocksnail has lost genetic diversity through both bottleneck and genetic drift (Wright et al. 2020, p. 12). Genetic diversity is increased at downstream sites (Whelan et al. 2019, p. 1593), facilitated by much greater downstream movement than upstream movement (Redak et al. 2021, p. 643). This downstream-biased movement, coupled with a lack of suitable habitat upstream, has resulted in a decline of genetic diversity at upstream sites despite the recent discovery of the species at multiple sites and a slightly expanded known distribution for the species.

Redundancy

The oblong rocksnail has limited to no redundancy. While the species is represented by only one population in one small river reach, oblong rocksnail

can be found at multiple sites within the singular population. These sites serve as ''internal redundancy'' within a singular population that could provide some ability to respond to stochastic events; however, because all sites occupied are linear in one stretch of the Cahaba River, it is possible that a catastrophic event could impact the entire population.

*Future Conditions*

As part of the SSA analysis, we developed three future-condition scenarios to capture the range of uncertainties regarding future threats and the projected responses by the oblong rocksnail. Our scenarios examined changes in urbanization and climate change, potential mitigation of urbanization and climate impacts by an existing management program, and the potential of a catastrophic oil spill to the species. Because we determined that the current condition of the oblong rocksnail is consistent with an endangered species (see Determination of Oblong Rocksnail's Status, below), we are not presenting the results of the future scenarios in this proposed rule. Please refer to the SSA report (Service 2021, pp. 28–34) for the full analysis of future scenarios.

Conservation Efforts and Regulatory Mechanisms

Reintroduction efforts for the oblong rocksnail are underway with the Alabama Department of Conservation and Natural Resources (ADCNR) (ADCNR 2021, entire). During a survey in the historical Belle Ellen shoal complex in May 2019, several federally listed species were located, but the oblong rocksnail was not (ADCNR 2021, p. 2). Although a targeted survey in October 2020 again did not locate the oblong rocksnail, ADCNR and Service personnel agreed to consider the site for future reintroduction efforts (ADCNR 2021, p. 2). Culture efforts, as a part of reintroduction efforts, began in 2020 (ADCNR 2021, p. 3). A total of 220 oblong rocksnail brood stock were collected from a shoal adjacent to the Living River complex on the Cahaba River and brought back to the Alabama Aquatic Biodiversity Center (ADCNR 2021, p. 3). After an 11-month effort, a total of 544 juvenile and 201 brood stock snails were released adjacent to the right-descending bank at the Belle Ellen shoal (ADCNR 2021, p. 3). Future plans also include the collection of more brood stock for additional culturing, evaluation of additional oblong rocksnail reintroduction sites in lower Buck Creek and lower Little Cahaba River, and a comprehensive reintroduction plan encompassing all approved reintroduction sites for the oblong rocksnail (ADCNR 2021, p. 3).

*Determination of Oblong Rocksnail'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

The oblong rocksnail is a local endemic in the Cahaba River system of Alabama. The species once occupied approximately 50 miles of the river and was thought extinct before it was rediscovered in 2011. The species currently occupies only a 5.6-mile (approximately 9-km) reach in the Cahaba River. There are no abundance estimates, but the oblong rocksnail is considered locally abundant where it occurs. Recruitment is presumed to be occurring in the occupied habitat. Current threats to the species include typical threats to aquatic species: water quality impairment, including sedimentation and contaminants from urbanization and habitat alteration (Factor A). The species' current distribution lacks dendritic networking; it is in a single reach of the mainstem river, and there is no ability for natural rescue if the main channel populations are lost when faced with a catastrophic event, such as a toxic spill or extreme weather event (flood or drought) (Factor E).

After evaluating threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we determine that the oblong rocksnail is affected by water quality impairment, including sedimentation, and potential catastrophic spills. The current threats to the oblong rocksnail present a high risk of extinction to the species, which occupies only about 11 percent of its historical range. This species has low resiliency; it is located in one stream reach, although it is locally abundant there. It has limited to no redundancy, with occupied sites in one linear population offering little ability to rebound from a catastrophic event, and it has low representation due to lost genetic diversity through bottleneck and subsequent genetic drift. Thus, after assessing the best available information, we determine that oblong rocksnail is in danger of extinction 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. We have determined that the oblong rocksnail is in danger of extinction throughout all of its range and accordingly did not undertake an analysis of any significant portion of its range. Because the oblong rocksnail warrants listing as endangered throughout all of its range, our determination is consistent with the decision in *Center for Biological Diversity* v. *Everson,* 2020 WL 437289 (D.D.C. Jan. 28, 2020), in which the court vacated the aspect 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) that provided the Service does not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range.

Determination of Status

Our review of the best available scientific and commercial information indicates that the oblong rocksnail meets the Act's definition of an endangered species. Therefore, we propose to list the oblong rocksnail as an endangered species in accordance with sections 3(6) 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 Alabama 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 Alabama would be eligible for Federal funds to implement management actions that promote the protection or recovery of the oblong rocksnail. 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 oblong rocksnail is only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7 of the Act is titled, ''Interagency Cooperation'' and mandates all Federal action agencies to use their existing authorities to further the conservation purposes of the Act and to ensure that their actions are not likely to jeopardize the continued existence of listed species or adversely modify critical habitat. Regulations implementing section 7 are codified at 50 CFR part 402.

Section 7(a)(2) states that each Federal action agency shall, in consultation with the Secretary, ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Each Federal agency shall review its action at the earliest possible time to determine whether it may affect listed species or critical habitat. If a determination is made that the action may affect listed species or critical habitat, formal consultation is required (50 CFR 402.14(a)), unless the Service concurs in writing that the action is not likely to adversely affect listed species or critical habitat. At the end of a formal consultation, the Service issues a biological opinion, containing its determination of whether the Federal action is likely to result in jeopardy or adverse modification.

In contrast, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. Although the conference procedures are required only when an action is likely to result in jeopardy or adverse modification, action agencies may voluntarily confer with the Service on actions that may affect species proposed for listing or critical habitat proposed to be designated. In the event that the subject species is listed or the relevant critical habitat is designated, a conference opinion may be adopted as a biological opinion and serve as compliance with section 7(a)(2) of the Act.

Examples of discretionary actions for the oblong rocksnail that may be subject to conference and consultation procedures under section 7 are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (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.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered wildlife. The prohibitions of section 9(a)(1) of the Act, codified at 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the

United States to commit, to attempt to commit, to solicit another to commit or to cause to be committed any of the following: (1) import endangered wildlife into, or export such wildlife from, the United States; (2) take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct) endangered wildlife within the United States or on the high seas; (3) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such wildlife that has been taken illegally; (4) deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or (5) sell or offer for sale in interstate or foreign commerce. Certain exceptions to these prohibitions apply to employees or agents of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits for endangered wildlife are codified at 50 CFR 17.22. With regard to endangered wildlife, a permit may be issued for scientific purposes, for enhancing the propagation or survival of the species, or for take incidental to otherwise lawful activities. The statute also contains certain exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

It is 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.

At this time, we are unable to identify specific activities that will be considered likely to result in a violation of section 9 of the Act beyond what is already clear from the descriptions of the prohibitions at 50 CFR 17.21 and general Service permitting regulations codified at 50 CFR part 13. Questions regarding whether specific activities would constitute violation of section 9 of the Act should be directed to the Alabama Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

## II. 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 if one has been issued for the listed species. 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

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. The species' needs are sufficiently well known, but 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 find designation of critical habitat for the oblong rocksnail is prudent but not determinable at this time. We plan to publish a proposed rule to designate critical habitat for the oblong rocksnail concurrent with the availability of a draft economic analysis of the proposed designation. 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 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.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretary's Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We have determined that the oblong rocksnail does not occupy any Tribal lands, so this proposed rule should not affect any Tribes or Tribal lands.

*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 Alabama 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 Alabama 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 ''Rocksnail, oblong'' in alphabetical order under SNAILS to read as follows:

**§ 17.11 Endangered and threatened wildlife.**

* * * * *

(h) * * *

| Common name | Scientific name | Where listed | Status | Listing citations and applicable rules |
|---|---|---|---|---|
| * | * | * | * | * * * |
| **Snails** | | | | |
| * | * | * | * | * * * |
| Rocksnail, oblong .... | *Leptoxis compacta* .. | Wherever found ..... | E ..... | [**Federal Register** citation when published as a final rule]. |
| * | * | * | * | * * * |

**Stephen Guertin,**

*Acting Director, U.S. Fish and Wildlife Service.*

[FR Doc. 2023–23994 Filed 10–30–23; 8:45 am]

**BILLING CODE 4333–15–P**

# Notices

Federal Register
Vol. 88, No. 209
Tuesday, October 31, 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.

## AGENCY FOR INTERNATIONAL DEVELOPMENT

### Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Information Collection Generic Clearance Request for USAID Workforce and Organizational Surveys

**AGENCY:** Bureau for Management, Office of the Director, (M/MPBP/OD), Agency for International Development (USAID).

**ACTION:** Notice of information collection; request for comment.

**SUMMARY:** USAID proposes a generic clearance to collect workforce feedback through surveys, interviews, and focus groups to optimize operations, strengthen organizational health and workforce culture, and improve workforce retention. USAID has a diverse workforce that consists of U.S. direct hires (foreign and civil service) and multiple contract mechanisms with the majority of the workforce belonging to multiple contract mechanisms, including Coordinating Country Nationals, Personal Services Contractors, and Institutional Support Contractors.

**DATES:** Interested persons are invited to submit comments within 60 days of this notice.

**ADDRESSES:** You may send comments by email to:

- *Email: oscholbe@usaid.gov.*

**FOR FURTHER INFORMATION CONTACT:** Owain Scholbe, Junior Management and Program Analyst, Management Bureau, Office of the Director (M/MPBP/OD), telephone 202–921–5070, or via email at *oscholbe@usaid.gov.*

**SUPPLEMENTARY INFORMATION:** In accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), USAID is providing the general public and Federal agencies with an opportunity to comment on the proposed collection of information. USAID is requesting a general clearance to provide and conduct workforce surveys, interviews, and focus groups with a diverse workforce consisting of numerous hiring mechanisms, including, but not limited to, U.S. direct hires, fellows, interns, Personal Services Contractors, Institutional Support Contractors, Coordinating Country Nationals, and Third Country Nationals. The goal of data collection under this generic clearance is to collect workforce feedback on organizational health, operations, workforce culture, and work environment necessary to strengthen mission readiness and better achieve its development objectives. USAID will only collect data from the approximately 11,000 members of the USAID workforce with minimal collection of personally identifiable information. The total estimated number of annual burden hours for these workforce population surveys is 41,250 hours. USAID will limit analysis and reporting to summary level statistics that will only be available to the internal workforce.

*OMB Control Number:* TBD.

Dated: October 25, 2023.

**Erin Brown,**

*Deputy Director, M/MPBP.*

[FR Doc. 2023–23949 Filed 10–30–23; 8:45 am]

**BILLING CODE 6116–01–P**

## AGENCY FOR INTERNATIONAL DEVELOPMENT

### Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

**AGENCY:** U.S. Agency for International Development (USAID).

**ACTION:** Notice of information collection; request for comment.

**SUMMARY:** In accordance with the Information Collection Review procedures of the Paperwork Reduction Act of 1995 (PRA), the United States Agency for International Development (USAID), is seeking comment on the proposed Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery. The Agency will use surveys and forms to collect, analyze, and interpret information gathered through this generic clearance to identify strengths and weakness of the current services, information, and to make improvements in customer service.

**DATES:** All comments should be submitted within 60 calendar days from the date of this publication.

**ADDRESSES:** Comments submitted in response to this notice should be submitted to the *icrteam@usaid.gov.*

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information should be directed to Kelly Hamilton at 202–921–5016, *icrteam@usaid.gov.*

**SUPPLEMENTARY INFORMATION:** The proposed information collection activity provides a means to garner qualitative customer and stakeholder feedback in an efficient, timely manner. By qualitative feedback we mean information that provides useful insights on perceptions and opinions but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide 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 the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

The Agency will collect, analyze, and interpret information gathered through this generic clearance to identify strengths and weaknesses of the current services, information, and make improvements in service delivery based on feedback. The solicitation of feedback will target areas such as: timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public.

The Agency will only submit a collection for approval under this generic clearance if it meets the following conditions:

- Information gathered will be used only internally for general service improvement and program management

purposes and is not intended for release outside of the agency (if released, procedures outlined in Question 16 will be followed);

• Information gathered will not be used for the purpose of substantially informing influential policy decisions;

• 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;

• 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; and

• With the exception of information needed to provide remunerations for participants of focus groups and cognitive laboratory studies, personally identifiable information (PII) is collected only to the extent necessary and is not retained.

As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

Below we provide projected average burden estimates for the next three years:

*Estimated Annual Number of Respondents:* 10,000.

*Responses per Respondent:* 1.

*Annual Responses:* 10,000.

*Average Minutes per Response:* 15 minutes.

*Annual Burden Hours:* 30,000 hours.

*Frequency:* On occasion.

Dated: October 26, 2023.

**Taniesha Tolbert,**

*Supervisory Records Information Management Specialist, Bureau for Management, Office of Management Services, Information and Records Division.*

[FR Doc. 2023–23986 Filed 10–30–23; 8:45 am]

**BILLING CODE 6116–01–P**

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

**[Doc. No. AMS–TM–23–0066]**

### Notice of Availability of the Programmatic Environmental Assessment for AMS Local Meat Capacity Grant Program

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Notice of availability; request for public comments.

**SUMMARY:** The Agricultural Marketing Service (AMS) announces that the Draft Programmatic Environmental Assessment (PEA) for the Local Meat Capacity Grant Program (Local MCap) is available for public review and comments.

**DATES:** Comments must be received on or before November 30, 2023 to be assured consideration.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this notice. Comments may be submitted electronically by Email: *LocalMCap@usda.gov.* Comments should reference the document number and the date and page number of this issue of the **Federal Register**. AMS will address comments received on the draft PEA in the final PEA.

**FOR FURTHER INFORMATION CONTACT:** Betsy Rakola, Associate Deputy Administrator, Transportation and Marketing Program; Telephone: (202)-690–1300; Email: *LocalMCap@usda.gov.*

**SUPPLEMENTARY INFORMATION:**

#### Background

The Draft PEA analyzes and discloses the potential environmental impacts associated with the establishment of the Local Meat Capacity Grant Program (Local MCap). AMS has proposed to fund grants to support independently owned meat and poultry processing businesses. These grants will help them provide additional and more efficient processing options for local livestock producers by modernizing, increasing, diversifying, and decentralizing meat and poultry processing capacity, including support for rendering.

This program will expand processing capacity for small and midsized meat and poultry processors, which are particularly vulnerable to disruption. It will also increase capacity and promote competition in the meat and poultry processing sector. Based on public input, USDA identified an urgent need to expand and diversify meat and poultry processing capacity.

The Local MCap Program is authorized by section 1001 (b)(4) of the American Rescue Plan Act (ARPA) (Pub. L. 117–2), which funds ''loans and grants and other assistance to maintain and improve food and agricultural supply chain resiliency.'' Recipients of funding from this proposed program would be allowed 36 months to complete work funded by the grant awards.

The environmental impacts of funding projects to enhance existing meat and poultry processing facilities have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA) of 1969, Public Law 91–190, 42 U.S.C. 4321–4347, as amended.

A Draft PEA has been prepared, and based on this analysis, AMS has preliminarily determined there will not be a significant impact to the human environment. As a result, an Environmental Impact Statement (EIS) has not been initiated (40 CFR 1501.6). AMS intends for this PEA to create efficiencies by establishing a framework that can be used for ''tiering,'' where appropriate, to project-specific actions that require additional analysis. As decisions on specific applications are made, to the extent additional NEPA analysis is required, environmental review will be conducted to supplement the analysis set forth in this PEA.

The Draft PEA is available for review online at the program website: *https://www.ams.usda.gov/services/grants/localmcap.*

#### Comments Invited

Interested stakeholders are invited to submit comments on the Draft PEA, as specified in the **ADDRESSES** section of this Notice. The most helpful comments reference a specific recommendation for changing AMS' proposed approach to assessing environmental impacts, explain the reason for any recommended change, and include supporting information. AMS will consider all comments received on or before the closing date.

**Melissa Bailey,**

*Associate Administrator, Agricultural Marketing Service.*

[FR Doc. 2023–23936 Filed 10–30–23; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

The Department of Agriculture will submit the following information collection requirement(s) to OMB for review and approval under the Paperwork Reduction Act of 1995,

Public Law 104–13 on or after the date of publication of this notice. Comments are requested regarding: (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (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, 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 30, 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.

**National Agricultural Statistics Service**

*Title:* Stocks Reports—Substantive Change.

*OMB Control Number:* 0535–0007.

*Summary of Collection:* General authority for these data collection activities is granted under U.S. Code Title 7, Section 2204 which specifies that ''The Secretary of Agriculture shall procure and preserve all information concerning agriculture which he can obtain . . . by the collection of statistics . . .''. The primary objective of the National Agricultural Statistics Service (NASS) is to provide data users with timely and reliable agricultural production and economic statistics, as well as environmental and specialty agricultural related statistics. To accomplish this objective, NASS relies on the use of diverse surveys that show changes within the farming industry over time.

The National Agricultural Statistics Service (NASS) is seeking approval to make a substantive change to the Off-farm Grain and Oilseeds Program by adding an Operation Profile survey. The Operation Profiles will have three main functions:

1. Inform the respondent about our data needs so they will have the details to provide storage capacity and the amount of grain stored according to NASS definitions.

2. Document items that the respondent cannot correctly report or estimate for each quarter.

3. Identify respondents who do not store any of the commodities of interest in their facilities.

The substantial change will add a contact to the entire sample over the course of three years (⅓ of the sample per year) and an average of 280 burden hours to the already approved annual total burden hours of 5,062.

*Need and Use of the Information:* The primary objective of the National Agricultural Statistics Service is to prepare and issue State and national estimates of crop and livestock production, stocks, disposition, and prices. The *Stocks Report* surveys, provide estimates of stocks of grains, hops, oilseeds, peanuts, potatoes, and rice that are stored off-farm. These off-farm stocks are combined with on-farm stocks to estimate stocks in all positions. The *Stocks Reports* are a principle economic indicator as defined by OMB. Stocks statistics are used by the U.S. Department of Agriculture to help administer programs; by State agencies to develop, research, and promote the marketing of products; and by producers and buyers to find their best market opportunity(s). The *Stocks Reports* are instrumental in providing timely, accurate data to help grain market participants. In order to maintain a complete and comprehensive list of operations, NASS needs to conduct an Operation Profile survey annually to add new operations to the survey population. This profile is also used to identify operations that do not meet the criteria to be included in the Off-farm Grain and Oilseeds Survey.

*Description of Respondents:* Farms and businesses.

*Number of Respondents:* 8,330.

*Frequency of Responses:* Reporting: Monthly; Quarterly; Annually.

*Total Burden Hours:* 5,342.

**Levi S. Harrell,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. 2023–23959 Filed 10–30–23; 8:45 am]

BILLING CODE 3410–20–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 30, 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:* Livestock, Poultry, and Grain Market News.

*OMB Control Number:* 0581–0033.

*Summary of Collection:* The Agricultural Marketing Act of 1946 (7 U.S.C. 1621–1627) (AMA), as amended, authorizes the Secretary of Agriculture ''to collect and disseminate marketing information, including adequate outlook information on a market-area basis, for the purpose of anticipating and meeting consumer requirements, aiding in the maintenance of farm income, and

bringing about a balance between production, and utilization of agricultural products.'' The collection of information in this request is based on the AMA, title II, subtitle A, § 203, principally, paragraphs (b), (g), and (k) that direct the Secretary of Agriculture to determine agricultural marketing costs and develop efficient marketing methods to reduce the price spread between producer and consumer; to collect and disseminate marketing information to bring about a balance between production and utilization of agricultural products; and to collect, tabulate, and disseminate agricultural marketing statistics.

Under this authority, the Agricultural Marketing Service (AMS) Livestock, Poultry, and Grain Market News (LPGMN) Division works to provide timely information of prices, supply, demands, trends, movement, and other details affecting the trade of livestock, poultry, meat, eggs, grain, and their related products, as well as locally produced and marketed products. The information requested is used to compile and disseminate market reports that provide current, unbiased information to all stakeholders in the U.S. agricultural industry.

*Need and Use of the Information:* Information is used by the private sector to make economic decisions to establish market values for application in contracts or settlement value, and to address specific concerns or issues related to trade agreements and disputes as well as being used by educational institutions, specifically, agricultural colleges and universities. Government agencies such as the Foreign Agricultural Service, Economic Research Service and the National Agricultural Statistics Service use market news data in the performance of their missions. LPGMN reports provide interested segments of the market chain and the general public with unbiased comprehensive livestock, poultry, meat, eggs, wool, grain market data which helps equalize the competitive position of all market participants. The absence of these data would deny primary and secondary users information that otherwise would be available to aid them in their production and marketing decisions, analyses, research and knowledge of current market conditions. The omission of these data could adversely affect prices, supply, and demand.

*Description of Respondents:* Business or other for-profit; Farms.

*Number of Respondents:* 3,220.

*Frequency of Responses:* Reporting: Weekly; Annually.

*Total Burden Hours:* 17,970.

**Levi S. Harrell,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. 2023–23952 Filed 10–30–23; 8:45 am]

**BILLING CODE 3410–02–P**

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by November 30, 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.

**Food and Nutrition Service**

*Title:* Understanding States' SNAP Customer Service Strategies (NEW).

*OMB Control Number:* 0584–NEW.

*Summary of Collection:* The Food and Nutrition Service (FNS) is interested in exploring how State agencies define and measure the quality of customer service for Supplemental Nutrition Assistance Program (SNAP) applicants and participants, particularly strategies that go beyond the minimum requirements set by FNS; and how State SNAP agencies implement and refine their customer service approaches. This study will conduct case studies in up to nine states to understand their approaches to defining, measuring, and improving customer service in SNAP.

*Need and Use of the Information:* (1) Review of existing studies, reports, and data on customer services strategies and approaches. (2) Case studies in up to nine states with diverse approaches to supporting and monitoring customer service in SNAP.

The research team will collect case study data during two-day in-person site visits to each selected State that will include interviews with State, regional (*e.g.,* call center), and local SNAP staff and key stakeholders, review of relevant documents and reports, and observations of staff interactions with customer service systems.

*Description of Respondents:* State, Local and Tribal Governments, Businesses.

*Number of Respondents:* 116.

*Frequency of Responses:* Reporting: Once.

*Total Burden Hours:* 144.

**Ruth Brown,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. 2023–23960 Filed 10–30–23; 8:45 am]

**BILLING CODE 3410–30–P**

## DEPARTMENT OF AGRICULTURE

### Farm Service Agency

**[Docket ID FSA–2023–0020]**

### Notice of Funds Availability; Emergency Relief Program 2022 (ERP 2022)

**AGENCY:** Farm Service Agency, USDA.

**ACTION:** Notice of funds availability.

**SUMMARY:** The Farm Service Agency (FSA) is issuing this notice announcing ERP 2022, which will provide payments to eligible crop producers for losses due to qualifying disaster events including wildfires, hurricanes, floods, derechos, excessive heat, tornadoes, winter storms, freeze (including a polar vortex), smoke exposure, excessive moisture, qualifying drought, and related conditions that occurred in calendar year 2022. ERP 2022 will be administered through 2 tracks (referred to as Track 1 and Track 2). Track 1 will

assist eligible crop producers who received indemnities for eligible crop or tree losses through certain Federal crop insurance policies or payments for crop losses through the Noninsured Crop Disaster Assistance Program (NAP). Track 2 will assist eligible crop producers for other eligible crop and tree losses through a revenue-based approach.

**DATES:**

*Funding availability:* Application period for Track 1 will begin October 31, 2023. Application period for Track 2 will begin October 31, 2023.

*Comments:* We will consider comments we receive by January 2, 2024.

**ADDRESSES:** You may submit comments by the following method: Federal eRulemaking Portal: Go to *https://www.regulations.gov* and search for Docket ID FSA–2023–0020. You may also send comments to the Desk Officer for Agriculture, Office of the Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503. Comments will be available for public inspection online at *https://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Kathy Sayers; telephone: (202) 720–6825; email: *kathy.sayers@usda.gov.* Individuals who require alternative means for communication should contact the USDA Target Center at (202) 720–2600 (voice and text telephone (TTY)) or dial 711 for Telecommunications Relay service (both voice and text telephone users can initiate this call from any telephone).

**SUPPLEMENTARY INFORMATION:**

## Background

Title I of the Disaster Relief Supplemental Appropriations Act, 2023 (Division N of the Consolidated Appropriations Act, 2023; Pub. L. 117–328) provides approximately $3.74 billion, to remain available until expended, for necessary expenses related to losses of revenue, quality, or production losses of crops (including milk, on-farm stored commodities, crops prevented from planting in 2022, and harvested adulterated wine grapes), trees, bushes, and vines, as a consequence of droughts, wildfires, hurricanes, floods, derechos, excessive heat, tornadoes, winter storms, freeze, including a polar vortex, smoke exposure, and excessive moisture occurring in calendar year 2022. Losses due to drought are only eligible for assistance if any area within the county in which the loss occurred was rated by the U.S. Drought Monitor as having a D2 (severe drought) for 8 consecutive weeks or a D3 (extreme drought) or higher level of drought intensity.

FSA is using the funding to assist eligible producers who suffered eligible losses through several programs.[1] In this document, FSA is announcing ERP 2022, which will assist eligible crop producers who suffered eligible losses due to qualifying disaster events as defined in this document. These producers have been significantly impacted by qualifying disaster events occurring in 2022, which have resulted in significant losses. FSA has designed ERP 2022 consistent with the public interest in streamlining and expediting disaster assistance payments to agricultural producers to the greatest extent possible. ERP 2022 will be administered through 2 tracks:

- Track 1 will use a streamlined process with pre-filled application forms, as discussed in this document. It will provide payments for eligible crop losses and tree losses, described below, where data are already on file with FSA or the Risk Management Agency (RMA), as a result of the producer previously receiving a NAP payment or an indemnity under certain Federal crop insurance policies for a loss in the same year that could have been affected by a qualifying disaster event; and
- Track 2 will provide payments for eligible crop and tree losses through a revenue-based approach using data provided by eligible producers on application forms.

Producers with losses that are eligible for Track 1 may apply for Track 1, Track 2, or both tracks; however, the Track 2 payment calculation will take into account any payments the producer receives under Track 1 to ensure a producer is not receiving duplicate benefits under both tracks.

Both tracks cover the same eligible crops, as defined below. For payment limitation purposes, ERP 2022 classifies eligible crops into the following categories:

- specialty crops;
- non-specialty crops;
- high value crops; and
- other crops.

The term ''non-specialty crop'' only applies to Track 1, the terms ''high value crop'' and ''other crop'' only apply to Track 2, and the term ''specialty crop'' applies to both tracks; those terms are defined in this document and discussed below in the payment limitation section.

[1] FSA previously announced Emergency Livestock Relief Program 2022 (ELRP 2022) on September 27, 2023 (88 FR 66361–66366) and the Milk Loss Program on September 11, 2023 (88 FR 62285–62292). ELRP 2022 and Milk Loss Program payments for 2022 losses have the same funding source as ERP 2022.

## Definitions

The definitions in 7 CFR parts 718 and 1400 apply to ERP 2022, except as otherwise provided in this document. The following definitions also apply.

*2017 WHIP* means the 2017 Wildfires and Hurricanes Indemnity Program (7 CFR part 760, subpart O).

*Administrative fee* means the amount an insured producer paid for catastrophic risk protection and any additional coverage for each crop year as specified in the applicable Federal crop insurance policy.

*Aquaculture* means any species of aquatic organisms grown as food for human or livestock consumption or for industrial or biomass uses, fish raised as feed for fish that are consumed by humans, and ornamental fish propagated and reared in an aquatic medium. Eligible aquacultural species must be raised by a commercial operator and in water in a controlled environment.

*ARC* means the Agriculture Risk Coverage program (7 CFR part 1412).

*Average adjusted gross farm income* means the average of the person or legal entity's adjusted gross income (AGI) derived from farming, ranching, and forestry operations, including losses, for the base period consisting of the 2018, 2019, and 2020 tax years.

If the resulting average adjusted gross farm income derived from items 1 through 12 of the definition of income derived from farming, ranching, and forestry operations is at least 66.66 percent of the average AGI of the person or legal entity, then the average adjusted gross farm income may also take into consideration income or benefits derived from the following:

(1) The sale of equipment to conduct farm, ranch, or forestry operations; and

(2) The provision of production inputs and production services to farmers, ranchers, foresters, and farm operations.

For legal entities not required to file a Federal income tax return, or a person or legal entity that did not have taxable income in one or more tax years during the base period, the average will be the adjusted gross farm income, including losses, averaged for the 2018, 2019, and 2020 tax years, as determined by FSA. A new legal entity will have its adjusted gross farm income averaged only for those years of the base period for which it was in business; however, a new legal entity will not be considered ''new'' to the extent it takes over an existing operation and has any elements of common ownership interest and land

with the preceding person or legal entity from which it took over. When there is such commonality, income of the previous person or legal entity will be averaged with that of the new legal entity for the base period. For a person filing a joint tax return, the certification of average adjusted farm income may be reported as if the person had filed a separate Federal tax return and the calculation is consistent with the information supporting the filed joint return.

*Average AGI* means the average of the AGI as defined under 26 U.S.C. 62 or comparable measure of the person or legal entity. The relevant tax years for the 2022 program year are 2018, 2019, and 2020.

*BCAP* means the Biomass Crop Assistance Program (7 CFR part 1450).

*Beginning farmer or rancher* means a farmer or rancher who has not operated a farm or ranch for more than 10 years and who materially and substantially participates in the operation. For a legal entity to be considered a beginning farmer or rancher, at least 50 percent of the interest must be beginning farmers or ranchers.

*Buy-up NAP coverage* means NAP coverage at a payment amount that is equal to an indemnity amount calculated for buy-up coverage computed under section 508(c)I or (h) of the Federal Crop Insurance Act and equal to the amount that the buy-up coverage yield for the crop exceeds the actual yield for the crop.

*Catastrophic coverage* has the same meaning as for NAP (in 7 CFR 1437.3), which is:

(1) For insured crops, the coverage offered by the Federal Crop Insurance Corporation (FCIC) under section 508(b) of the Federal Crop Insurance Act.

(2) For eligible NAP crops, coverage at the following levels due to an eligible cause of loss impacting the NAP covered crop during the coverage period:

(i) Prevented planting in excess of 35 percent of the intended acres;

(ii) A yield loss in excess of 50 percent of the approved yield;

(iii) A value loss in excess of 50 percent; or

(iv) An animal-unit-days (AUD) loss greater than 50 percent of expected AUD.

*CFAP* means the Coronavirus Food Assistance Program 1 and 2 under 7 CFR part 9, subparts A through C, excluding assistance for contract producers specified in § 9.203(l) through (o).

*Certifying agent* means a private or governmental entity accredited by the USDA Secretary for the purpose of certifying a production, processing, or handling operation as organic.

*Controlled environment* means an environment in which everything that can practicably be controlled by the producer with structures, facilities, and growing media (including but not limited to water, soil, or nutrients), is in fact controlled by the producer, as determined by industry standards.

*Coverage level* means the percentage determined by multiplying the elected yield percentage under a Federal crop insurance policy or NAP coverage by the elected price percentage.

*Crop year* means:

(1) For insured crops and trees, the crop year as defined according to the applicable Federal crop insurance policy; and

(2) For NAP-covered crops, the crop year as defined in 7 CFR 1437.3.

*Deputy Administrator* means the FSA Deputy Administrator for Farm Programs.

*Direct market crop* means a crop sold directly to consumers without the intervention of an intermediary such as a registered handler, wholesaler, retailer, packer, processor, shipper, or buyer (for example, a crop sold at a farmer's market or roadside stand), excluding crops sold for livestock consumption.

*Disaster year* means the calendar year in which the qualifying disaster event occurred (that is, 2022).

*ELAP* means the Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program (7 CFR part 1416, subpart B).

*Eligible crop* means a crop, including eligible aquaculture, that is produced, or would have been produced if the qualifying disaster event had not occurred (for example, crops prevented from planting), in the United States as part of a farming operation. It excludes:

(1) Crops for grazing;

(2) Aquatic species that do not meet the definition of aquaculture;

(3) *Cannabis sativa L.* and any part of that plant that does not meet the definition of hemp; and

(4) Timber.

*Farming operation* means a business enterprise engaged in the production of agricultural products, commodities, or livestock, operated by a person, legal entity, or joint operation. A person or legal entity may have more than one farming operation if the person or legal entity is a member of one or more legal entity or joint operation.

*FCIC* means the Federal Crop Insurance Corporation, a wholly owned Government Corporation of USDA, administered by RMA.

*Federal crop insurance* means an insurance policy reinsured by FCIC administered by RMA under the provisions of the Federal Crop Insurance Act (7 U.S.C. 1501–1524), as amended. It does not include private plans of insurance.

*Federal crop insurance indemnity* means the payment to a participant for crop losses covered under Federal crop insurance administered by RMA in accordance with the Federal Crop Insurance Act.

*Feedstock* means a crop including, but not limited to, grasses or legumes, algae, cotton, peanuts, coarse grains, small grains, oilseeds, or short rotation woody crops grown expressly for the purpose of producing a biobased material or product, and does not include residues and by-products of crops grown for any other purpose.

*Hemp* means the plant species *Cannabis sativa* L. and any part of that plant, including the seeds and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis, that is grown under a license or other required authorization issued by the applicable governing authority that permits the production of the hemp.

*High value crop* means, for Track 2:

(1) Any eligible crop that is not specifically identified as a specialty crop or listed in the definition of ''other crop''; and

(2) Any eligible crop, regardless of whether it is identified as a specialty crop or listed in the definition of ''other crop,'' if the crop is a direct market crop, organic crop, or a crop grown for a specific market in which specialized products can be sold resulting in an increased value compared to the typical market for the crops (for example, soybeans intended for tofu production), as determined by the Deputy Administrator.

**Note:** The term ''high value crop'' does not apply to Track 1.

*Income derived from farming, ranching, and forestry operations* means income of a person or legal entity derived from:

(1) Production of crops and unfinished raw forestry products;

(2) Production of livestock, aquaculture products used for food, honeybees, and products derived from livestock;

(3) Production of farm-based renewable energy;

(4) Selling (including the sale of easements and development rights) of farm, ranch, and forestry land, water or hunting rights, or environmental benefits;

(5) Rental or lease of land or equipment used for farming, ranching, or forestry operations, including water or hunting rights;

(6) Processing, packing, storing, and transportation of farm, ranch, or forestry commodities including for renewable energy;

(7) Feeding, rearing, or finishing of livestock;

(8) Payments of benefits, including benefits from risk management practices, Federal crop insurance indemnities, and catastrophic risk protection plans;

(9) Sale of land that has been used for agricultural purposes;

(10) Benefits (including, but not limited to, cost-share assistance and other payments) from any Federal program made available and applicable to payment eligibility and payment limitation rules, as provided in 7 CFR part 1400;

(11) Income reported on IRS Schedule F or other schedule used by the person or legal entity to report income from such operations to the IRS;

(12) Wages or dividends received from a closely held corporation, an Interest Charge Domestic International Sales Corporation (IC–DISC), or legal entity comprised entirely of family members when more than 50 percent of the legal entity's gross receipts for each tax year are derived from farming, ranching, and forestry activities as defined in this document; and

(13) Any other activity related to farming, ranching, or forestry, as determined by the Deputy Administrator.

*IRS* means the Department of the Treasury, Internal Revenue Service.

*LDP* means the Loan Deficiency Payment programs (7 CFR parts 1421, 1425, 1427, 1434, and 1435).

*Legal entity* means a corporation, joint stock company, association, limited partnership, limited liability company, irrevocable trust, estate, charitable organization, general partnership, joint venture, or other similar organization created under Federal or State law including any such organization participating in a business structure as a partner in a general partnership, a participant in a joint venture, a grantor of a revocable trust, or as a participant in a similar organization. A business operating as a sole proprietorship is considered a legal entity.

*Limited resource farmer or rancher* means a farmer or rancher who is both of the following:

(1) A person whose direct or indirect gross farm sales did not exceed $189,200 in each of the 2019 and 2020 calendar years (the relevant years for the 2022 program year); and

(2) A person whose total household income was at or below the national poverty level for a family of four in each of the 2019 and 2020 calendar years. Limited resource farmer or rancher status can be determined using a website available through the Limited Resource Farmer and Rancher Online Self Determination Tool through the Natural Resources Conservation Service at *https://lrftool.sc.egov.usda.gov.*

For an entity to be considered a limited resource farmer or rancher, all members who hold an ownership interest in the entity must meet the criteria in paragraphs (1) and (2) of this definition.

*LFP* means the Livestock Forage Disaster Program (7 CFR part 1416, subpart C).

*MLG* means marketing loan gains from the Marketing Assistance Loan program (7 CFR parts 1421, 1425, 1427, 1434, and 1435).

*Minor child* means a person who is under 18 years of age as of June 1, 2022.

*MFP* means the 2018 Market Facilitation Program (7 CFR part 1409, subpart A) and the 2019 Market Facilitation Program (7 CFR part 1409, subpart B).

*NAP* means the Noninsured Crop Disaster Assistance Program (7 CFR part 1437).

*NAP service fee* means the fee the producer paid to obtain NAP coverage specified in 7 CFR 1437.7.

*Non-specialty crop* means a crop, under Track 1, that does not meet the definition of specialty crop. Note: The term ''non-specialty crop'' does not apply to Track 2.

*On-Farm Storage Loss Program* means the On-Farm Storage Loss Program (7 CFR part 760, subpart P).

*Organic crop* means a crop that is grown on acreage certified by a certifying agent as conforming to organic standards (7 CFR part 205) and organically produced consistent with section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502).

*Other crop* means, for Track 2, cotton, peanuts, rice, feedstock, and any crop grown with an intended use of grain, silage, or forage, unless the crop meets the requirements in paragraph (2) of the definition of ''high value crop.'' Note: The term ''other crop'' does not apply to Track 1.

*Ownership interest* means to have either a legal ownership interest or a beneficial ownership interest in a legal entity. For the purposes of administering ERP 2022, a person or legal entity that owns a share or stock in a legal entity that is a corporation, limited liability company, limited partnership, or similar type entity where members hold a legal ownership interest and shares in the profits or losses of such entity is considered to have an ownership interest in such legal entity. A person or legal entity that is a beneficiary of a trust or heir of an estate who benefits from the profits or losses of such entity is also considered to have a beneficial ownership interest in such legal entity.

*Person* means an individual who is a natural person and does not include a legal entity.

*PLC* means the Price Loss Coverage program (7 CFR part 1412).

*Premium* means the premium paid by the producer for Federal crop insurance coverage or NAP buy-up coverage levels.

*Producer* means a person or legal entity who was entitled to a share in the eligible crop or would have shared had the eligible crop been produced.

*Production inputs* mean material to conduct farming operations, such as seeds, chemicals, and fencing supplies.

*Production services* mean services provided to support a farming operation, such as custom farming, custom feeding, and custom fencing.

*Qualifying disaster event* means wildfires, hurricanes, floods, derechos, excessive heat, tornadoes, winter storms, freeze (including a polar vortex), smoke exposure, excessive moisture, qualifying drought, and related conditions occurring in 2022.

*Qualifying drought* means an area within the county was rated by the U.S. Drought Monitor as having a drought intensity of D2 (severe drought) for 8 consecutive weeks or D3 (extreme drought) or higher level for any period of time during the applicable calendar year.

*QLA Program* means the Quality Loss Adjustment Program (7 CFR part 760, subpart R).

*Related condition* means damaging weather and adverse natural occurrences that occurred concurrently with and as a direct result of a specified qualifying disaster event. Related conditions include, but are not limited to:

(1) Excessive wind that occurred as a direct result of a derecho;

(2) Silt and debris that occurred as a direct and proximate result of flooding;

(3) Excessive wind, storm surges, tropical storms, and tropical depressions that occurred as a direct result of a hurricane; and

(4) Excessive wind and blizzards that occurred as a direct result of a winter storm.

*Socially disadvantaged farmer or rancher* means a farmer or rancher who is a member of a group whose members have been subjected to racial, ethnic, or gender prejudice because of their identity as members of a group without regard to their individual qualities. For entities, at least 50 percent of the ownership interest must be held by individuals who are members of such a group. Socially disadvantaged groups include the following and no others unless approved in writing by the Deputy Administrator:

(1) American Indians or Alaskan Natives;

(2) Asians or Asian-Americans;

(3) Blacks or African Americans;

(4) Hispanics or Hispanic Americans;

(5) Native Hawaiians or other Pacific Islanders; and

(6) Women.

*Specialty crops* means fruits, tree nuts, vegetables, culinary herbs and spices, medicinal plants, and nursery, floriculture, and horticulture crops. This includes common specialty crops identified by USDA's Agricultural Marketing Service at *https://www.ams.usda.gov/services/grants/scbgp/specialty-crop* and other crops as designated by the Deputy Administrator. This term also includes trees covered by Federal crop insurance policies included in Track 1.

*STRP* means the Seafood Trade Relief Program (announced in the notice of funds availability published on September 14, 2020 (85 FR 56572)).

*Substantial beneficial interest (SBI)* has the same meaning as specified in 7 CFR 457.8. For the purposes of ERP 2022 Track 1, Federal crop insurance records for ''transfer of coverage, right to indemnity'' are considered the same as SBIs.

*Tree* means a tall, woody plant having comparatively great height, and a single trunk from which an annual crop is produced for commercial market for human consumption, such as a maple tree for syrup, or papaya or orchard tree for fruit. It includes immature trees that are intended for commercial purposes. Nursery stock, banana and plantain plants, and trees used for pulp or timber are not considered eligible trees.

*Underserved farmer or rancher* means a beginning farmer or rancher, limited resource farmer or rancher, socially disadvantaged farmer or rancher, or veteran farmer or rancher.

*Unit* means the unit structure as defined under the applicable Federal crop insurance policy for insured crops or in 7 CFR 1437.9 for NAP-covered crops.

*United States* means all 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

*USDA* means the U.S. Department of Agriculture.

*U.S. Drought Monitor* means the system for classifying drought severity according to a range of abnormally dry to exceptional drought. It is a collaborative effort between Federal and academic partners, produced on a weekly basis, to synthesize multiple indices, outlooks, and drought impacts on a map and in narrative form. This synthesis of indices is reported by the National Drought Mitigation Center at *http://droughtmonitor.unl.edu.*

*Veteran farmer or rancher* means a farmer or rancher who has served in the Armed Forces (as defined in 38 U.S.C. 101(10)) [2] and:

(1) Has not operated a farm or ranch for more than 10 years; or

(2) Has obtained status as a veteran (as defined in 38 U.S.C. 101(2)) [3] during the most recent 10-year period.

For an entity to be considered a veteran farmer or rancher, at least 50 percent of the ownership interest must be held by members who have served in the Armed Forces and meet the criteria in paragraph (1) or (2) of this definition.

*WFRP* means Whole-Farm Revenue Protection available through the FCIC, including coverage under the Micro Farm Program.

*WHIP+* means the Wildfires and Hurricanes Indemnity Program Plus (7 CFR part 760, subpart O).

**Producer Eligibility**

To be eligible for ERP 2022, a producer must meet all requirements described below for Track 1 or Track 2, as applicable, and be a:

(1) Citizen of the United States;

(2) Resident alien, which for purposes of ERP 2022 means ''lawful alien'' as defined in 7 CFR part 1400;

(3) Partnership organized under State law;

(4) Corporation, limited liability company, or other organizational structure organized under State law;

(5) Indian Tribe or Tribal organization, as defined in section 4(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304); or

(6) Foreign person or foreign entity who meets all requirements as described in 7 CFR part 1400.

[2] The term ''Armed Forces'' means the United States Army, Navy, Marine Corps, Air Force, Space Force, and Coast Guard, including the reserve components.

[3] The term ''veteran'' means a person who served in the active military, naval, air, or space service, and who was discharged or released under conditions other than dishonorable.

**Track 1 Overview**

Track 1 will provide a streamlined application process for eligible crop and tree losses during the 2022 or 2023 crop years [4] for which a producer had:

- A Federal crop insurance policy that provided coverage for crop production losses or tree losses related to the qualifying disaster events and received an indemnity [5] for a crop and unit, excluding:

—crops with an intended use of grazing,[6]

—livestock policies,

—forage seeding,

—Margin Protection Plan policies purchased without a base policy,[7]

—banana plants insured under the Hawaii Tropical Trees provisions,[8] and

—policies issued in Puerto Rico; [9] or

- NAP coverage and received a NAP payment for a crop and unit, excluding crops with an intended use of grazing.

The applicable Federal crop insurance policies and NAP provide payments to producers for crop and tree losses due to eligible causes of loss, as defined in the producer's Federal crop insurance policy or NAP regulations and basic provisions. RMA and FSA are using data submitted by producers for Federal crop insurance or NAP purposes to calculate a producer's eligible loss under Track 1. The Track 1 payment calculation is intended to compensate eligible crop and tree producers for a percentage of that loss determined by the applicable ERP factor, which varies based on the producer's level of Federal crop insurance or NAP coverage, as described later in this document. To be eligible for payment under Track 1, a producer must have suffered a crop or tree loss that was caused, in whole or in part, by a qualifying disaster event. Because the amount of loss due to a

[4] The 2023 crop year is included because a qualifying disaster event occurring in the 2022 calendar year may have caused a loss of a crop during the 2023 crop year, based on how ''crop year'' is defined in the applicable Federal crop insurance policy or NAP provisions.

[5] For purposes of Track 1, ''indemnity'' does not include cottonseed endorsement payments, downed rice endorsement payments, sugarcane crop replacement endorsement payments, replant payments, or raisin reconditioning payments.

[6] Crops with an intended use of grazing are covered under ELRP 2022.

[7] While the majority of crop insurance policies cover an eligible crop loss, a small number do not and are not eligible for ERP, including livestock policies, forage seeding, and margin policies.

[8] While bananas are covered under crops, the banana plants are not a tree, bush or a vine.

[9] Federal crop insurance policies issued in Puerto Rico are not transmitted through the standardized Policy Acceptance and Storage System. Therefore, pre-filled applications cannot be automatically generated under Track 1.

qualifying disaster event cannot be separated from the amount of loss caused by other causes of loss covered by some Federal crop insurance policies or NAP, the Track 1 payment will be based on the producer's loss as long as those losses were caused, in whole or in part, by a qualifying disaster event.

Track 1 excludes losses to aquacultural species for which the producer received a payment under ELAP to avoid providing duplicate benefits for losses already at least partially compensated for by ELAP. It also excludes losses for which the producer received a Phase 1 payment under the previous ERP.[10]

In some situations, a producer may have received both a NAP payment for a crop loss and an indemnity under a Federal crop insurance policy that is included in Track 1 to address the same loss. Examples of these policies include Rainfall Index plans for Annual Forage; Pasture, Rangeland, and Forage; and Apiculture. In those situations, the producer must elect whether to receive the Track 1 payment based only on the data associated with their Federal crop insurance indemnity or their NAP payment, but they cannot receive a Track 1 payment based on both the crop insurance indemnity and NAP payment. This policy is necessary to avoid compensating producers twice for the same loss under Track 1.

**Track 1 Applications**

FSA and RMA will identify the producers who meet the criteria described above to apply for Track 1. For each of those producers, FSA will generate an FSA–523, Emergency Relief Program (ERP) 2022 Track 1 Application, with certain items pre-filled with information already on file with USDA, as listed below. Producers cannot alter the data in these pre-filled items; any alterations in the pre-filled data on the application will result in the producer's Track 1 application being considered incomplete and the application will not be processed by FSA. FSA will not calculate Track 1 payments using data manually submitted by producers. Track 1 payments will only be calculated using data already on file with RMA and FSA. If a producer believes that any information that has been pre-filled is incorrect, the producer should contact their Federal crop insurance agent for insured crops or their FSA county office for NAP-covered crops. Once the corrected data have been received and processed by RMA and FSA, an updated Track 1 application may be generated for the producer.

For producers who received a Federal crop insurance indemnity for eligible policies, the pre-filled application will include:

- the producer's physical State and county codes,
- unit numbers,
- crops, and
- crop years.

For producers who received a NAP payment, the pre-filled applications will include:

- the producer's administrative State and county codes,
- unit numbers,
- crop years,
- pay crops, and
- pay groups.

FSA will also pre-fill the calculated Track 1 payment amounts, prior to any payment reductions for reasons such as payment limitation and factoring of payments to stay within available funding.

Receipt of a pre-filled application form is not a confirmation that the producer is eligible to receive a Track 1 payment. In order to receive a payment, the producer must certify that their Federal crop insurance indemnity or NAP payment on which the Track 1 payment will be based was due, in whole or in part, to a crop production loss or a tree loss caused by a qualifying disaster event. Producers are responsible for reviewing the list of qualifying disaster events, and if a loss was due to drought, producers must also ensure that the county where the crop and unit was located meets the definition of ''qualifying drought.'' FSA will provide a factsheet and other materials to provide examples and more details on the qualifying disaster events to assist producers (available through FSA county offices and at *https://www.fsa.usda.gov/programs-and-services/emergency-relief/index*). Producers who received a Federal crop insurance indemnity under a WFRP policy or for a whole-farm unit must also certify to the percentage of their expected revenue or total liability for the unit, respectively, from specialty crops for the purpose of administration of ERP 2022 payment limitations.[11]

Producers must also certify on FSA–523 that they will meet the requirement to purchase Federal crop insurance or NAP coverage for the next 2 available crop years, as described later in this document. If multiple crops and units are listed on an application and the producer only agrees to purchase Federal crop insurance or NAP coverage for only some of the crops and units, a Track 1 payment will be issued only for those crops and units for which the producer agrees to purchase Federal crop insurance or NAP coverage for the next 2 available crop years.

The portion of the form for producers who had Federal crop insurance will list the primary policy holder and all producers with an SBI who have a record established with FSA. If one or more producers with an SBI had a share in a crop, the primary policy holder must update the application to show the share in the crop for each of those producers in addition to the primary policy holder. If the producer(s) are determined to be eligible, payments will be issued to the primary policy holder and to any eligible producers with an SBI based on their ownership share of the crop. To receive a payment, each person or entity that is listed as having a share of the Track 1 payment for a crop and unit must sign the application and agree to purchase Federal crop insurance or NAP coverage for that crop and unit.

**Track 1 Payment Calculation**

FSA and RMA will calculate Track 1 payments using the loss data on file with FSA or RMA at the time of payment calculation or as later updated by FSA or RMA upon identification of an error in the data on file at time of payment calculation.[12] The Track 1 payment calculation for a crop and unit will depend on the type and level of Federal crop insurance or NAP coverage obtained by the producer. Crops covered under a WFRP policy or included in a whole-farm unit will be treated as a single crop for payment calculation purposes. Separate payment limitations will apply to the portions of the payments that are attributed to specialty and to non-specialty crops, as described later in this document.

Each payment calculation will use an ERP factor based on the producer's level of Federal crop insurance or NAP coverage for that eligible crop or tree, as specified in the following tables.

[10] The previous ERP provided assistance for eligible crop losses due to qualifying disaster events in calendar years 2020 and 2021. Phase 1 of that program included 2022 crop year losses if the loss was due, in whole or in part, to a qualifying disaster event that occurred in the 2021 calendar year.

[11] WFRP provides risk management safety for specialty and non-specialty crops under one Federal crop insurance policy. The producer certifies to the percentage of expected revenue or total liability for the unit for specialty crops, which results in the attribution of the specialty and non-specialty crop portions of the ERP 2022 payment to the separate payment limitations.

[12] Track 1 payments will be calculated using only data on file with RMA and FSA. FSA will not calculate Track 1 payments using data manually submitted by producers.

| Federal crop insurance coverage level | ERP factor (%) |
|---|---|
| Catastrophic coverage | 75.0 |
| More than catastrophic coverage but less than 55 percent | 80.0 |
| At least 55 percent but less than 60 percent | 82.5 |
| At least 60 percent but less than 65 percent | 85.0 |
| At least 65 percent but less than 70 percent | 87.5 |
| At least 70 percent but less than 75 percent | 90.0 |
| At least 75 percent but less than 80 percent | 92.5 |
| At least 80 percent | 95.0 |

| NAP coverage level | ERP factor (%) |
|---|---|
| Catastrophic coverage | 75.0 |
| 50 percent | 80.0 |
| 55 percent | 85.0 |
| 60 percent | 90.0 |
| 65 percent | 95.0 |

When determining the ERP factors, analysis was conducted to ensure that payments do not exceed available funding and, in aggregate across all eligible crop and tree producers, do not exceed 90 percent of losses, as required by Title I of the Disaster Relief Supplemental Appropriations Act, 2023. The difference between the ERP factors for Federal crop insurance and NAP is due to differences in the available coverage levels under Federal crop insurance and NAP. Federal crop insurance is available at the catastrophic coverage level (50 percent production coverage of 55 percent of the price) and buy-up coverage levels (50 percent to 85 percent of the production for 100 percent of the price). The coverage level for NAP is limited by law to a maximum of 65 percent buy-up coverage. For both NAP and Federal crop insurance, the ERP payment factor for the catastrophic and maximum buy-up levels are 75 percent and 95 percent, respectively, with the ERP factors stair-stepping for the buy-up options in-between as shown in the tables above. Title I of the Disaster Relief Supplemental Appropriations Act, 2023, provides that payments to eligible crop and tree producers who did not have Federal crop insurance or NAP coverage cannot exceed 70 percent of their loss. The lowest ERP factor for eligible crop and tree producers who had Federal crop insurance or NAP is set at 75 percent. Payment limits and other reductions will result in reducing ERP 2022 payments, further lowering the percent of losses covered.

For eligible crop producers who received Federal crop insurance indemnities, RMA will use the producer's data that are already on file, which provide the necessary information to determine the producer's amount of loss. Federal crop insurance provides financial assistance for crop losses due to specified natural disasters and uses a producer's data to calculate a payment based on the type of Federal crop insurance coverage elected by the producer. As previously discussed, Track 1 is intended to compensate eligible crop and tree producers for a percentage of their loss determined by the applicable ERP factor based on the level of Federal crop insurance coverage purchased; therefore, RMA will calculate each producer's loss consistent with the approved RMA loss procedures for the type of coverage purchased [13] but using the ERP factor. This calculated amount will then be adjusted by subtracting the gross Federal crop insurance indemnity.

After calculating the producer's loss and subtracting the gross Federal crop insurance indemnity as described above for each crop and unit, progressive factoring [14] will be applied. Progressive factoring will be applied by payment range, according to the table below, and FSA will calculate the sum of each of those calculations.

| Payment range | Progressive factor (%) |
|---|---|
| Up to $2,000 | 100 |
| $2,001 to $4,000 | 80 |
| $4,001 to $6,000 | 60 |
| $6,001 to $8,000 | 40 |
| $8,001 to $10,000 | 20 |
| Over $10,000 | 10 |

For example, to apply progressive factoring to a calculated loss (after subtraction of indemnities) of $5,000, FSA would multiply:

- the first $2,000 by a factor of 100 percent ($2,000 × 100% = $2,000),
- the second $2,000 by a factor of 80 percent ($2,000 × 80% = $1,600), and
- the remaining $1,000 by a factor of 60 percent ($1,000 × 60% = $600).

The sum of those calculations is $4,200, which is the calculated ERP 2022 payment after progressive factoring.

For another example, to apply progressive factoring to a calculated loss (after subtraction of indemnities) of $430,000, FSA would multiply:

- the first $2,000 by a factor of 100 percent ($2,000 × 100% = $2,000),
- the second $2,000 by a factor of 80 percent ($2,000 × 80% = $1,600),
- the third $2,000 by a factor of 60 percent ($2,000 × 60% = $1,200),
- the fourth $2,000 by a factor of 40 percent ($2,000 × 40% = $800),
- the fifth $2,000 by a factor of 20% ($2,000 × 20% = $400), and
- the remaining $420,000 by a factor of 10 percent ($420,000 × 10% = $42,000).

The sum of those calculations is $48,000, which is the calculated ERP 2022 payment after progressive factoring.

For underserved producers, the producer's share of the Federal crop insurance administrative fee and premium will be added to the resulting sum.[15]

For all eligible crop producers, FSA will then apply a final payment factor of 75 percent, resulting in the producer's calculated Track 1 payment.

For NAP-covered crops and trees, FSA will use the producer's crop production or inventory data that are already on file, which provides the necessary information to determine the producer's amount of loss. NAP provides financial assistance for crop losses due to specified natural disasters and uses a producer's crop production or inventory data to calculate a payment based on the level of NAP coverage elected by the producer. As previously discussed, ERP 2022 is intended to compensate eligible crop and tree producers for a percentage of loss determined by the applicable ERP factor based on their NAP coverage level;

[13] For example, ERP 2022 for Area Risk Protection Insurance (ARPI) and Stacked Income Protection (STAX) is based on area-wide (for example, county) production losses.

[14] Progressive factoring is a mechanism that ensures the limited available funding is distributed in a manner benefitting the majority of producers rather than a few. Additionally, progressive factoring increases emergency relief payments to most participants while reducing larger potential payments which increases the proportion of funding provided to smaller producers.

[15] Providing a refund of underserved producers' premiums and fees supports the equitable administration of FSA programs by targeting limited resources to support underserved farmers and ranchers, who are more likely to lack financial reserves and access to capital to invest in future risk protection while coping with losses due to unexpected events outside of their control. The refund of premiums and fees for these more-often vulnerable and smaller operations who often lack financial resources supports access to higher levels of coverage available through Federal crop insurance or NAP. This approach is consistent with the intent to provide reduced service fees and premium reductions to underserved farmers and ranchers for other FSA programs as authorized by law. NAP provides a reduced service fee and premium for underserved farmers and ranchers (7 U.S.C. 7333(k)(2) and 7 U.S.C. 7333(l)(3)). In addition, Federal crop insurance provides an administrative fee waiver for limited resource farmers, beginning farmers or ranchers, and veteran farmers or ranchers; and offers a premium reduction for beginning farmers or ranchers and veteran farmers or ranchers (7 U.S.C. 1508(b)(5)(E)(i) and 7 U.S.C. 1508(e)(8)).

therefore, FSA will perform a calculation that is consistent with the NAP payment calculation for the pay crop and unit, as provided in 7 CFR part 1437, but using the ERP factor in the table above applicable to the producer's NAP coverage level as the applicable guarantee in those calculations. For example, the guarantee for a producer that had purchased 60 percent NAP coverage would be adjusted and recalculated based on a 90 percent ERP factor. The calculated amount using the ERP factor would then be adjusted by subtracting the producer's gross NAP payment.[16] For underserved producers, the producer's share of the NAP service fees and premium will be added to the result of that calculation.[17]

The calculated amount for NAP-covered crops will not be subject to the progressive factoring[18] that applies to ERP 2022 payments based on Federal crop insurance indemnities; however, it will be multiplied by a final payment factor of 75 percent to ensure that total payments do not exceed the available funding.

FSA will issue Track 1 payments as applications are processed and approved. All ERP 2022 payments are subject to the availability of funding. If additional funding is available after all eligible ERP 2022 applications have been processed and payments have been issued, FSA may issue an additional payment, not to exceed the maximum amount allowed by law.

**Track 2 Overview**

Track 2 will provide assistance for eligible revenue, production, and quality losses of eligible crops not included in Track 1. FSA has determined that the best estimation of such losses is a producer's decrease in disaster year revenue compared to a benchmark year revenue, where benchmark year revenue represents a producer's revenue prior to the impact of the qualifying disaster event. This difference in revenue will reflect losses in both production and quality due in whole or in part to qualifying disaster events without requiring the more extensive calculations and documentation required under some previous FSA programs addressing crop losses due to disaster events. Decreases in disaster year revenue compared to benchmark revenue also reflect a producer's loss due to a qualifying disaster event regardless of whether the loss occurs before harvest or after harvest while the crop is in storage, further streamlining the delivery of assistance.

To be eligible for Track 2, a producer must certify that they suffered a loss in disaster year revenue, as compared to a benchmark year revenue, that was due to necessary expenses associated with losses of eligible crops due in whole or in part to a qualifying disaster event that occurred in the 2022 calendar year. Track 2 provides 2 options for determining the benchmark and disaster year revenues:

- The tax year option, which allows producers to use certain information located in their tax records to apply for Track 2;[19] or
- The expected revenue option, which is intended to better address situations such as a change in operation capacity[20] in the disaster year, as compared to the 2018 or 2019 benchmark year; the 2018 and 2019 tax years not reasonably reflecting a normal year's revenue for reasons including losses due to disaster events in 2018 and 2019 or changes in crop prices; or production of crops that do not generate revenue for the producer directly from the sale of the crop (for example, forage fed to livestock or grapes used by the producer to make wine).

The following table summarizes benchmark and disaster year revenue for the 2 options. Sources of revenue to be included in allowable gross revenue, expected revenue, and actual revenue are explained below in greater detail.

| Option | Benchmark year revenue | Disaster year revenue |
|---|---|---|
| Tax Year | A producer's allowable gross revenue for the 2018 or 2019 tax year, as elected by the producer. | A producer's allowable gross revenue for the 2022 or 2023 tax year, as elected by the producer. |
| Expected Revenue | A producer's expected revenue from all eligible crops that could have been affected by a qualifying disaster event in calendar year 2022. | A producer's actual revenue from all eligible crops that were included in the producer's expected revenue. |

Although most producers may choose between the 2 options when applying for Track 2, there are two situations that require a producer to use a specific option:

- *Situation 1:* Producers who received a payment under the previous ERP for the 2021 disaster year and elected the 2022 tax year for their representative disaster year for Phase 2 can only apply for Track 2 using the tax year option, and they must select 2023 as their representative disaster year to ensure that they are not paid for the same loss under both programs, as those producers had previously certified that 2022 losses were the result of 2021 disaster events.[21]
- *Situation 2:* Producers, except those described in Situation 1, must use the expected revenue option if they had a decrease in operating capacity during their disaster year, as compared to the 2018 or 2019 benchmark year, were a new producer with no benchmark year revenue in 2018 or 2019, or produced any crop or crops that did not generate revenue directly from the sale of the crop and that the producer uses within their ordinary operation.

Producers who had an increase in operation capacity may elect either the tax year option or the expected revenue option; however, they may not adjust benchmark year revenue under the tax year option to reflect the change, which

[16] The gross NAP payment is the amount calculated according to 7 CFR part 1437, prior to any payment reductions for reasons including, but not limited to, sequestration, payment limitation, and average AGI limitations.

[17] See footnote 15. NAP service fees are waived for producers with a CCC–860 certification of underserved status on file; however, if an underserved producer did not previously file CCC–860 to receive a service fee waiver, but files one now, their service fee will be added in the Track 1 payment calculation.

[18] Progressive factoring will not apply to ERP Track 1 payments calculated based on NAP payments as they traditionally support smaller producers and non-traditional crops. Non-traditional crops are not typically covered by Federal crop insurance products so the higher levels of coverage and risk protection under Federal crop insurance are not available to offset losses for producers of those crops in times of disaster.

[19] The tax year option is similar to the approach used in Phase 2 of the previous ERP, which provided assistance for crop losses due to disaster events in 2020 and 2021.

[20] Change in operation capacity does not include crop rotation from year to year, changes in farming practices such as converting from conventional tillage to no-till, or changing the amount of fertilizers or chemicals used.

[21] Producers applying for Phase 2 of the previous ERP for losses due to qualifying disaster events in the 2021 calendar year selected either the 2021 or 2022 tax year as the applicable disaster year. Producers who selected the 2022 tax year have already been compensated for their 2022 tax year losses, but may select the 2023 tax year for the disaster year for Track 2.

is likely to result in a lower Track 2 payment because the 2018 or 2019 tax year would not accurately reflect their expected revenue at their 2022 operating capacity.

Producers must use the same option to calculate both the benchmark year revenue and disaster year revenue. For example, a producer who uses the expected revenue option for the benchmark year must also use the actual revenue option for the disaster year; they cannot use 2022 or 2023 tax year revenue for the disaster year.

**Track 2 Tax Year Option**

Producers who use the tax year option for Track 2 will select 2018 or 2019 for their benchmark year revenue and 2022 or 2023 as their representative year for the disaster year revenue and will certify to their allowable gross revenue for those years. Allowable gross revenue is based on the year for which the revenue would be reported for the purpose of filing a tax return, except for the ERP 2022 Track 1 payments specified below. Producers who file or would be eligible to file a joint tax return will certify their allowable gross revenue based on what it would have been had they filed taxes separately for the applicable year.

Allowable gross revenue includes revenue from:

(1) Sales of eligible crops produced by the producer, which includes sales resulting from value added through post-production activities (for example, sales of jam from the processing of strawberries) that were reportable on IRS Schedule F;

(2) Sales of eligible crops a producer purchased for resale that had a change in characteristic due to the time held (for example, a plant purchased at a size of 2 inches and sold as an 18-inch plant after 4 months), less the cost or other basis of such eligible crops;

(3) Cooperative distributions directly related to the sale of the eligible crops produced by the producer, such as patronage paid to producers for gross grain sales;

(4) Benefits for eligible crops under the following agricultural programs: 2017 WHIP, ARC and PLC, BCAP, CFAP, ELAP (for aquaculture crops), ERP Phases 1 and 2, LDP, MLG, MFP, the On-Farm Storage Loss Program, Pandemic Assistance Revenue Program, QLA Program, STRP, and WHIP+;

(5) Commodity Credit Corporation loans for eligible crops, if treated as income and reported to the IRS;

(6) Federal crop insurance proceeds for eligible crops, minus the amount of administrative fees and premiums;

(7) NAP payments for eligible crops, minus the amount of service fees and premiums;

(8) Proceeds for eligible crops under private insurance policies;

(9) Payments issued through grant agreements with FSA for losses of eligible crops;

(10) Grants from the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA) and State program funds providing direct payments for the loss of eligible crops or the loss of revenue from eligible crops;

(11) Other revenue directly related to the production of eligible crops that the IRS requires the producer to report as income, such as commodity-specific income received from State or local governments and net gain from hedging; and

(12) For the disaster year only, ERP 2022 Track 1 payments issued to another person or entity for the producer's share of an eligible crop, regardless of the tax year in which the payment would be reported to the IRS.[22]

Allowable gross revenue does not include revenue from sources other than those listed above, including but not limited to, revenue from:

(1) Federal assistance programs not included above;

(2) Sales of livestock, animal by-products, and any commodities that are excluded from ''eligible crops;''

(3) Resale items not held for characteristic change;

(4) Income from a pass-through entity such as an S Corp or limited liability company;

(5) Conservation program payments;

(6) Any pandemic assistance payments that were not for the loss of eligible crops or the loss of revenue from eligible crops including, but not limited to, the Pandemic Livestock Indemnity Program, Pandemic Assistance for Timber Harvesters and Haulers, and Spot Market Hog Pandemic Program;

(7) Custom hire income;

(8) Net gain from speculation;

(9) Wages, salaries, tips, and cash rent;

(10) Rental of equipment or supplies; and

(11) Acting as a contract producer of an agricultural commodity.

[22] Track 1 allows producers who received pre-filled application forms to indicate shares in the crop. In some cases, payment for a producer's share of a crop may have been issued to a different person or entity than the producer applying for a related revenue loss under Track 2. Applications for Track 2 must include any Track 1 payments issued to another person or entity for the producer's share of an eligible crop in order to prevent duplicate benefits being issued for the same loss.

Form FSA–524–A, Emergency Relief Program (ERP) 2022 Track 2 Tax Year Revenue Worksheet, is an optional form that producers may use to assist in determining their allowable gross revenue. It is available at *https://www.fsa.usda.gov/programs-and-services/emergency-relief/index.*

**Track 2 Tax Year Option Special Provisions for Certain Producers**

As stated above, producers who received a payment under the previous ERP for the 2021 program year and elected the 2022 tax year for their representative disaster year revenue are required to use the tax year option for Track 2, and they must use the 2023 tax year for disaster year revenue.

Those producers must certify to an allowable gross revenue for the benchmark year that they adjusted if the producer had a decreased operation capacity in a disaster year for which they are applying for ERP Track 2, compared to the benchmark year. Those producers may certify to an allowable gross revenue that they adjusted for the benchmark year on FSA–524 if either of the following apply:

(1) The producer did not have a full year of revenue for 2018 or 2019; or

(2) The producer had expanded their operation capacity in the disaster year compared to the benchmark year.

Change in operation capacity does not include crop rotation from year to year, changes in farming practices such as converting from conventional tillage to no-till, or increasing the rate of fertilizers or chemicals.

If requested by FSA, producers are required to submit documentation to FSA to support their adjustments within 30 calendar days of the request. The documentation to support an adjustment due to a change in operation capacity must show that the adjustment to the producer's benchmark year revenue is due to:

(1) An addition or decrease in production capacity of the farming operation;

(2) An increase or decrease in the use of existing production capacity; or

(3) Physical alterations that were made to existing production capacity.

If a producer did not have allowable gross revenue in a benchmark year because they began farming in 2020 or later, the producer may adjust benchmark year revenue on FSA–524 that represents the producer's reasonably expected disaster year revenue prior to the impact of the qualifying disaster event.

If requested by FSA, documentation required to support a producer's certification must be provided within 30

calendar days of FSA's request, or the producer will be considered ineligible for ERP Track 2. Acceptable documentation must be generated in the ordinary course of business and dated prior to the impact of the qualifying disaster event and includes, but is not limited to:

(1) Financial documents such as a business plan or cash flow statement that demonstrate an expected level of revenue;

(2) Sales contracts or purchase agreements; and

(3) Documentation supporting production capacity, use of existing production capacity, or physical alterations that demonstrate production capacity.

Producers who received a payment under the previous ERP for the 2021 program year and elected the 2022 tax year for their representative disaster year must also include in the allowable gross revenue a value for certain crops, when and as determined by the Deputy Administrator, that they produced that did not generate revenue directly from the sale of the crop and that the producer uses within their ordinary operation. This would include, for example, wine makers who grow their own wine grapes and process those grapes into wine and producers of forage crops who store the crop to feed to livestock on their farm. These producers would not have revenue from the sale of the portion of their crop used for these purposes. The determination that producers may include a crop's value is at the Deputy Administrator's discretion. Wine grapes used to process grapes into wine, forage crops that are stored and fed to livestock, and certain other crops, as listed on the FSA website at *https://www.fsa.usda.gov/programs-and-services/emergency-relief/index,* have been determined by the Deputy administrator to qualify for including the crop's value.

The value of the eligible crop reported in the producer's allowable gross revenue will be based on the producer's actual production of the crop and a price for the crop based on the best available data for each crop, such as published price data for the crop [23] or the average price obtained by other producers in the area, as determined by the Deputy Administrator and published through guidance on FSA's website. This provision is intended to address a gap in how crop losses in these situations may be accounted for in a producer's payment, and it does not cover crops that were sold by a producer.

These adjustment provisions only apply to producers that received a payment under the previous ERP for the 2021 program year based on the 2022 tax year for their representative disaster year revenue because those producers must use the tax year option. All other producers that would require such adjustments must use the expected revenue option, as previously explained in this document.

**Track 2 Expected Revenue Option**

As mentioned above, for Track 2, as an alternative to using the tax year option, a producer may certify to a benchmark year revenue that represents the producer's reasonably expected revenue prior to the impact of the qualifying disaster event, as well as their actual disaster year revenue. The producer's total expected revenue must include all eligible crops that could have been affected by a qualifying disaster event in calendar year 2022, including crops prevented from being planted, planted crops (including annual, perennial, and inventory), and crops that were in storage. It does not include revenue from crop by-products, such as cotton seed and corn stalks. Expected revenue will be based on:

- For perennial, planted, and prevented planted yield-based crops, the producer's expected acres multiplied by their expected yield per acre, multiplied by the expected price;
- For inventory crops, the total inventory prior to the impact of the qualifying disaster event multiplied by the expected price; and
- For crops in storage, the producer's production in storage multiplied by the expected price.

Expected revenue must be based on realistic projections that can be supported by acceptable documentation of expected inventory, acres, yield, and unit price, such as the following:

- sales contracts,
- purchase agreements,
- market agreements,
- settlement sheets,
- scale tickets,
- lease agreements,
- local market prices,
- FCIC established yield and prices,
- Federal crop insurance documents,
- historical yield data,
- appraisals,
- farm business plans,
- acreage reports,
- FSA National Crop Table (NCT) data,[24]
- ARC and PLC prices and yields [25]
- cooperative extension service and university data,
- financial institute documentation, and
- National Agricultural Statistics Service data.

The producer must maintain sufficient documentation to support that their projection is reasonable and realistic; that documentation must be available if requested.

Actual disaster year revenue for the expected revenue option is equal to the actual revenue from all crops that were included in the producer's expected revenue. Actual disaster year revenue includes:

- Revenue from sales of eligible crops;
- Federal crop insurance indemnities for eligible crops, minus premiums and administrative fees;
- NAP payments for eligible crops, minus premiums and service fees;
- Indemnities for eligible crops under private crop insurance policies;
- The value of eligible crops produced but not sold (such as crops in storage or inventory, or fed to the producer's livestock);
- FSA Payments issued for 2022 calendar year disaster losses, including but not limited to payments under:
  - ELAP for aquaculture crops,
  - ARC,
  - LDP,
  - MLG,
- Net gains from hedging from eligible crops produced;
- Grants from NOAA and State programs for the direct loss of eligible crops or the loss of revenue for eligible crops; and
- Other revenue directly related to the production of eligible crops that IRS requires the producer to report as income.

For crops produced in the 2022 or 2023 crop years but not sold, the value included in actual disaster year revenue may differ from the expected revenue for the crops due to market price fluctuations between planting and time of marketing, quality losses, or production losses related to qualifying disaster events occurring in the 2022 calendar year. Crops in storage from 2021 or earlier must use the expected price to calculate the value included in actual disaster year revenue if the crop remains in storage at the time of application since ERP 2022 does not pay

[23] Published sources of price data that the Deputy Administrator may consider include, but are not limited to, FCIC-established prices, FSA-established NCT prices, and National Agricultural Statistic Service prices.

[24] NCT data are available at *https://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/noninsured-crop-disaster-assistance/index.*

[25] ARC and PLC information is available at *https://www.fsa.usda.gov/programs-and-services/arcplc_program/arcplc-program-data/index.*

for market fluctuations for prior year crops.

Form FSA–524–B, Emergency Relief Program (ERP) 2022 Track 2 Expected Revenue Worksheet, is an optional form that producers may use to assist in calculating their expected and actual revenue. It is available at *https://www.fsa.usda.gov/programs-and-services/emergency-relief/index.*

**Track 2 Applications**

Producers applying for Track 2 must submit FSA–524, Emergency Relief Program (ERP) 2022 Track 2 Application, certifying their benchmark year revenue and disaster year revenue. The FSA–524 Appendix provides a guide for what should be included as applicable revenue for the option elected by the producer. In addition, all producers applying for Track 2 must submit FSA–525, Crop Insurance and/or NAP Coverage Agreement, by the application deadline to have a complete application on file.

For the purpose of administration of the ERP 2022 payment limitations, producers applying for Track 2 must certify to the percentage of their disaster year revenue from specialty and high value crops combined, and from other crops on their application. The percentages certified must be equal to the percentages that the producer would have reasonably expected to receive for the disaster year if not for the qualifying disaster event. Producers must also certify to whether all acreage of all eligible crops (including crops grown, prevented from being planted, and in storage or inventory in the disaster year) were covered by Federal crop insurance or NAP, for the purpose of determining the applicable ERP factor, as explained below.

If requested by FSA, documentation required to support a producer's certifications of revenue and other information provided on the application must be submitted within 30 calendar days of FSA's request, or the producer will be considered ineligible for Track 2.

**Track 2 Payment Calculation**

To determine a producer's Track 2 payment amount, FSA will calculate:

Step 1 The producer's benchmark year revenue, multiplied by the ERP factor of 90 percent if all acres of all eligible crops were covered by Federal crop insurance or NAP, or 70 percent if not all acres of all eligible crops were covered by Federal crop insurance or NAP; minus

Step 2 The producer's disaster year revenue; minus

Step 3 The sum of the producer's gross Track 1 payments.[26]

After performing the calculation described above, progressive factoring [27] will be applied to the calculated amount according to the table below.

| Payment range | Progressive factor (%) |
|---|---|
| Up to $2,000 | 100 |
| $2,001 to $4,000 | 80 |
| $4,001 to $6,000 | 60 |
| $6,001 to $8,000 | 40 |
| $8,001 to $10,000 | 20 |
| Over $10,000 | 10 |

For example, to apply progressive factoring to a calculated loss of $5,000, FSA would multiply:

- the first $2,000 by a factor of 100 percent ($2,000 × 100% = $2,000),
- the second $2,000 by a factor of 80 percent ($2,000 × 80% = $1,600), and
- the remaining $1,000 by a factor of 60 percent ($1,000 × 60% = $600).
- The sum of those calculations is $4,200.

For another example, to apply progressive factoring to a calculated loss of $430,000, FSA would multiply:

- the first $2,000 by a factor of 100 percent ($2,000 × 100% = $2,000),
- the second $2,000 by a factor of 80 percent ($2,000 × 80% = $1,600),
- the third $2,000 by a factor of 60 percent ($2,000 × 60% = $1,200),
- the fourth $2,000 by a factor of 40 percent ($2,000 × 40% = $800),
- the fifth $2,000 by a factor of 20% ($2,000 × 20% = $400), and
- the remaining $420,000 by a factor of 10 percent ($420,000 × 10% = $42,000).

The sum of those calculations is $48,000, which is the gross ERP 2022 payment after progressive factoring.

FSA will calculate the total of the results for each range above. For underserved producers, the sum of the results will be multiplied by a factor of 115 percent, and the underserved producer's calculated Track 2 payment will be equal to the lesser of the resulting amount or the amount calculated after step 3 above.[28] For all other eligible producers, the sum of the results for each range will be the calculated Track 2 payment. FSA will multiply that amount by the percentage of the expected disaster year revenue for specialty and high value crops or other crops, as applicable, to determine the amounts that will apply to the payment limitations for specialty and high value crops (combined) and other crops.

For example, the amount calculated after step 3 above is $430,000 and is reduced to $48,000 after progressive factoring. For an underserved producer, FSA would multiply $48,000 times 115 percent which equals $55,200 which is less than the max payment amount of $430,000. The producer certified to 50 percent of expected revenue as being from specialty crops. FSA would multiply $55,200 times 50 percent which equals $27,600 gross payment attributed to specialty crops. FSA would subtract $27,600 from $55,200 which equals $27,600 gross payment attributed to other crops. The producer's total payment is $55,200 ($27,600 + $27,600 = $55,200). FSA will apply a final payment factor of 75 percent to all calculated Track 2 payments, including payments to underserved producers, to ensure payments do not exceed available funding.

If a producer receives a Track 1 payment after their Track 2 payment is calculated, the producer's Track 2 payment will be recalculated and the producer must refund any resulting overpayment.

FSA will issue Track 2 payments as applications are processed and approved. All ERP 2022 payments are subject to the availability of funding. If additional funding is available after ERP

[26] The gross ERP Track 1 calculated payment is the calculated payment amount after all applicable factoring and prior to any payment reductions for reasons including, but not limited to, sequestration and payment limitation.

[27] Track 2 applies progressive factoring in a manner consistent with the progressive factoring of Track 1 payments based on Federal crop insurance indemnified losses. Track 2 assistance is calculated based on a decrease in disaster year revenue for eligible revenue, production, and quality losses of eligible insured, non-insurable, and uninsured crops not included in Track 1. While Track 1 payments based on NAP payments are not subject to progressive factoring, Track 2 assistance is calculated based on the overall decrease in disaster year revenue and does not calculate assistance independently for insured crops and NAP crops in a manner similar to Track 1; therefore, progressive factoring is applied to all Track 2 payments.

[28] Underserved producers will receive an increase to their Track 2 payment that is equal to 15 percent of the gross Track 2 payment after progressive factoring not to exceed the calculated Track 2 payment before progressive factoring. FSA calculates payments based on a higher payment factor for underserved farmers and ranchers (or specific groups included in that term) in several programs, such as Emergency Conservation Program, ELAP, and the Tree Assistance Program. FSA has also used higher payment factors for these producers in several recently announced programs: the Food Safety Certification for Specialty Crops Program, the Organic and Transitional Education and Certification Program, Pandemic Assistance Revenue Program, and the previous ELRP and ERP programs for qualifying disaster events in calendar years 2020 and 2021. In addition, NAP provides a reduced service fee and premium for underserved farmers and ranchers. This approach supports the equitable administration of FSA programs, as underserved farmers and ranchers are more likely to lack financial reserves and access to capital that would allow them to cope with losses due to unexpected events outside of their control.

2022 payments are issued, FSA may issue an additional payment, not to exceed the maximum amount allowed by law as explained below.

**Applying for ERP 2022**

FSA expects to begin mailing Track 1 application forms on or around November 8, 2023, to producers who received Federal crop insurance indemnities, and to begin mailing forms to producers who received NAP payments on or around November 8, 2023. For Track 2, FSA will begin accepting applications on October 31, 2023, and producers may obtain an application form and FSA–525, Crop Insurance and/or Nap Coverage Agreement for ERP 2022, through their county office or online at *https://www.fsa.usda.gov/programs-and-services/emergency-relief/index.*

Applications may be submitted in person or by mail, email, facsimile, or other methods announced by FSA. A complete application for each track a producer is applying for must be submitted to the producer's recording county office by the close of business on the deadline announced by FSA (the ERP 2022 deadline).

To receive an ERP 2022 payment, producers, including any producers with an SBI who have a share in a crop as indicated on a Track 1 application, must also have the following forms on file with FSA within 60 days of the ERP 2022 deadline:

- Form AD–2047, Customer Data Worksheet;
- Form CCC–902, Farm Operating Plan for an individual or legal entity as provided in 7 CFR part 1400;
- Form CCC–901, Member Information for Legal Entities (if applicable); and
- A highly erodible land conservation (sometimes referred to as HELC) and wetland conservation certification as provided in 7 CFR part 12 (form AD–1026 Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) Certification) for the producer and applicable affiliates.

Many producers, especially if they have participated in FSA programs recently, will already have these forms on file with FSA.

In addition to the forms listed above, certain producers will also need to submit the following forms in order to have their payment calculated as described above for underserved producers or to qualify for an increased payment limitation, as described in the Payment Limitation section in this document:

- Form CCC–860, Socially Disadvantaged, Limited Resource, Beginning and Veteran Farmer or Rancher Certification, applicable for the 2022 program year; [29] or
- Form FSA–510, Request for an Exception to the $125,000 Payment Limitation for Certain Programs, including the certification from a certified public accountant or attorney that the person or legal entity has met the requirements to be eligible for the increased payment limitation, for a person or a legal entity and all members of that entity, for the 2022 program year.

FSA will continue to accept forms CCC–860 and FSA–510 for ERP 2022 until 60 days after the ERP 2022 deadline. If a producer files a CCC–860 or FSA–510 and the accompanying certification after their ERP 2022 payment is issued but before the deadline to submit these forms, FSA will process the form CCC–860 or FSA–510 and issue any resulting additional payment amount.

**Payment Limitation**

As required by Title I of the Disaster Relief Supplemental Appropriations Act, 2023, the payment limitation for ERP 2022 is determined by the person's or legal entity's average adjusted gross farm income. Specifically, a person or legal entity, other than a joint venture or general partnership, cannot receive, directly or indirectly, more than $125,000 in payments for specialty and high value crops combined and $125,000 in payment for all non-specialty crops and other crops under ERP 2022 (for Track 1 and Track 2 combined) if their average adjusted gross farm income is less than 75 percent of their average AGI the 3 taxable years preceding the most immediately preceding complete tax year.

If at least 75 percent of the person or legal entity's average AGI is income derived from farming, ranching, and forestry related activities and the participant provides the required certification and documentation, as discussed below, the person or legal entity, other than a joint venture or general partnership, is eligible to receive, directly or indirectly, up to:

- $900,000 for specialty crops under Tracks 1 and 2 and high value crops under Track 2 combined; and
- $250,000 for non-specialty crops under Track 1 and other crops under Track 2, combined.

The relevant tax years for establishing a producer's AGI and percentage derived from farming, ranching, and forestry related activities are 2018, 2019, and 2020.

To receive more than $125,000 in ERP 2022 payments, producers must submit form FSA–510, including the certification from a certified public accountant or attorney that the person or legal entity has met the requirements to be eligible for the increased payment limitation. If a producer requesting the increased payment limitation is a legal entity, all members of that entity must also complete form FSA–510 and provide the required certification according to the direct attribution provisions in 7 CFR 1400.105, ''Attribution of Payments.'' If a legal entity would be eligible for the increased payment limitation based on the legal entity's average AGI that is income derived from farming, ranching, and forestry related activities but a member of that legal entity either does not complete a form FSA–510 and provide the required certification or is not eligible for the increased payment limitation, the payment to the legal entity will be reduced for the payment limitation applicable to the share of the payment attributed to that member.

A payment made to a legal entity will be attributed to those members who have a direct or indirect ownership interest in the legal entity, unless the payment of the legal entity has been reduced by the proportionate ownership interest of the member due to that member's ineligibility.

Attribution of payments made to legal entities will be tracked through four levels of ownership in legal entities as follows:

- First level of ownership—any payment made to a legal entity that is owned in whole or in part by a person will be attributed to the person in an amount that represents the direct ownership interest in the first level or payment legal entity; [30]

[29] A person who has filed CCC–860 certifying their status as a socially disadvantaged, beginning, or veteran farmer or rancher for a prior program year is not required to submit a subsequent CCC–860 certifying their status for a later program year because a person's status as socially disadvantaged would not change in different years, and their certification as a beginning or veteran farmer or rancher includes the relevant date needed to determine for what program years the status would apply.

An entity that has filed CCC–860 certifying its status as a socially disadvantaged, beginning, or veteran farmer or rancher for a prior program year is not required to submit a subsequent certification of its status for a later program year unless the entity's status has changed due to changes in membership.

Because a producer's status as a limited resource farmer or rancher may change annually depending on the producer's direct and indirect gross farm sales and household income, those producers must submit CCC–860 for each applicable program year.

[30] The ''first level or payment legal entity'' means that the payment entity will have a reduction

Continued

• Second level of ownership—any payment made to a first-level legal entity that is owned in whole or in part by another legal entity (referred to as a second-level legal entity) will be attributed to the second-level legal entity in proportion to the ownership of the second-level legal entity in the first-level legal entity; if the second-level legal entity is owned in whole or in part by a person, the amount of the payment made to the first-level legal entity will be attributed to the person in the amount that represents the indirect ownership in the first-level legal entity by the person;

• Third and fourth levels of ownership—except as provided in the second level of ownership bullet above and in the fourth level of ownership bullet below, any payments made to a legal entity at the third and fourth levels of ownership will be attributed in the same manner as specified in the second level of ownership bullet above; and

• Fourth-level of ownership—if the fourth level of ownership is that of a legal entity and not that of a person, a reduction in payment will be applied to the first-level or payment legal entity in the amount that represents the indirect ownership in the first level or payment legal entity by the fourth-level legal entity.

Payments made directly or indirectly to a person who is a minor child will not be combined with the earnings of the minor's parent or legal guardian.

A person or legal entity must provide the name, address, valid taxpayer identification number, and ownership share of each person, or the name, address, valid taxpayer identification number, and ownership share of each legal entity, that holds or acquires an ownership interest in the legal entity. ERP 2022 payments to a legal entity will be reduced in proportion to a member's ownership share when a valid taxpayer identification number for a person or legal entity that holds a direct or indirect ownership interest of less than 10 percent at or above the fourth level of ownership in the business structure is not provided to USDA. A legal entity will not be eligible to receive payment when a valid taxpayer identification number for a person or legal entity that holds a direct or indirect ownership interest of 10 percent or greater at or above the fourth level of ownership in the business structure is not provided to USDA.

If a person or legal entity is not eligible to receive ERP 2022 payments due to the person or legal entity failing to satisfy payment eligibility provisions, the payment made either directly or indirectly to the person or legal entity will be reduced to zero. The amount of the reduction for the direct payment to the producer will be commensurate with the direct or indirect ownership interest of the ineligible person or ineligible legal entity.

Like other programs administered by FSA, payments made to an Indian Tribe or Tribal organization, as defined in section 4(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304), will not be subject to payment limitation.

**Requirement To Purchase Federal Crop Insurance or NAP Coverage**

Title I of the Disaster Relief Supplemental Appropriations Act, 2023, requires all producers who receive ERP 2022 payments, including those receiving a Track 1 payment for a tree loss under a Federal crop insurance policy, to purchase Federal crop insurance, or NAP coverage where Federal crop insurance is not available, for the next 2 available crop years, as determined by the Secretary. Participants must file an accurate acreage report and obtain Federal crop insurance or NAP coverage, as may be applicable:

• At a coverage level equal to or greater than 60 percent for insurable crops and trees; or

• At the catastrophic level or higher for NAP-eligible crops.

Availability will be determined from the date a producer receives an ERP 2022 payment and may vary depending on the timing and availability of Federal crop insurance or NAP coverage for a producer's particular crops. The final crop year to purchase Federal crop insurance or NAP coverage to meet the second year of coverage for this requirement is the 2027 crop year.

In situations where Federal crop insurance is unavailable for a crop, an ERP 2022 participant must obtain NAP coverage. Section 1001D of the Food Security Act of 1985 (1985 Farm Bill; Pub. L. 99–198) provides that a person or entity with an average AGI greater than $900,000 is not eligible to participate in NAP; however, producers with an average AGI greater than $900,000 are eligible to participate in ERP 2022. To reconcile this restriction in the 1985 Farm Bill and the requirement to obtain NAP or Federal crop insurance coverage, ERP 2022 participants may meet the purchase requirement by purchasing WFRP coverage, if eligible, or they may pay the applicable NAP service fee despite their ineligibility for a NAP payment. In other words, the service fee must be paid even though no NAP payment may be made because the average AGI of the person or entity exceeds the 1985 Farm Bill limitation.

For Track 1, the Federal crop insurance and NAP coverage requirements are specific to the crop and county (which is the county where the crop is physically located for insured crops and the administrative county for NAP-covered crops) for which Track 1 payments are paid.

Producers who receive a Track 1 payment that was calculated based on an indemnity under a Pasture, Rangeland, and Forage policy; Annual Forage policy; or WFRP policy must purchase the same type of policy or a combination of individual policies for the crops that had covered losses under ERP 2022 to meet the Federal crop insurance and NAP coverage requirement.

Producers who receive a Track 1 payment on a crop in a county and who have the crop or crop acreage in subsequent years, as provided in this document, and who fail to obtain the 2 years of Federal crop insurance or NAP coverage required as specified in this document must refund all Track 1 payments for that crop in that county with interest from the date of disbursement.

Producers who were paid under Track 1 for a crop in a county, but do not plant that crop in that county in a year for which the Federal crop insurance and NAP coverage requirement applies, are not subject to the Federal crop insurance or NAP purchase requirement for that year.

For Track 2, producers must report all crops that suffered a revenue loss in whole or in part due to a qualifying disaster event on form FSA–525, Crop Insurance and/or NAP Coverage Agreement, and obtain the required level of Federal crop insurance or NAP coverage in all counties where the crop is grown for the applicable years. For all crops listed on form FSA–525, producers who have the crop or crop acreage in subsequent years and who fail to obtain the required 2 years of Federal crop insurance or NAP coverage must refund the ERP Track 2 payment with interest from the date of disbursement.

If both Federal crop insurance and NAP coverage are unavailable for a crop,

applied, and if the payment entity happens to be a joint venture, that reduction is applied to the first level, or highest level, for payments. The ''first level or payment legal entity'' is the highest level of ownership of the applicant to whom payments can be attributed or limited. If the applicant is a business type that does not have a limitation or attribution, the reduction is applied to the first level, but if the business type can have the reduction applied directly to it, then the limitation applies.

the producer must obtain WFRP Federal crop insurance coverage, if eligible.

Producers who receive an ERP Track 1 payment for a crop are not required to obtain additional years of Federal crop insurance or NAP coverage for that crop if they also receive an ERP Track 2 payment for a loss associated with that crop.

Producers who do not plant a crop listed on form FSA–525 in a year for which the Federal crop insurance and NAP coverage requirement applies are not subject to the Federal crop insurance or NAP purchase requirement for that crop for that year.

**Provisions Requiring Refund to FSA**

In the event that any ERP 2022 payment resulted from erroneous information reported by the producer, or any person acting on their behalf, or if the producer's data are updated after RMA or FSA calculates a producer's Track 1 payment, the ERP 2022 payment for both Track 1 and Track 2, as applicable, will be recalculated and the producer must refund any excess payment to FSA, including interest to be calculated from the date of the disbursement to the producer. If FSA determines that the producer intentionally misrepresented information used to determine the producer's ERP 2022 payment amount, the application will be disapproved and the producer must refund the full payment to FSA with interest from the date of disbursement. All persons with a financial interest in a legal entity receiving payments are jointly and severally liable for any refund, including related charges, which is determined to be due to FSA for any reason. Any required refunds must be resolved in accordance with debt settlement regulations in 7 CFR part 3.

**General Provisions**

Applicable general eligibility requirements, including recordkeeping requirements and required compliance with HELC and Wetland Conservation provisions, are similar to those for previous ad hoc crop disaster programs and current permanent disaster programs.

General requirements that apply to other FSA-administered commodity programs also apply to ERP 2022. Accordingly, producers that receive ERP 2022 must be in compliance with the provisions of 7 CFR part 12, ''Highly Erodible Land and Wetland Conservation,'' and the provisions of 7 CFR 718.6, which address ineligibility for benefits for offenses involving controlled substances. Appeal regulations in 7 CFR parts 11 and 780 and equitable relief and finality provisions in 7 CFR part 718, subpart D, apply to determinations under ERP 2022. As described above, Track 1 payments are calculated using data on file with RMA and FSA at the time of payment calculation, unless that data are later updated. Producers who receive a Track 1 application and disagree with the calculated payment amount or data used in the calculation may apply for Track 2, which will allow them to provide their data to FSA through a traditional application process.

Participants are required to retain documentation in support of their application for 3 years after the date of approval. All information provided to FSA for program eligibility and payment calculation purposes, including certification that a producer suffered a loss due to a qualifying disaster event, is subject to spot check. Participants receiving ERP 2022 payments or any other person who furnishes such information to USDA must permit authorized representatives of USDA or the Government Accountability Office, during regular business hours, to enter the agricultural operation and to inspect, examine, and to allow representatives to make copies of books, records, or other items for the purpose of confirming the accuracy of the information provided by the participant.

If requested by FSA, the producer must provide additional documentation that establishes the producer's eligibility for ERP 2022. If supporting documentation is requested, the documentation must be submitted to FSA within 30 calendar days from the request or the application will be disapproved by FSA. FSA may request supporting documentation to verify information provided by the producer and the producer's eligibility including, but not limited to, the producer's ownership share in the crop or commodity, benchmark year revenue, disaster year revenue, and percentage of expected revenue from specialty and high value crops and other crops.

ERP 2022 applicants filing an FSA–510 are subject to an FSA audit of information submitted for the purpose of increasing the program's payment limitation. As a part of this audit, FSA may request income tax returns, and if requested, must be supplied by all related persons and legal entities. In addition to any other requirement under any Federal statute, relevant Federal income tax returns and documentation must be retained a minimum of 3 years after the end of the calendar year corresponding to the year for which payments or benefits are requested. Failure to provide necessary and accurate information to verify compliance, or failure to comply with these requirements will result in ineligibility for ERP 2022 benefits and require refund of any ERP 2022 payments, including interest to be calculated from the date of the disbursement to the producer.

Applicants have a right to a decision in response to a timely-filed complete application.

If an applicant files a late ERP 2022 application, the application will be considered a request to waive the deadline. Requests to waive or modify program provisions are at the discretion of the Deputy Administrator. The Deputy Administrator has the authority to waive or modify application deadlines and other requirements or program provisions not specified in law in cases where the Deputy Administrator determines it is equitable to do so and the lateness or failure to meet such other requirements or program provisions do not adversely affect the operation of ERP 2022. Applicants who request to waive or modify program provisions do not have a right to a decision on those requests. The Deputy Administrator's refusal to exercise discretion on requests to waive or modify ERP 2022 provisions will not be considered an adverse decision and is, by itself, not appealable.

Any payment under ERP 2022 will be made without regard to questions of title under State law and without regard to any claim or lien. The regulations governing offsets in 7 CFR part 3 apply to ERP 2022 payments.

If any person who would otherwise be eligible to receive a payment dies before the payment is received, payment may be released as specified in 7 CFR 707.3. Similarly, if any person or legal entity who would otherwise have been eligible to apply for a payment dies or is dissolved, respectively, before the payment is applied for, payment may be released in accordance with this document if a timely application is filed by an authorized representative. Proof of authority to sign for the deceased producer or dissolved entity must be provided. If a participant is now a dissolved general partnership or joint venture, all members of the general partnership or joint venture at the time of dissolution or their duly authorized representatives must sign the application for payment. Eligibility of such participant will be determined, as it is for other participants, based on ownership share and risk in producing the crop.

In either applying for or participating in ERP 2022, or both, the producer is

subject to laws against perjury (including, but not limited to, 18 U.S.C. 1621). If the producer willfully makes and represents as true any verbal or written declaration, certification, statement, or verification that the producer knows or believes not to be true, in the course of either applying for or participating in ERP 2022, or both, then the producer may be found to be guilty of perjury. Except as otherwise provided by law, if guilty of perjury the applicant may be fined, imprisoned for not more than 5 years, or both, regardless of whether the producer makes such verbal or written declaration, certification, statement, or verification within or outside the United States.

For the purposes of the effect of a lien on eligibility for Federal programs (28 U.S.C. 3201(e)), USDA waives the restriction on receipt of funds under ERP 2022 under the following condition: by applying for ERP 2022, applicants agree, as a condition of the waiver, that the ERP 2022 payments will be applied to reduce the amount of the judgment lien.

In addition to any other Federal laws that apply to ERP 2022, the following laws apply: 15 U.S.C. 714; and 18 U.S.C. 286, 287, 371, and 1001.

**Paperwork Reduction Act Requirements**

In compliance with the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), the information collection request has been approved by OMB under an emergency request under control number 0560–0316. FSA will collect the information from producers to qualify for an ERP 2022 payment. ERP 2022 is a one-time funding as described in this NOFA.

In accordance with the Paperwork Reduction Act, FSA is requesting comments from all interested individuals and organizations on a new information collection request that supports ERP 2022.

**Description of Information Collection**

*Title:* Emergency Relief Program 2022 (ERP 2022).

*OMB Control Number:* 0560–0316.

*Type of Request:* New.

*Abstract:* FSA is providing assistance to eligible crop producers to cover the necessary expenses related losses of revenue, quality, or production of crops (including milk, on-farm stored commodities, crops prevented from planting in 2020 and 2021, and harvested adulterated wine grapes), trees, bushes, and vines, as a consequence of droughts, wildfires, hurricanes, tornadoes, floods, derechos, excessive heat, winter storms, freeze, including a polar vortex, smoke exposure, quality losses of crops, and excessive moisture occurring in calendar year 2022.

FSA is administering ERP in two tracks (referred to as Track 1 and Track 2). ERP Track 1 will use a streamlined process with pre-filled application forms for losses where the data are already on file with FSA or the Risk Management Agency (RMA) as a result of the producers previously receiving a Noninsured Crop Disaster Assistance Program (NAP) payment or a Federal crop insurance indemnity under certain Federal crop insurance policies. ERP Track 2 will provide payments for other eligible losses through a revenue-based approach using a traditional application process during which producers will provide the information required to calculate a payment.

For the following estimated total annual burden on respondents, the formula used to calculate the total burden hours is the estimated average time per response multiplied by the estimated total annual responses.

*Estimate of Average Time to Respond:* Public reporting burden for collecting information under this notice is estimated to average 0.305 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collections of information.

*Type of Respondents:* Producers.

*Estimated Number of Respondents:* 230,000.

*Estimated Average Number of Responses per Respondent:* 1.43.

*Estimated Total Annual Responses:* 327,855.

*Estimated Total Annual Burden on Respondents:* 100,072 hours.

The purpose of this notice is to request comments from the public (as well as affected agencies) concerning the information collection request.

The comments will help us:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of burden of the collection of information including the validity of the methodology and assumptions used;

(3) Evaluate the quality, utility and clarity of the information technology; and

(4) Minimize the burden of the information collection on those who respond through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses where provided, will be made a matter of public record. Comments will be summarized and included in the submission for Office of Management and Budget approval.

**Environmental Review**

The environmental impacts have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and the FSA regulation for compliance with NEPA (7 CFR part 799). ERP 2022 is authorized by Title I of the Disaster Relief Supplemental Appropriations Act, 2023. The intent of ERP 2022 is to provide payments to eligible crop producers who suffered eligible crop and tree losses due to wildfires, hurricanes, floods, derechos, excessive heat, tornadoes, winter storms, freeze (including a polar vortex), smoke exposure, excessive moisture, and qualifying drought, and related conditions occurring in calendar year 2022.

The limited discretionary aspects of the program were designed to be consistent with established FSA disaster programs. As such, the Categorical Exclusions in 7 CFR part 799.31 apply, specifically 7 CFR 799.31(b)(6)(iv) and (vi) (that is, § 799.31(b)(6)(iv) Individual farm participation in FSA programs where no ground disturbance or change in land use occurred as a result of the action or participation; and § 799.31(b)(6)(vi) Safety net programs administered by FSA). No Extraordinary Circumstances (7 CFR 799.33) exist. As such, FSA has determined that the implementation of ERP 2022 and the participation in ERP 2022 do not constitute major Federal actions that would significantly affect the quality of the human environment, individually or cumulatively. Therefore, FSA will not prepare an environmental assessment or environmental impact statement for this regulatory action, and this notice serves as documentation of the programmatic environmental compliance decision.

**Federal Assistance Programs**

The titles and numbers of the Federal assistance programs, as found in the Assistance Listings, to which this document applies are 10.964—

Emergency Relief Program and 10.979—Emergency Relief Program 2022.

**USDA Non-Discrimination Policy**

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family or parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Individuals who require alternative means of communication for program information (for example, braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or the USDA TARGET Center at (202) 720–2600 (voice and text telephone (TTY)) or dial 711 for Telecommunications Relay Service (both voice and text telephone users can initiate this call from any telephone). Additionally, program information may be made available in languages other than English.

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**Zach Ducheneaux,**

*Administrator, Farm Service Agency.*

[FR Doc. 2023–24009 Filed 10–30–23; 8:45 am]

**BILLING CODE 3410–05–P**

## COMMISSION ON CIVIL RIGHTS

### Notice of Public Briefing of the Minnesota Advisory Committee to the U.S. Commission on Civil Rights

**AGENCY:** U.S. Commission on Civil Rights.

**ACTION:** Notice of public briefing.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the Minnesota Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a public briefing via Zoom at 12 p.m. CT on Wednesday, January 17, 2024. The purpose of this briefing is to hear testimony on housing affordability in the state.

**DATES:** Wednesday, January 17, 2024, from 12 p.m.–2 p.m. Central Time.

**ADDRESSES:** The meeting will be held via Zoom.

*Registration Link (Audio/Visual): https://www.zoomgov.com/j/1610159425.*

*Join by Phone (Audio Only):* (833) 435–1820 USA Toll-Free; Meeting ID: 161 015 9425.

**FOR FURTHER INFORMATION CONTACT:** Ana Victoria Fortes, Designated Federal Officer, at *afortes@usccr.gov* or (202) 519–2938.

**SUPPLEMENTARY INFORMATION:** This committee meeting is available to the public through the registration link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email Liliana Schiller, Support Services Specialist, at *lschiller@usccr.gov* at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Ana Victoria Fortes at *afortes@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Minnesota Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at *lschiller@usccr.gov.*

**Agenda**

I. Welcome & Roll Call
II. Introductory Remarks
III. Panelist Presentations & Committee Q&A
IV. Public Comment
V. Closing Remarks
VI. Adjournment

Dated: October 25, 2023.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2023–23945 Filed 10–30–23; 8:45 am]

**BILLING CODE P**

## COMMISSION ON CIVIL RIGHTS

### Notice of Public Briefing of the Minnesota Advisory Committee to the U.S. Commission on Civil Rights

**AGENCY:** U.S. Commission on Civil Rights.

**ACTION:** Notice of public briefing.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the Minnesota Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a public briefing via Zoom at 12 p.m. CT on Friday, January 26, 2024. The purpose of this briefing is to hear testimony on housing affordability in the state.

**DATES:** Friday, January 26, 2024, from 12 p.m.–2 p.m. Central Time.

**ADDRESSES:** The meeting will be held via Zoom.

*Registration Link (Audio/Visual): https://www.zoomgov.com/j/1613104128.*

*Join by Phone (Audio Only):* (833) 435–1820 USA Toll-Free; Meeting ID: 161 310 4128.

**FOR FURTHER INFORMATION CONTACT:** Ana Victoria Fortes, Designated Federal Officer, at *afortes@usccr.gov* or (202) 519–2938.

**SUPPLEMENTARY INFORMATION:** This committee meeting is available to the public through the registration link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email Liliana Schiller, Support Services Specialist, at *lschiller@usccr.gov* at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Ana Victoria Fortes at *afortes@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Minnesota Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at *lschiller@usccr.gov.*

**Agenda**

I. Welcome & Roll Call

II. Introductory Remarks

III. Panelist Presentations & Committee Q&A

IV. Public Comment

V. Closing Remarks

VI. Adjournment

Dated: October 25, 2023.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2023–23944 Filed 10–30–23; 8:45 am]

**BILLING CODE 6335–01–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Notice of Scope Ruling Applications Filed in Antidumping and Countervailing Duty Proceedings

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The U.S. Department of Commerce (Commerce) received scope ruling applications, requesting that scope inquiries be conducted to determine whether identified products are covered by the scope of antidumping duty (AD) and/or countervailing duty (CVD) orders and that Commerce issue scope rulings pursuant to those inquiries. In accordance with Commerce's regulations, we are notifying the public of the filing of the scope ruling applications listed below in the month of September 2023.

**DATES:** Applicable October 31, 2023.

**FOR FURTHER INFORMATION CONTACT:** Terri Monroe, 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) 482–1384.

**SUPPLEMENTARY INFORMATION:**

### Notice of Scope Ruling Applications

In accordance with 19 CFR 351.225(d)(3), we are notifying the public of the following scope ruling applications related to AD and CVD orders and findings filed in or around the month of September 2023. This notification includes, for each scope application: (1) identification of the AD and/or CVD orders at issue (19 CFR 351.225(c)(1)); (2) concise public descriptions of the products at issue, including the physical characteristics (including chemical, dimensional and technical characteristics) of the products (19 CFR 351.225(c)(2)(ii)); (3) the countries where the products are produced and the countries from where the products are exported (19 CFR 351.225(c)(2)(i)(B)); (4) the full names of the applicants; and (5) the dates that the scope applications were filed with Commerce and the name of the Antidumping and Countervailing Duty Electronic Service System (ACCESS) scope segment where the scope applications can be found.[1] This notice does not include applications which have been rejected and not properly resubmitted. The scope ruling applications listed below are available on Commerce's online e-filing and document management system, ACCESS, at *https://access.trade.gov.*

*Scope Ruling Applications*

Common Alloy Aluminum Sheet from the People's Republic of China (China) (A–570–073/C–570–074); aluminum association series 8011 alloy aluminum sheet products;[2] produced in and exported from China; submitted by Century Metals & Supplies, Inc.; September 7, 2023; ACCESS scope segment ''Series 8011 Alloy Products.''

Malleable Cast Iron Pipe Fittings from China (A–570–881); Electrical Conduit Fittings;[3] produced in and exported from China; submitted by JL International, Inc.; September 11, 2023; ACCESS scope segment ''SCO—JLI Conduit Fittings.''

Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules from China (A–570–979/C–570–980); off-grid solar charging module GC4291F;[4] produced in and exported from China; submitted by GameChange Solar Corp.; September 14, 2023; ACCESS scope segment ''Off-Grid Solar Charging Module GC4291F.''

[1] *See Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws,* 86 FR 52300, 52316 (September 20, 2021) (''It is our expectation that the **Federal Register** list will include, where appropriate, for each scope application the following data: (1) identification of the AD and/or CVD orders at issue; (2) a concise public summary of the product's description, including the physical characteristics (including chemical, dimensional and technical characteristics) of the product; (3) the country(ies) where the product is produced and the country from where the product is exported; (4) the full name of the applicant; and (5) the date that the scope application was filed with Commerce.'')

[2] The product is aluminum coil 8011 H14 and H16 having a thickness of 6.3 millimeters or less, but greater than 0.2 millimeters, made from 8011 series aluminum.

[3] The products include the following three categories of electrical conduit fittings: (1) various subtypes of electrical conduit bodies used to provide access to conductors in a conduit line and to conserve space on certain bends and to split conduits in multiple directions; (2) various subtypes of electrical conduit nipples that extend a run of electrical conduits in order to reach fittings, boxes, enclosures, or similar articles; and (3) various subtypes of electrical conduit couplings and connectors that join two pieces of electrical conduits together.

[4] The products are small off-grid solar charging modules that connect to the Genius Tracker solar tracking unit by attaching the wire connector that is permanently attached to the small off-grid solar charging module through a male barrel connector. The products provide a small power output of 60 watts.

Certain Steel Wheels from China (A–570–082/C–570–083); steel truck wheels manufactured in Thailand; [5] produced in and exported from Thailand; submitted by Asia Wheel Co., Ltd. (Asia Wheel); September 15, 2023; ACCESS scope segment ''Asia Wheel II.''

Xanthan Gum from China (A–570–985); GPI Xantech DF40 and GPI Xantech DF40–D; [6] produced in and exported from Canada; submitted by Gum Products International, Inc.; September 19, 2023; ACCESS scope segment ''GPI Oilfield Lubricants.''

Xanthan Gum from China (A–570–985); GPI PureXan 80AN, GPI PureXan 200AN, and GPI Quickxan; [7] produced in and exported from Canada; submitted by Gum Products International, Inc.; September 19, 2023; ACCESS scope segment ''GPI Food Ingredients.''

*Notification to Interested Parties*

This list of scope ruling applications is not an identification of scope inquiries that have been initiated. In accordance with 19 CFR 351.225(d)(1), if Commerce has not rejected a scope ruling application nor initiated the scope inquiry within 30 days after the filing of the application, the application will be deemed accepted and a scope inquiry will be deemed initiated the following day—day 31.[8] Commerce's practice generally dictates that where a deadline falls on a weekend, Federal holiday, or other non-business day, the appropriate deadline is the next business day.[9] Accordingly, if the 30th day after the filing of the application falls on a non-business day, the next business day will be considered the ''updated'' 30th day, and if the application is not rejected or a scope inquiry initiated by or on that particular business day, the application will be deemed accepted and a scope inquiry will be deemed initiated on the next business day which follows the ''updated'' 30th day.[10]

In accordance with 19 CFR 351.225(m)(2), if there are companion AD and CVD orders covering the same merchandise from the same country of origin, the scope inquiry will be conducted on the record of the AD proceeding. Further, please note that pursuant to 19 CFR 351.225(m)(1), Commerce may either apply a scope ruling to all products from the same country with the same relevant physical characteristics, (including chemical, dimensional, and technical characteristics) as the product at issue, on a country-wide basis, regardless of the producer, exporter, or importer of those products, or on a company-specific basis.

For further information on procedures for filing information with Commerce through ACCESS and participating in scope inquiries, please refer to the Filing Instructions section of the Scope Ruling Application Guide, at *https://access.trade.gov/help/Scope_Ruling_Guidance.pdf.* Interested parties, apart from the scope ruling applicant, who wish to participate in a scope inquiry and be added to the public service list for that segment of the proceeding must file an entry of appearance in accordance with 19 CFR 351.103(d)(1) and 19 CFR 351.225(n)(4). Interested parties are advised to refer to the case segment in ACCESS as well as 19 CFR 351.225(f) for further information on the scope inquiry procedures, including the timelines for the submission of comments.

Please note that this notice of scope ruling applications filed in AD and CVD proceedings may be published before any potential initiation, or after the initiation, of a given scope inquiry based on a scope ruling application identified in this notice. Therefore, please refer to the case segment on ACCESS to determine whether a scope ruling application has been accepted or rejected and whether a scope inquiry has been initiated.

Interested parties who wish to be served scope ruling applications for a particular AD or CVD order may file a request to be included on the annual inquiry service list during the anniversary month of the publication of the AD or CVD order in accordance with 19 CFR 351.225(n) and Commerce's procedures.[11]

Interested parties are invited to comment on the completeness of this monthly list of scope ruling applications received by Commerce. Any comments should be submitted to James Maeder, Deputy Assistant Secretary for AD/CVD Operations, Enforcement and Compliance, International Trade Administration, via email to *CommerceCLU@trade.gov.*

This notice of scope ruling applications filed in AD and CVD proceedings is published in accordance with 19 CFR 351.225(d)(3).

Dated: October 26, 2023.

**Scot Fullerton,**

*Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2023–23991 Filed 10–30–23; 8:45 am]

**BILLING CODE 3510–DS–P**

[5] The products are steel truck wheels that are produced as follows: (1) using rims manufactured in Thailand using rectangular steel plates from China or a third country; and (2) using discs manufactured in Thailand using circular steel plates from China or a third country. Asia Wheel welds the Thailand-produced rims and discs to assemble steel truck wheels.

[6] The products are GPI Xantech DF40 and GPI Xantech DF40–D, which are dry powders used as equipment lubricants in the oil and gas drilling industries.

[7] The products are food ingredients. PureXan80AN and 200AN impart a creamy consistency to food products. Quickxan 70 is used as a thickening and stabilizing agent in food preparations.

[8] In accordance with 19 CFR 351.225(d)(2), within 30 days after the filing of a scope ruling application, if Commerce determines that it intends to address the scope issue raised in the application in another segment of the proceeding (such as a circumvention inquiry under 19 CFR 351.226 or a covered merchandise inquiry under 19 CFR 351.227), it will notify the applicant that it will not initiate a scope inquiry, but will instead determine if the product is covered by the scope at issue in that alternative segment.

[9] *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

[10] This structure maintains the intent of the applicable regulation, 19 CFR 351.225(d)(1), to allow day 30 and day 31 to be separate business days.

[11] *See Scope Ruling Application; Annual Inquiry Service List; and Informational Sessions,* 86 FR 53205 (September 27, 2021).

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–158, A–301–806, A–247–004, A–331–804, A–533–920, A–560–840, A–475–846, A–580–918, A–557–826, A–201–860, A–583–874, A–549–847, A–489–850, A–520–810, A–552–837]**

### Aluminum Extrusions From the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**DATES:** Applicable October 24, 2023.

**FOR FURTHER INFORMATION CONTACT:** Jonathan Hill (the People's Republic of China (China)) at (202) 482–3518; Jose Rivera (Colombia) at (202) 482–0842; Stefan Smith (the Dominican Republic) at (202) 482–4342; Reginald Anadio (Ecuador) at (202) 482–3166; Alex Cipolla (India) at (202) 482–4956; Jonathan Hall-Eastman (Indonesia) at (202) 482–1468; Christopher Maciuba (the Republic of Korea (Korea)) at (202) 482–0413; Eric Hawkins (Italy) at (202) 482–1988; Benjamin Blythe (Malaysia) at (202) 482–3457; Tyler Weinhold (Mexico) at (202) 482–1121; Hermes

Pinilla (Taiwan) at (202) 482–3477; Jun Jack Zhao (Thailand) at (202) 482–1396; Sean Grossnickle (the Republic of Turkey (Turkey)) at (202) 482–3818; John K. Drury (the United Arab Emirates (UAE)) at (202) 482–0195; and Katherine Smith (the Socialist Republic of Vietnam (Vietnam)) at (202) 482–0557, AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

**SUPPLEMENTARY INFORMATION:**

## The Petitions

On October 4, 2023, the U.S. Department of Commerce (Commerce) received antidumping duty (AD) petitions concerning imports of aluminum extrusions from China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Korea, Malaysia, Mexico, Taiwan, Thailand, Turkey, the UAE, and Vietnam filed in proper form on behalf of the U.S. Aluminum Extruders Coalition [1] and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), a coalition of domestic producers of aluminum extrusions and a certified union, which represents workers engaged in the production of aluminum extrusions in the United States (collectively, the petitioners).[2] These AD Petitions were accompanied by countervailing duty (CVD) petitions concerning imports of aluminum extrusions from China, India, Mexico, and Turkey.[3]

Between October 6 and 20, 2023, Commerce requested supplemental information pertaining to certain aspects of the Petitions in separate supplemental questionnaires.[4] The petitioners filed responses to the supplemental questionnaires between October 12 and 23, 2023.[5]

In accordance with section 732(b) of the Tariff Act of 1930, as amended (the Act), the petitioners allege that imports of aluminum extrusions from China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Korea, Malaysia, Mexico, Taiwan, Thailand, Turkey, the UAE, and Vietnam are being, or are likely to be, sold in the United States at less than fair value (LTFV) within the meaning of section 731 of the Act, and that imports of such products are materially injuring, or threatening material injury to, the aluminum extrusions industry in the United States. Consistent with section 732(b)(1) of the Act, the Petitions are accompanied by information reasonably available to the petitioners supporting their allegations.

Commerce finds that the petitioners filed the Petitions on behalf of the domestic industry, because the petitioners are interested parties, as defined in sections 771(9)(D) and (E) of the Act.[6] Commerce also finds that the petitioners demonstrated sufficient industry support for the initiation of the requested LTFV investigations.[7]

## Periods of Investigation

Because the Petitions were filed on October 4, 2023, pursuant to 19 CFR 351.204(b)(1), the period of investigation (POI) for the Colombia, Dominican Republic, Ecuador, India, Indonesia, Italy, Korea, Malaysia, Mexico, Taiwan, Thailand, Turkey, and the UAE AD investigations is October 1, 2022, through September 30, 2023. Because China and Vietnam are non-market economy (NME) countries, pursuant to 19 CFR 351.204(b)(1), the POI for the China and Vietnam AD investigations is April 1, 2023, through September 30, 2023.

## Scope of the Investigations

The products covered by these investigations are aluminum extrusions from China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Korea, Malaysia, Mexico, Taiwan, Thailand, Turkey, the UAE, and Vietnam. For a full description of the scope of these investigations, *see* the appendix to this notice.

## Comments on the Scope of the Investigations

On October 10, 11, 18, and 19, 2023, Commerce requested information and

[1] The members of the U.S. Aluminum Extruders Coalition are Alexandria Extrusion Company; APEL Extrusions Inc.; Bonnell Aluminum; Brazeway; Custom Aluminum Products; Extrudex Aluminum; International Extrusions; Jordan Aluminum Company; M–D Building Products, Inc.; Merit Aluminum; MI Metals; Pennex Aluminum; Tower Extrusions; and Western Extrusions.

[2] *See* Petitioners' Letter, ''Aluminum Extrusions from Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Malaysia, Mexico, the People's Republic of China, South Korea, Taiwan, Thailand, Turkey, the United Arab Emirates and Vietnam: Petitions for the Imposition of Antidumping and Countervailing Duties,'' dated October 4, 2023 (the Petitions).

[3] *Id.*

[4] *See* Commerce's Letters, ''Petitions for the Imposition of Antidumping and Countervailing Duties on Imports of Aluminum Extrusions from the People's Republic of China, Colombia, Ecuador, the Dominican Republic, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Supplemental Questions,'' dated October 6, 2023; ''Petitions for the Imposition of Antidumping and Countervailing Duties on Imports of Aluminum Extrusions from the People's Republic of China, Colombia, Ecuador, the Dominican Republic, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Supplemental Questions,'' dated October 10, 2023 (First Scope Questionnaire); Country-Specific Supplemental Questionnaires: China Supplemental, Colombia Supplemental, Dominican Republic Supplemental, Ecuador Supplemental; India Supplemental, Indonesia Supplemental, Italy Supplemental; Korea Supplemental; Malaysia Supplemental, Mexico Supplemental, Taiwan Supplemental, Thailand Supplemental, Turkey Supplemental, UAE Supplemental, and Vietnam Supplemental, dated October 10 and 11, 2023; Country-Specific Supplemental Questionnaires: Second Indonesia Supplemental and Second Vietnam Supplemental, dated October 12, 2023; and ''Petitions for the Imposition of Antidumping and Countervailing Duties on Imports of Aluminum Extrusions from the People's Republic of China, Colombia, Ecuador, the Dominican Republic, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Second Scope Supplemental Questionnaire,'' dated October 18, 2023 (Second Scope Questionnaire); Country-Specific Supplemental Questionnaire: Second Malaysia Supplemental, dated October 19, 2023; and Country-Specific Supplemental Questionnaire: Second Ecuador Supplemental, dated October 20, 2023; *see also* Memorandum, ''Phone Call with Counsel to the Petitioners,'' dated October 11, 2023 (October 11 Memorandum); and Memorandum, ''Phone Call with Counsel to the Petitioners,'' dated October 19, 2023 (October 19 Memorandum).

[5] *See* Petitioner's Letters, ''Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Malaysia, Mexico, the Republic of Korea, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Response to First Supplemental Questions Regarding Common Issues and Injury Petition Volume I of the Petition,'' dated October 11, 2023 (General Issues Supplement); ''Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Malaysia, Mexico, the Republic of Korea, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Response to First Supplemental Scope Questions Regarding Common Issues and Injury Petition Volume I of the Petition,'' dated October 13, 2023 (First Scope Supplement); Country-Specific Supplemental Responses, dated October 12, 13, and 16, 2023; Second Mexico and Turkey Supplemental Responses, dated October 16, 2023; ''Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Malaysia, Mexico, the Republic of Korea, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Response to Second Supplemental Scope Questions Regarding Common Issues and Injury Petition Volume I of the Petition, '' dated October 20, 2023 (Second Scope Supplement); ''Aluminum Extrusions from Malaysia: Response to Second Supplemental Questions Regarding Malaysia Antidumping Duty Volume VII of the Petition,'' dated October 20, 2023; and ''Aluminum Extrusions from Ecuador: Response to Second Supplemental Questions Regarding Ecuador Antidumping Duty Volume IV of the Petition,'' dated October 23, 2023.

[6] *See* Petitions at Volume I (page 2). The U.S. Aluminum Extruders Coalition is an interested party under section 771(9)(E) of the Act, while the USW is an interested party under section 771(9)(D) of the Act.

[7] *See, infra,* section on ''Determination of Industry Support for the Petitions.''

clarification from the petitioners regarding the proposed scope to ensure that the scope language in the Petitions is an accurate reflection of the products for which the domestic industry is seeking relief.[8] On October 13 and 20, 2023, the petitioners provided clarifications and revised the scope of these investigations.[9] The description of merchandise covered by these investigations, as described in the appendix to this notice, reflects these clarifications.

As discussed in the *Preamble* to Commerce's regulations, we are setting aside a period for parties to raise issues regarding product coverage (*i.e.,* scope).[10] We have some concerns related to the administrability of certain provisions in the proposed scope. For example, we find the definition of subassemblies (included) and imported merchandise that is not a part or subassembly of a larger product or system (excluded) remains an outstanding issue. Accordingly, Commerce intends to continue evaluating the scope of these investigations, with the possibility of making additional modifications to clarify further what products are covered and not covered by the scope of these investigations.

Commerce will consider all scope comments received and, if necessary, will consult with interested parties prior to the issuance of the preliminary determinations. If scope comments include factual information,[11] all such factual information should be limited to public information. To facilitate preparation of its questionnaires, Commerce requests that scope comments be submitted by 5 p.m. Eastern Time (ET) on November 13, 2023, which is 20 calendar days from the signature date of this notice. Any rebuttal comments, which may include factual information, must be filed by 5 p.m. ET on November 24, 2023, which is the next business day after 10 calendar days from the initial comment deadline.[12]

Commerce requests that any factual information that parties consider relevant to the scope of these investigations be submitted during that period. However, if a party subsequently finds that additional factual information pertaining to the scope of the investigations may be relevant, the party must contact Commerce and request permission to submit the additional information. All such submissions must be filed on the records of each of the concurrent AD and CVD investigations.

**Filing Requirements**

All submissions to Commerce must be filed electronically using Enforcement and Compliance's Antidumping Duty and Countervailing Duty Centralized Electronic Service System (ACCESS), unless an exception applies.[13] An electronically filed document must be received successfully in its entirety by the time and date it is due.

**Comments on Product Characteristics**

Commerce is providing interested parties an opportunity to comment on the appropriate physical characteristics of aluminum extrusions to be reported in response to Commerce's AD questionnaires. This information will be used to identify the key physical characteristics of the subject merchandise in order to report the relevant factors of production (FOP) or costs of production (COP) accurately, as well as to develop appropriate product comparison criteria.

Interested parties may provide any information or comments that they feel are relevant to the development of an accurate list of physical characteristics. Specifically, they may provide comments as to which characteristics are appropriate to use as: (1) general product characteristics; and (2) product comparison criteria. We note that it is not always appropriate to use all product characteristics as product comparison criteria. We base product comparison criteria on meaningful commercial differences among products. In other words, although there may be some physical product characteristics utilized by manufacturers to describe aluminum extrusions, it may be that only a select few product characteristics take into account commercially meaningful physical characteristics. In addition, interested parties may comment on the order in which the physical characteristics should be used in matching products. Generally, Commerce attempts to list the most important physical characteristics first and the least important characteristics last.

In order to consider the suggestions of interested parties in developing and issuing the AD questionnaires, all product characteristics comments must be filed by 5 p.m. ET on November 13, 2023, which is 20 calendar days from the signature date of this notice.[14] Any rebuttal comments must be filed by 5:00 p.m. ET on November 24, 2023, which is the next business day after 10 calendar days from the initial comment deadline.[15] All comments and submissions to Commerce must be filed electronically using ACCESS, as explained above, on the record of each of the AD investigations.

**Determination of Industry Support for the Petitions**

Section 732(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, Commerce shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the ''industry.''

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus,

[8] *See* First Scope Questionnaire; *see also* October 11 Memorandum; Second Scope Questionnaire; and October 19 Memorandum.

[9] *See* First Scope Supplement at 1–19 and Exhibit I–Scope Supp–1; *see also* Second Scope Supplement at 1–3 and Exhibits I–Second Scope Supp–1 and I–Second Scope Supp–2.

[10] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997) (*Preamble*); *see also* 19 CFR 351.312.

[11] *See* 19 CFR 351.102(b)(21) (defining ''factual information'').

[12] The deadline for rebuttal comments falls on November 23, 2023, which is a federal holiday. In accordance with 19 CFR 351.303(b)(1), Commerce will accept rebuttal comments filed by 5:00 p.m. ET on November 24, 2023. *Id.* (''For both electronically filed and manually filed documents, if the applicable due date falls on a non-business day, the Secretary will accept documents that are filed on the next business day.'').

[13] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011); *see also Enforcement and Compliance: Change of Electronic Filing System Name,* 79 FR 69046 (November 20, 2014) for details of Commerce's electronic filing requirements, effective August 5, 2011. Information on help using ACCESS can be found at *https://access.trade.gov/help.aspx* and a handbook can be found at *https://access.trade.gov/help/Handbook_on_Electronic_Filing_Procedures.pdf.*

[14] *See* 19 CFR 351.303(b)(1).

[15] The deadline for rebuttal comments falls on November 23, 2023, which is a Federal holiday. In accordance with 19 CFR 351.303(b)(1), Commerce will accept rebuttal comments filed by 5 p.m. ET on November 24, 2023. *Id.* (''For both electronically filed and manually filed documents, if the applicable due date falls on a non-business day, the Secretary will accept documents that are filed on the next business day.'').

to determine whether a petition has the requisite industry support, the statute directs Commerce to look to producers and workers who produce the domestic like product. The U.S. International Trade Commission (ITC), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both Commerce and the ITC must apply the same statutory definition regarding the domestic like product,[16] they do so for different purposes and pursuant to a separate and distinct authority. In addition, Commerce's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law.[17]

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, the petitioners do not offer a definition of the domestic like product distinct from the scope of the investigations.[18] Based on our analysis of the information submitted on the record, we have determined that aluminum extrusions, as defined in the scope, constitute a single domestic like product, and we have analyzed industry support in terms of that domestic like product.[19]

In determining whether the petitioners have standing under section 732(c)(4)(A) of the Act, we considered the industry support data contained in the Petitions with reference to the domestic like product as defined in the ''Scope of the Investigations,'' in the appendix to this notice. To establish industry support, the petitioners provided the total 2022 shipments of the domestic like product for the U.S. producers that support the Petitions, as well as the estimated 2022 production of the domestic like product for the plants represented by the USW, and compared this to the estimated total 2022 shipments of the domestic like product for the entire domestic industry.[20] The petitioners estimated the total 2022 shipments of the domestic like product for the entire U.S. industry based on information derived from the Aluminum Association.[21] Because total industry production data for the domestic like product for 2022 are not reasonably available to the petitioners, and the petitioners have established that shipments are a reasonable proxy for production data,[22] we have relied on the data provided by the petitioners for purposes of measuring industry support.[23]

On October 17, 2023, we received timely filed comments on industry support from Hydro Precision Tubing USA, LLC (Hydro Precision), a U.S. producer of aluminum extrusions.[24] On October 17, 2023, we also received timely filed comments on industry support from Ashley Furniture Industries, LLC and Kimball International Inc. (collectively, Ashley/Kimball), domestic producers of furniture.[25] On October 19, 2023, the petitioners responded to the comments from Hydro Precision and Ashley/Kimball in a timely filed rebuttal submission.[26]

Our review of the data provided in the Petitions, the General Issues Supplement, the Petitioners' Standing Response, and other information readily available to Commerce indicates that the petitioners have established industry support for the Petitions.[27] First, the Petitions established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, Commerce is not required to take further action in order to evaluate industry support (*e.g.,* polling).[28] Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petitions account for at least 25 percent of the total production of the domestic like product.[29] Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petitions account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petitions.[30] Accordingly, Commerce determines that the Petitions were filed on behalf of the domestic industry within the meaning of section 732(b)(1) of the Act.[31]

[16] *See* section 771(10) of the Act.

[17] *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (CIT 2001) (citing *Algoma Steel Corp., Ltd.* v. *United States,* 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989)).

[18] *See* Petitions at Volume I (pages 23–28); *see also* General Issues Supplement at 1 and Exhibit I–Supp–1.

[19] For a discussion of the domestic like product analysis as applied to these cases and information regarding industry support, *see* Antidumping Duty Investigation Initiation Checklists: Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Mexico, Malaysia, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam, dated concurrently with this notice (Country-Specific AD Initiation Checklists) at Attachment II, Analysis of Industry Support for the Antidumping and Countervailing Duty Petitions Covering Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Mexico, Malaysia, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam (Attachment II). These Initiation Checklists are on file electronically via ACCESS.

[20] *See* Petitions at Volume I (pages 2–6 and Exhibits I–3, I–4, I–23, and I–58); *see also* General Issues Supplement at 3–7 and Exhibits I–Supp–8 through I–Supp–10.

[21] *See* Petitions at Volume I (pages 3–6 and Exhibits I–4 and I–58); *see also* General Issues Supplement at 3–7 and Exhibit I–Supp–8.

[22] *See* Petitions at Volume I (pages 3–5 and Exhibit I–4); *see also* General Issues Supplement at 4–5.

[23] *See* Petitions at Volume I (pages 2–6 and Exhibits I–1 through I–4, I–23, and I–58); *see also* General Issues Supplement at 2–7 and Exhibits I–Supp–4 through I–Supp–10. For further discussion, *see* Attachment II of the Country-Specific AD Initiation Checklists.

[24] *See* Hydro Precision's Letter, ''Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Malaysia, Mexico, the Republic of Korea, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Hydro Precision Tubing USA, LLC's Comments on the Lack of Standing of the Petitioner and Request for Polling of the Domestic Industry,'' dated October 17, 2023.

[25] *See* Ashley/Kimball's Letter, ''Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Comments on Industry Support,'' dated October 17, 2023.

[26] *See* Petitioners' Letter, ''Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Malaysia, Mexico, the Republic of Korea, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Response to Comments on Industry Support,'' dated October 19, 2023 (Petitioners' Standing Response).

[27] *See* Petitions at Volume I (pages 2–6 and Exhibits I–1 through I–4, I–23, and I–58); *see also* General Issues Supplement at 2–7 and Exhibits I–Supp–4 through I–Supp–10; and Petitioners' Standing Response at 1–23 and Exhibits 1–16. For further discussion, *see* Attachment II of the Country-Specific AD Initiation Checklists.

[28] *See* Attachment II of the Country-Specific AD Initiation Checklists; *see also* section 732(c)(4)(D) of the Act.

[29] *See* Attachment II of the Country-Specific AD Initiation Checklists.

[30] *Id.*

[31] *Id.*

**Allegations and Evidence of Material Injury and Causation**

The petitioners allege that the U.S. industry producing the domestic like product is being materially injured, or is threatened with material injury, by reason of the imports of the subject merchandise sold at LTFV. In addition, with regard to China, Colombia, the Dominican Republic, Indonesia, Mexico, Turkey, and Vietnam, the petitioners allege that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.[32] With regard to Ecuador, India, Korea, Malysia, Taiwan, Thailand, Italy, and the UAE, while the allegedly dumped imports from each of these countries do not individually exceed the statutory requirements for negligibility, the petitioners provided data demonstrating that the aggregate import share from these five countries is 13.65 percent, which exceeds the seven percent threshold established by the exception in section 771(24)(A)(ii) of the Act.[33]

The petitioners contend that the industry's injured condition is illustrated by a significant volume of subject imports; reduced market share; underselling and price depression and/or suppression; lost sales and revenues; decline in the domestic industry's production, capacity utilization, and U.S. shipments; declining employment variables; adverse impact on the domestic industry's profitability and financial performance; and the magnitude of the alleged dumping margins.[34] We assessed the allegations and supporting evidence regarding material injury, threat of material injury, causation, as well as negligibility, and we have determined that these allegations are properly supported by adequate evidence, and meet the statutory requirements for initiation.[35]

**Allegations of Sales at LTFV**

The following is a description of the allegations of sales at LTFV upon which Commerce based its decision to initiate AD investigations of imports of aluminum extrusions from China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Korea, Malaysia, Mexico, Taiwan, Thailand, Turkey, the UAE, and Vietnam. The sources of data for the deductions and adjustments relating to U.S. price and normal value (NV) are discussed in greater detail in the Country-Specific AD Initiation Checklists.

**U.S. Price**

For China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Korea, Mexico, Taiwan, Thailand, Turkey, and Vietnam, the petitioners based export price (EP) on pricing information for sales of, or offers for sale of, aluminum extrusions produced in and exported from each country.[36] For Italy, Malaysia, and the UAE, the petitioners based EP on transaction-specific average unit values (AUVs) (*i.e.,* a month- and port-specific AUV) derived from official import statistics and tied to ship manifest data. For each country, the petitioners made certain adjustments to U.S. price to calculate a net ex-factory U.S. price, where applicable.[37]

**Normal Value** [38]

For the Dominican Republic, Italy, and the UAE, the petitioners based NV on home market prices they obtained for aluminum extrusions produced in and sold, or offered for sale, in each country during the applicable time period.[39] The petitioners made certain adjustments to home market price to calculate a net ex-factory home market price, where appropriate.[40]

For Colombia, Ecuador, India, Indonesia, Korea, Malaysia, Mexico, Taiwan, Thailand, and Turkey, the petitioners stated that they were unable to obtain home market or third country pricing information for aluminum extrusions to use as a basis for NV.[41] Therefore, for Colombia, Ecuador, India, Indonesia, Korea, Malaysia, Mexico, Taiwan, Thailand, and Turkey, the petitioners calculated NV based on constructed value (CV).[42] For further discussion of CV, *see* the section ''Normal Value Based on Constructed Value,'' below.

Commerce considers China and Vietnam to be NME countries.[43] In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by Commerce. Therefore, we continue to treat China and Vietnam as NME countries for purposes of the initiation of these investigations. Accordingly, we base NV on factors of production (FOPs) valued in a surrogate market economy country in accordance with section 773(c) of the Act.

The petitioners claims that Turkey is an appropriate surrogate country for China because it is a market economy that is at a level of economic development comparable to that of China and is a significant producer of comparable merchandise.[44] The petitioners provided publicly available information from Turkey to value all FOPs.[45] Based on the information provided by the petitioners, we believe it is appropriate to use Turkey as a surrogate country to value all FOPs for initiation purposes.

The petitioner claims that Indonesia is an appropriate surrogate country for Vietnam because it is a market economy that is at a level of economic development comparable to that of Vietnam and is a significant producer of comparable merchandise.[46] The petitioners provided publicly available information from Indonesia to value all FOPs (except selling, general, and administrative expenses (SG&A), overhead, financial expenses, and profit).[47] To value SG&A, overhead, financial expenses, and profit, the petitioners provided financial statements from a producer of identical merchandise domiciled in another surrogate country, Egypt.[48] Based on the

[32] *See* Petitions at Volume I (pages 37–38 and Exhibit I–16); *see also* General Issues Supplement at 9 and Exhibit I–Supp–11.

[33] *See* General Issues Supplement at 9 and Exhibit I–Supp–11.

[34] *See* Petitions at Volume I (pages 22, 30–60 and Exhibits I–9 through I–56); *see also* General Issues Supplement at 7–9 and Exhibit I–Supp–11.

[35] *See* Country-Specific AD Initiation Checklists at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Antidumping and Countervailing Duty Petitions Covering Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Mexico, Malaysia, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam.

[36] *See* Country-Specific AD Initiation Checklists.

[37] *Id.*

[38] In accordance with section 773(b)(2) of the Act, for the Colombia, Dominican Republic, Ecuador, India, Indonesia, Italy, Korea, Malaysia, Mexico, Taiwan, Thailand, Turkey, and UAE investigations, Commerce will request information necessary to calculate the constructed value (CV) and COP to determine whether there are reasonable grounds to believe or suspect that sales of the foreign like product have been made at prices that represent less than the COP of the product.

[39] *See* Country-Specific AD Initiation Checklists.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *See, e.g., Certain Freight Rail Couplers and Parts Thereof from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value and Preliminary Affirmative Determination of Critical Circumstances,* 88 FR 15372 (March 13, 2023), and accompanying Preliminary Decision Memorandum at 5, unchanged in *Certain Freight Rail Couplers and Parts Thereof from the People's Republic of China: Final Affirmative Determination of Sales at Less-Than-Fair Value and Final Affirmative Determination of Critical Circumstances,* 88 FR 34485 (May 30, 2023); *see also Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results, and Final Results of No Shipments of the Antidumping Duty Administrative Review; 2016–2017,* 84 FR 18007 (April 29, 2019).

[44] *See* China AD Initiation Checklist.

[45] *Id.*

[46] *See* Vietnam AD Initiation Checklist.

[47] *Id.*

[48] *Id.*

information provided by the petitioners, we believe it is appropriate to use Indonesia as a surrogate country to value all FOPs (except SG&A, overhead, financial expenses, and profit) and Egypt to value SG&A, overhead, financial expenses, and profit for initiation purposes.

Interested parties will have the opportunity to submit comments regarding surrogate country selection and, pursuant to 19 CFR 351.301(c)(3)(i), will be provided an opportunity to submit publicly available information to value FOPs within 30 days before the scheduled date of the preliminary determinations.

**Factors of Production**

Because information regarding the volume of inputs consumed by Chinese and Vietnamese producers/exporters was not reasonably available, the petitioners used product-specific consumption rates from a U.S. producer of aluminum extrusions as a surrogate to value Chinese and Vietnamese manufacturers' FOPs.[49] Additionally, as noted above, the petitioners calculated factory overhead, SG&A, and profit based on the experience of a Turkish and Egyptian producer of identical merchandise for China and Vietnam, respectively.[50]

**Normal Value Based on Constructed Value**

As noted above for Colombia, Ecuador, India, Indonesia, Korea, Malaysia, Mexico, Taiwan, Thailand, and Turkey, the petitioners stated that they were unable to obtain home market or third-country prices for aluminum extrusions to use as a basis for NV. Therefore, for these countries, the petitioners calculated NV based on CV.[51]

Pursuant to section 773(e) of the Act, the petitioners calculated CV as the sum of the cost of manufacturing, SG&A, financial expenses, and profit.[52] For each of these countries, in calculating the cost of manufacturing, the petitioners relied on the production experience and input consumption rates of a U.S. producer of aluminum extrusions, valued using publicly available information applicable to the respective countries.[53] In calculating SG&A, financial expenses, and profit ratios (where applicable), the petitioners relied on the calendar year 2022 financial statements of a producer of identical or comparable merchandise domiciled in each respective subject country or a third country, where appropriate.[54]

**Fair Value Comparisons**

Based on the data provided by the petitioners, there is reason to believe that imports of aluminum extrusions from China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Korea, Malaysia, Mexico, Taiwan, Thailand, Turkey, the UAE, and Vietnam are being, or are likely to be, sold in the United States at LTFV. Based on comparisons of EP to NV in accordance with sections 772 and 773 of the Act, the estimated dumping margins for aluminum extrusions for each of the countries covered by this initiation are as follows: (1) China—376.85 percent; (2) Colombia—165.25 percent; (3) Dominican Republic—28.29 percent; (4) Ecuador—42.79 to 63.21 percent; (5) India—39.05 percent; (6) Indonesia—88.53 percent; (7) Italy—41.67 percent; (8) Korea—43.56 percent; (9) Malaysia—25.89 to 27.51 percent; (10) Mexico—76.68 to 82.03 percent; (11) Taiwan—60.25 to 67.86 percent; (12) Thailand—76.73 percent; (13) Turkey—48.43 percent; (14) UAE—42.29 percent; and (15) Vietnam—41.84 percent.[55]

**Initiation of LTFV Investigations**

Based upon the examination of the Petitions and supplemental responses, we find that they meet the requirements of section 732 of the Act. Therefore, we are initiating LTFV investigations to determine whether imports of aluminum extrusions from China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Korea, Malaysia, Mexico, Taiwan, Thailand, Turkey, the UAE, and Vietnam are being, or are likely to be, sold in the United States at LTFV. In accordance with section 733(b)(1)(A) of the Act and 19 CFR 351.205(b)(1), unless postponed, we will make our preliminary determinations no later than 140 days after the date of these initiations.

**Respondent Selection**

*Colombia, Dominican Republic, Ecuador, India, Indonesia, Italy, Korea, Malaysia, Mexico, Taiwan, Thailand, Turkey, and the UAE*

In the Petitions, the petitioners identified one company in Colombia, two companies in the Dominican Republic, three companies in Ecuador, 13 companies in India, 18 companies in Indonesia, 22 companies in Italy, 13 companies in Korea, nine companies in Malaysia, 14 companies in Mexico, 21 companies in Taiwan, eight companies in Thailand, 39 companies in Turkey, and 13 companies in the UAE as producers/exporters of aluminum extrusions.[56] For Ecuador, India, Indonesia, Italy, Korea, Malaysia, Mexico, Taiwan, Thailand, Turkey, and the UAE, in the event Commerce determines that the number of companies is large, and it cannot individually examine each company based upon Commerce's resources, where appropriate, Commerce intends to select mandatory respondents based on quantity and value (Q&V) questionnaires issued to potential respondents. Following standard practice in AD investigations involving market economy countries, Commerce would normally select respondents based on U.S. Customs and Border Protection (CBP) entry data for imports under the appropriate Harmonized Tariff Schedule of the United States (HTSUS) subheadings listed in the scope of the investigations. However, for these investigations, due to the wide variety of individual types of aluminum extrusions products covered by the scope, we cannot rely on CBP data in selecting respondents. Notwithstanding the decision to rely on Q&V questionnaires for respondent selection, due to the number of producers and/or exporters identified in the Petitions, Commerce has determined to limit the number of Q&V questionnaires that it will issue to producers and/or exporters based on CBP data for aluminum extrusions from Indonesia, Italy, Taiwan, and Turkey during the POI under the appropriate HTSUS subheadings listed in the ''Scope of the Investigations,'' in the appendix. Accordingly, for Indonesia, Italy, Taiwan, and Turkey, Commerce will send Q&V questionnaires to the largest producers and/or exporters that are identified in the CBP entry data for which there is complete address information on the record. For Ecuador, India, Korea, Malaysia, Mexico, Thailand, and the UAE, we intend to issue Q&V questionnaires to each potential respondent for which the petitioners have provided a complete address. For Colombia and the Dominican Republic, the petitioners identified one company as a producer or exporter of aluminum extrusions (Colombia) and two companies as

[49] *See* China AD Initiation Checklist and Vietnam AD Initiation Checklist.

[50] *Id.* As noted above, the petitioners calculated SG&A, overhead, and profit using information specific to Egypt. *See* Vietnam AD Initiation Checklist.

[51] *See* Country-Specific AD Initiation Checklists.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *See* Petitions at Volume I (page 18 and Exhibit I–8); *see also* General Issues Supplement at 1–2 and Exhibit I–Supp–3.

producers and/or exporters of aluminum extrusions (Dominican Republic). Therefore, unless we receive voluntary responses to the Q&V questionnaire from companies not identified, as described below, we intend to examine the one producer/exporter of aluminum extrusions from Colombia and the two producers/exporters of aluminum extrusions from the Dominican Republic.

Commerce will post the Q&V questionnaires along with filing instructions on Commerce's website at *https://www.trade.gov/ec-adcvd-case-announcements.* Exporters/producers of aluminum extrusions from Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Korea, Malaysia, Mexico, Taiwan, Thailand, Turkey, and the UAE that do not receive Q&V questionnaires by mail may still submit a response to the Q&V questionnaire and can obtain a copy of the Q&V questionnaire from Enforcement and Compliance's website. Responses to the Q&V questionnaire must be submitted by the relevant producers/exporters no later than 5 p.m. ET on November 7, 2023, which is two weeks from the signature date of this notice. All Q&V responses must be filed electronically via ACCESS. An electronically filed document must be received successfully, in its entirety, by ACCESS no later than 5:00 p.m. ET on the deadline noted above.

Interested parties must submit applications for disclosure under administrative protective order (APO) in accordance with 19 CFR 351.305(b). Instructions for filing such applications may be found on Commerce's website at *https://www.trade.gov/administrative-protective-orders.* Commerce intends to make its decisions regarding respondent selection for Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Korea, Malaysia, Mexico, Taiwan, Thailand, Turkey, and the UAE within 20 days of publication of this notice.

*China and Vietnam*

In the Petitions, the petitioners named over 100 companies in China and 13 companies in Vietnam as producers and/or exporters of aluminum extrusions.[57] Our standard practice for respondent selection in AD investigations involving NME countries is to select respondents based on Q&V questionnaires in cases where it has determined that the number of companies is large and it cannot individually examine each company based upon its resources. Therefore, considering the number of producers and/or exporters identified in the Petitions, Commerce will solicit Q&V information that can serve as a basis for selecting exporters for individual examination in the event that Commerce determines that the number is large and decides to limit the number of respondents individually examined pursuant to section 777A(c)(2) of the Act. For China, because there are nearly 300 Chinese producers and/or exporters identified in the Petitions, Commerce has determined that it will issue Q&V questionnaires to the largest producers and/or exporters that are identified in the CBP data for which there is complete address information on the record. For Vietnam, Commerce has determined that it will issue Q&V questionnaires to each potential respondent for which the petitioners have provided a complete address.

Commerce will post the Q&V questionnaires along with filing instructions on Commerce's website at *https://www.trade.gov/ec-adcvd-case-announcements.* Producers/exporters of aluminum extrusions from China and Vietnam that do not receive Q&V questionnaires may still submit a response to the Q&V questionnaire and can obtain a copy of the Q&V questionnaire from Commerce's website. Responses to the Q&V questionnaire must be submitted by the relevant Chinese and Vietnamese producers/exporters no later than 5:00 p.m. ET on November 7, 2023, which is two weeks from the signature date of this notice. All Q&V questionnaire responses must be filed electronically via ACCESS. An electronically filed document must be received successfully, in its entirety, by ACCESS no later than 5:00 p.m. ET on the deadline noted above.

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305(b). As stated above, instructions for filing such applications may be found on Commerce's website at *https://www.trade.gov/administrative-protective-orders.* Commerce intends to make its decisions regarding respondent selection for China and Vietnam within 20 days of publication of this notice.

**Separate Rates**

In order to obtain separate rate status in an NME investigation, exporters and producers must submit a separate rate application. The specific requirements for submitting a separate rate application in an NME investigation are outlined in detail in the application itself, which is available on Commerce's website at *https://access.trade.gov/Resources/nme/nme-sep-rate.html.* The separate rate application will be due 30 days after publication of this initiation notice. Exporters and producers must file a timely separate rate application if they want to be considered for individual examination. Exporters and producers who submit a separate rate application and have been selected as mandatory respondents will be eligible for consideration for separate rate status only if they respond to all parts of Commerce's AD questionnaire as mandatory respondents. Commerce requires that companies from China and Vietnam submit a response both to the Q&V questionnaire and to the separate rate application by the respective deadlines in order to receive consideration for separate rate status. Companies not filing a timely Q&V questionnaire response will not receive separate rate consideration.

**Use of Combination Rates**

Commerce will calculate combination rates for certain respondents that are eligible for a separate rate in an NME investigation. The Separate Rates and Combination Rates Bulletin states:

> {w}hile continuing the practice of assigning separate rates only to exporters, all separate rates that {Commerce} will now assign in its NME Investigation will be specific to those producers that supplied the exporter during the period of investigation. Note, however, that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This practice applies both to mandatory respondents receiving an individually calculated separate rate as well as the pool of non-investigated firms receiving the {weighted average} of the individually calculated rates. This practice is referred to as the application of ''combination rates'' because such rates apply to specific combinations of exporters and one or more producers. The cash-deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question *and* produced by a firm that supplied the exporter during the period of investigation.[58]

**Distribution of Copies of the AD Petitions**

In accordance with section 732(b)(3)(A) of the Act and 19 CFR 351.202(f), copies of the public version of the AD Petitions have been provided to the governments of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Korea, Malaysia, Mexico, Taiwan, Thailand, Turkey, the

[57] *See* Petitions at Volume I (page 18 and Exhibit I–8); *see also* General Issues Supplement at 1–2 and Exhibit I–Supp–3.

[58] *See* Enforcement and Compliance's Policy Bulletin 05.1, regarding, ''Separate-Rates Practice and Application of Combination Rates in Antidumping Investigation involving NME Countries,'' (April 5, 2005) at 6 (emphasis added), available on Commerce's website at *https://access.trade.gov/Resources/policy/bull05-1.pdf.*

UAE, and Vietnam via ACCESS. To the extent practicable, we will attempt to provide a copy of the public version of the AD Petitions to each exporter named in the AD Petitions, as provided under 19 CFR 351.203(c)(2).

**ITC Notification**

Commerce will notify the ITC of our initiation, as required by section 732(d) of the Act.

**Preliminary Determinations by the ITC**

The ITC will preliminarily determine, within 45 days after the date on which the AD Petitions were filed, whether there is a reasonable indication that imports of aluminum extrusions from China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Korea, Malaysia, Mexico, Taiwan, Thailand, Turkey, the UAE, and/or Vietnam are materially injuring, or threatening material injury to, a U.S. industry.[59] A negative ITC determination for any country will result in the investigation being terminated with respect to that country.[60] Otherwise, these LTFV investigations will proceed according to statutory and regulatory time limits.

**Submission of Factual Information**

Factual information is defined in 19 CFR 351.102(b)(21) as: (i) evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)–(iv). Section 351.301(b) of Commerce's regulations requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted[61] and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct.[62] Time limits for the submission of factual information are addressed in 19 CFR 351.301, which provides specific time limits based on the type of factual information being submitted. Interested parties should review the regulations prior to submitting factual information in these investigations.

**Particular Market Situation Allegation**

Section 773(e) of the Act addresses the concept of particular market situation (PMS) for purposes of CV, stating that ''if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology.'' When an interested party submits a PMS allegation pursuant to section 773(e) of the Act, Commerce will respond to such a submission consistent with 19 CFR 351.301(c)(2)(v). If Commerce finds that a PMS exists under section 773(e) of the Act, then it will modify its dumping calculations appropriately.

Neither section 773(e) of the Act, nor 19 CFR 351.301(c)(2)(v), 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 a respondent's initial section D questionnaire response.

**Extensions of Time Limits**

Parties may request an extension of time limits before the expiration of a time limit established under 19 CFR 351.301, or as otherwise specified by Commerce. In general, an extension request will be considered untimely if it is filed after the expiration of the time limit established under 19 CFR 351.301.[63] For submissions that are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10 a.m. ET on the due date. Under certain circumstances, we may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, we will inform parties in a letter or memorandum of the deadline (including a specified time) by which extension requests must be filed to be considered timely. An extension request must be made in a separate, stand-alone submission; under limited circumstances we will grant untimely filed requests for the extension of time limits, where we determine, based on 19 CFR 351.302, that extraordinary circumstances exist. Parties should review Commerce's regulations concerning the extension of time limits and the *Time Limits Final Rule* prior to submitting factual information in these investigations.[64]

**Certification Requirements**

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information.[65] Parties must use the certification formats provided in 19 CFR 351.303(g).[66] Commerce intends to reject factual submissions if the submitting party does not comply with the applicable certification requirements.

**Notification to Interested Parties**

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305. Parties wishing to participate in these investigations should ensure that they meet the requirements of 19 CFR 351.103(d) (*e.g.,* by filing the required letter of appearance). Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[67]

This notice is issued and published pursuant to sections 732(c)(2) and 777(i) of the Act, and 19 CFR 351.203(c).

[59] *See* section 733(a) of the Act.

[60] *Id.*

[61] *See* 19 CFR 351.301(b).

[62] *See* 19 CFR 351.301(b)(2).

[63] *See* 19 CFR 351.301; *see also Extension of Time Limits; Final Rule,* 78 FR 57790 (September 20, 2013) (*Time Limits Final Rule*), available at *https://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm.*

[64] *See* 19 CFR 351.302; *see also, e.g., Time Limits Final Rule.*

[65] *See* section 782(b) of the Act.

[66] *See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (*Final Rule*). Additional information regarding the *Final Rule* is available at *https://access.trade.gov/Resources/filing/index.html.*

[67] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020). Additionally, note that Commerce has modified its regulations to make permanent certain changes to its service procedures that were adopted on a temporary basis due to COVID–19, as well as additional clarifications and corrections to its AD/CVD regulations. Effective October 30, 2023, these changes will apply to all AD/CVD proceedings that are ongoing on the effective date and all AD/CVD proceedings initiated on or after the effective date. *See Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069 (September 29, 2023).

Dated: October 24, 2023.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

## Appendix—Scope of the Investigations

The merchandise subject to these investigations are aluminum extrusions, regardless of form, finishing, or fabrication, whether assembled with other parts or unassembled, whether coated, painted, anodized, or thermally improved. Aluminum extrusions are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by the Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 1 contain not less than 99 percent aluminum by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 3 contain manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 6 contain magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The scope also includes merchandise made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) that have a magnesium content accounting for up to but not more than 2.0 percent of total materials by weight.

The country of origin of the aluminum extrusion is determined by where the metal is extruded (*i.e.,* pressed through a die).

Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars, and rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Subject aluminum extrusions are produced and imported with a variety of coatings and surface treatments, and types of fabrication. The types of coatings and treatments applied to aluminum extrusions include, but are not limited to, extrusions that are mill finished (*i.e.,* without any coating or further finishing), brushed, buffed, polished, anodized (including brightdip), liquid painted, electroplated, chromate converted, powder coated, sublimated, wrapped, and/or bead blasted. Subject aluminum extrusions may also be fabricated, *i.e.,* prepared for assembly, or thermally improved. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, stretch-formed, hydroformed, knurled, swedged, mitered, chamfered, threaded, and spun. Performing such operations in third countries does not otherwise remove the merchandise from the scope of the investigations.

The types of products that meet the definition of subject merchandise include but are not limited to, vehicle roof rails and sun/moon roof framing, solar panel racking rails and framing, tradeshow display fixtures and framing, parts for tents or clear span structures, fence posts, drapery rails or rods, electrical conduits, door thresholds, flooring trim, electric vehicle battery trays, heat sinks, signage or advertising poles, picture frames, telescoping poles, or cleaning system components.

Aluminum extrusions may be heat sinks, which are fabricated aluminum extrusions that dissipate heat away from a heat source and may serve other functions, such as structural functions. Heat sinks come in a variety of sizes and shapes, including but not limited to a flat electronic heat sink, which is a solid aluminum extrusion with at least one flat side used to mount electronic or mechanical devices; a heat sink that is a housing for electronic controls or motors; lighting heat sinks, which dissipate heat away from LED devices; and process and exchange heat sinks, which are tube extrusions with fins or plates used to hold radiator tubing. Heat sinks are included in the scope, regardless of whether the design and production of the heat sinks are organized around meeting specified thermal performance requirements and regardless of whether they have been tested to comply with such requirements. For purposes of these investigations on aluminum extrusions from the People's Republic of China, only heat sinks designed and produced around meeting specified thermal performance requirements and tested to comply with such requirements are included in the scope.

Merchandise that is comprised solely of aluminum extrusions or aluminum extrusions and fasteners, whether assembled at the time of importation or unassembled, is covered by the scope in its entirety.

The scope also covers aluminum extrusions that are imported with non-extruded aluminum components beyond fasteners, whether assembled at the time of importation or unassembled, that are a part or subassembly of a larger product or system. Only the aluminum extrusion portion of the merchandise described in this paragraph, whether assembled or unassembled, is subject to duties. Examples of merchandise that is a part or subassembly of a larger product or system include, but are not limited to, window parts or subassemblies; door unit parts or subassemblies; shower and bath system parts or subassemblies; solar panel mounting systems; fenestration system parts or subassemblies, such as curtain wall and window wall units and parts or subassemblies of storefronts; furniture parts or subassemblies; appliance parts or subassemblies, such as fin evaporator coils and systems for refrigerators; railing or deck system parts or subassemblies; fence system parts or subassemblies; motor vehicle parts or subassemblies, such as bumpers for motor vehicles; trailer parts or subassemblies, such as side walls, flooring, and roofings; electric vehicle charging station parts or subassemblies; or signage or advertising system parts or subassemblies. Parts or subassemblies described by this paragraph that are subject to duties in their entirety pursuant to existing antidumping and countervailing duty orders are excluded from the scope of these investigations, so long as they remain subject to the scope of such orders. Any part or subassembly that otherwise meets the requirements of this scope and that is not covered by other antidumping and/or countervailing duty orders remains subject to the scope of these investigations.

The scope excludes assembled merchandise containing non-extruded aluminum components beyond fasteners that is not a part or subassembly of a larger product or system and that is used as imported, without undergoing after importation any processing, fabrication, finishing, or assembly or the addition of parts or material, regardless of whether the additional parts or material are interchangeable.

The scope also excludes merchandise containing non-extruded aluminum components beyond fasteners that is not a part or subassembly of a larger product or system that enters unassembled as a packaged combination of parts to be assembled as is for its intended use, without undergoing after importation any processing, fabrication, or finishing or the addition of parts or material, regardless of whether the additional parts or material are interchangeable. To be excluded under this paragraph, the merchandise must be sold and enter as a discrete kit on one Customs entry form.

Examples of such excluded assembled and unassembled merchandise include windows with glass, door units with door panel and glass, motor vehicles, trailers, furniture, and appliances.

The scope also includes aluminum extrusions that have been further processed in a third country, including, but not limited to, the finishing and fabrication processes described above, assembly, whether with other aluminum extrusion components or with non-aluminum extrusion components, or any other processing that would not otherwise remove the merchandise from the scope if performed in the country of manufacture of the in-scope product. Third-country processing; finishing; and/or fabrication, including those processes described in the scope, does not alter the country of origin of the subject aluminum extrusions.

The following aluminum extrusion products are excluded: aluminum extrusions made from an aluminum alloy with an Aluminum Association series designations commencing with the number 2 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 1.5 percent copper by weight; aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying

body equivalents) and containing in excess of 2.0 percent magnesium by weight; and aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 7 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent zinc by weight.

The scope also excludes aluminum alloy sheet or plates produced by means other than the extrusion process, such as aluminum products produced by a method of continuous casting or rolling. Cast aluminum products are also excluded. The scope also excludes unwrought aluminum in any form.

The scope also excludes collapsible tubular containers composed of metallic elements corresponding to alloy code 1080A as designated by the Aluminum Association (not including proprietary equivalents or other certifying body equivalents) where the tubular container (excluding the nozzle) meets each of the following dimensional characteristics: (1) length of 37 millimeters (mm) or 62 mm; (2) outer diameter of 11.0 mm or 12.7 mm; and (3) wall thickness not exceeding 0.13 mm.

Also excluded from the scope of these investigations is certain rectangular wire, imported in bulk rolls or precut strips and produced from continuously cast rolled aluminum wire rod, which is subsequently extruded to dimension to form rectangular wire with or without rounded edges. The product is made from aluminum alloy grade 1070 or 1370 (not including proprietary equivalents or other certifying body equivalents), with no recycled metal content allowed. The dimensions of the wire are 2.95 mm to 6.05 mm in width, and 0.65 mm to 1.25 mm in thickness. Imports of rectangular wire are provided for under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7605.19.0000, 7604.10.5000, or 7616.99.5190.

Also excluded from the scope of these antidumping and countervailing duty investigations on aluminum extrusions from the People's Republic of China are all products covered by the scope of the antidumping and countervailing duty orders on *Aluminum Extrusions from the People's Republic of China. See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order,* 76 FR 30,650 (May 26, 2011); and *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order,* 76 FR 30,653 (May 26, 2011) (collectively, *Aluminum Extrusions from the People's Republic of China*). Solely for these investigations on aluminum extrusions from the People's Republic of China, the following is an exhaustive list of products that meet the definition of subject merchandise. Merchandise that is not included in the following list that meets the definition of subject merchandise in the 2011 antidumping and countervailing duty orders on *Aluminum Extrusions from the People's Republic of China* remains subject to the earlier orders. No other section of this scope language that provides examples of subject merchandise is exhaustive. The following products are included in the scope of these investigations on aluminum extrusions from the People's Republic of China, whether assembled or unassembled: heat sinks as described above; cleaning system components like mops and poles; banner stands/back walls; fabric wall systems; drapery rails; side mount valve controls; water heater anodes; solar panel mounting systems; 5050 alloy rails for showers and carpets; auto heating and cooling system components; assembled motor cases with stators; louver assemblies; event décor; window wall units and parts; trade booths; micro channel heat exchangers; telescoping poles, pole handles, and pole attachments; flagpoles; wind sign frames; foreline hose assembly; electronics enclosures; parts and subassemblies for storefronts, including portal sets; light poles; air duct registers; outdoor sporting goods parts and subassemblies; glass refrigerator shelves; aluminum ramps; handicap ramp system parts and subassemblies; frames and parts for tents and clear span structures; parts and subassemblies for screen enclosures, patios, and sunrooms; parts and subassemblies for walkways and walkway covers; aluminum extrusions for LED lights; parts and subassemblies for screen, storm, and patio doors; pontoon boat parts and subassemblies, including rub rails, flooring, decking, transom structures, canopy systems, seating; boat hulls, framing, ladders, and transom structures; parts and subassemblies for docks, piers, boat lifts and mounting; recreational and boat trailer parts and subassemblies, including subframes, crossmembers, and gates; solar tracker assemblies with gears; garage door framing systems; door threshold and sill assemblies; highway and bridge signs; bridge, street, and highway rails; scaffolding, including planks and struts; railing and support systems; parts and subassemblies for exercise equipment; weatherstripping; door bottom and sweeps; door seals; floor transitions and trims; parts and subassemblies for modular walls and office furniture; truck trailer parts and subassemblies; boat cover poles, outrigger poles, and rod holders; bleachers and benches; parts and subassemblies for elevators, lifts, and dumbwaiters; parts and subassemblies for mirror and framing systems; window treatments; parts and subassemblies for air foils and fans; bus and RV window frames; sliding door rails; dock ladders; parts and subassemblies for RV frames and trailers; awning, canopy, and sunshade structures and their parts and subassemblies; marine motor mounts; linear lighting housings; and cluster mailbox systems.

Imports of the subject merchandise are primarily provided for under the following categories of the HTSUS: 7604.10.1000; 7604.10.3000; 7604.10.5000; 7604.21.0010; 7604.21.0090; 7604.29.1010; 7604.29.1090; 7604.29.3060; 7604.29.3090; 7604.29.5050; 7604.29.5090; 7608.10.0030; 7608.10.0090; 7608.20.0030; 7608.20.0090; 7609.00.0000; 7610.10.0010; 7610.10.0020; 7610.10.0030; 7610.90.0040; and 7610.90.0080.

Imports of the subject merchandise, including subject merchandise entered as parts of other products, may also be classifiable under the following additional HTSUS categories, as well as other HTSUS categories: 6603.90.8100; 7606.12.3091; 7606.12.3096; 7615.10.2015; 7615.10.2025; 7615.10.3015; 7615.10.3025; 7615.10.5020; 7615.10.5040; 7615.10.7125; 7615.10.7130; 7615.10.7155; 7615.10.7180; 7615.10.9100; 7615.20.0000; 7616.10.9090; 7616.99.1000; 7616.99.5130; 7616.99.5140; 7616.99.5190; 8302.10.3000; 8302.10.6030; 8302.10.6060; 8302.10.6090; 8302.20.0000; 8302.30.3010; 8302.30.3060; 8302.41.3000; 8302.41.6015; 8302.41.6045; 8302.41.6050; 8302.41.6080; 8302.42.3010; 8302.42.3015; 8302.42.3065; 8302.49.6035; 8302.49.6045; 8302.49.6055; 8302.49.6085; 8302.50.0000; 8302.60.3000; 8302.60.9000; 8305.10.0050; 8306.30.0000; 8414.59.6590; 8415.90.8045; 8418.99.8005; 8418.99.8050; 8418.99.8060; 8419.50.5000; 8419.90.1000; 8422.90.0640; 8424.90.9080; 8473.30.2000; 8473.30.5100; 8479.89.9599; 8479.90.8500; 8479.90.9596; 8481.90.9060; 8481.90.9085; 8486.90.0000; 8487.90.0080; 8503.00.9520; 8508.70.0000; 8513.90.2000; 8515.90.2000; 8516.90.5000; 8516.90.8050; 8517.71.0000; 8517.79.0000; 8529.90.7300; 8529.90.9760; 8536.90.8585; 8538.10.0000; 8541.90.0000; 8543.90.8885; 8547.90.0020; 8547.90.0030; 8708.10.3050; 8708.29.5160; 8708.80.6590; 8708.99.6890; 8807.30.0060; 9031.90.9195; 9401.99.9081; 9403.99.1040; 9403.99.9010; 9403.99.9015; 9403.99.9020; 9403.99.9040; 9403.99.9045; 9405.99.4020; 9506.11.4080; 9506.51.4000; 9506.51.6000; 9506.59.4040; 9506.70.2090; 9506.91.0010; 9506.91.0020; 9506.91.0030; 9506.99.0510; 9506.99.0520; 9506.99.0530; 9506.99.1500; 9506.99.2000; 9506.99.2580; 9506.99.2800; 9506.99.5500; 9506.99.6080; 9507.30.2000; 9507.30.4000; 9507.30.6000; 9507.30.8000; 9507.90.6000; 9547.90.0040; and 9603.90.8050.

While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

[FR Doc. 2023–23962 Filed 10–30–23; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–533–877, A–570–064, C–533–878, C–570–065]**

### Stainless Steel Flanges From India and the Peoples's Republic of China: Continuation of Antidumping and Countervailing Duty Orders

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** As a result of the determinations by the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) that revocation of the antidumping duty (AD) and countervailing duty (CVD) orders on stainless steel flanges from India and the People's Republic of China (China) would likely lead to a continuation or recurrence of dumping,

countervailable subsidies, and material injury to an industry in the United States, Commerce is publishing a notice of continuation of the AD and CVD orders.

**DATES:** Applicable October 24, 2023.

**FOR FURTHER INFORMATION CONTACT:** Emily Halle or Robert Galantucci, 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 or (202) 482–2923, respectively.

**SUPPLEMENTARY INFORMATION:**

## Background

On August 1, 2018, and October 9, 2018, Commerce published in the **Federal Register** the AD orders on stainless steel flanges from China and India, respectively.[1] On June 5 and October 5, 2018, Commerce published in the **Federal Register** the CVD orders on steel flanges from China and India, respectively.[2] On May 1, 2023, the ITC instituted,[3] and Commerce initiated,[4] the first sunset reviews of the *AD Orders* and the *CVD Orders,* 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 *AD Orders* and *CVD Orders* would likely lead to continuation or recurrence of dumping and countervailable subsidies, and, therefore, notified the ITC of the magnitude of the margins of dumping and subsidy rates likely to prevail should the *AD Orders*[5] and *CVD Orders*[6] be revoked.

On October 24, 2023, the ITC published its determination, pursuant to sections 751(c) and 752(a) of the Act, that revocation of the *AD Orders* and *CVD Orders* would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[7]

## Scope of the AD Orders and CVD Orders

The scope of the *AD Orders* and *CVD Orders* covers certain forged stainless steel flanges, whether unfinished, semi-finished, or finished (certain forged stainless steel flanges). Certain forged stainless steel flanges are generally manufactured to, but not limited to, the material specification of ASTM/ASME A/SA182 or comparable domestic or foreign specifications. Certain forged stainless-steel flanges are made in various grades such as, but not limited to, 304, 304L, 316, and 316L (or combinations thereof). The term ''stainless steel'' used in this scope refers to an alloy steel containing, by actual weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements.

Unfinished stainless steel flanges possess the approximate shape of finished stainless steel flanges and have not yet been machined to final specification after the initial forging or like operations. These machining processes may include, but are not limited to, boring, facing, spot facing, drilling, tapering, threading, beveling, heating, or compressing. Semi-finished stainless-steel flanges are unfinished stainless steel flanges that have undergone some machining processes.

The scope includes six general types of flanges. They are: (1) weld neck, generally used in butt-weld line connection; (2) threaded, generally used for threaded line connections; (3) slip-on, generally used to slide over pipe; (4) lap joint, generally used with stub-ends/butt-weld line connections; (5) socket weld, generally used to fit pipe into a machine recession; and (6) blind, generally used to seal off a line. The sizes and descriptions of the flanges within the scope include all pressure classes of ASME B16.5 and range from one-half inch to twenty-four inches nominal pipe size. Specifically excluded from the scope of the *AD Orders* and *CVD Orders* are cast stainless steel flanges. Cast stainless steel flanges generally are manufactured to specification ASTM A351.

The country of origin for certain forged stainless steel flanges, whether unfinished, semi-finished, or finished is the country where the flange was forged. Subject merchandise includes stainless steel flanges as defined above that have been further processed in a third country. The processing includes, but is not limited to, boring, facing, spot facing, drilling, tapering, threading, beveling, heating, or compressing, and/or any other processing that would not otherwise remove the merchandise from the scope of the *AD Orders* or *CVD Orders* if performed in the country of manufacture of the stainless steel flanges.

Merchandise subject to the *AD Orders* or *CVD Orders* is typically imported under headings 7307.21.1000 and 7307.21.5000 of the Harmonized Tariff Schedule of the United States (HTSUS). While HTSUS subheadings and ASTM specifications are provided for convenience and customs purposes, the written description of the scope is dispositive.

## Continuation of the AD Orders and CVD Orders

As a result of the determinations by Commerce and the ITC that revocation of the *AD Orders* and *CVD Orders* would likely lead to a continuation or a recurrence of dumping, countervailable subsidies, 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 *AD Orders* and *CVD Orders.* U.S. Customs and Border Protection will continue to collect AD and CVD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of the continuation of the *AD Orders* and *CVD Orders* will be October 24, 2023.[8] 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 *AD Orders* and *CVD Orders* 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

[1] *See Stainless Steel Flanges from the People's Republic of China: Antidumping Duty Order,* 83 FR 37468 (August 1, 2018); and *Stainless Steel Flanges from India: Antidumping Duty Order,* 83 FR 50639 (October 9, 2018) (collectively, *AD Orders*).

[2] *See Stainless Steel Flanges from the People's Republic of China: Countervailing Duty Order,* 83 FR 26006 (June 5, 2018); and *Stainless Steel Flanges from India: Countervailing Duty Order,* 83 FR 50336 (October 5, 2018), (collectively, *CVD Orders*).

[3] *See Stainless Steel Flanges from China and India; Institution of Five-Year Reviews,* 88 FR 26592 (May 1, 2023).

[4] *See Initiation of Five-Year (Sunset) Reviews,* 88 FR 26522 (May 1, 2023).

[5] *See Stainless Steel Flanges from India and the People's Republic of China: Final Results of the Expedited First Sunset Reviews of the Antidumping Duty Orders,* 88 FR 60642 (September 5, 2023).

[6] *See Stainless Steel Flanges from India: Final Results of the Expedited First Sunset Review of the Countervailing Duty Order,* 88 FR 60181 (August 31, 2023); *see also Stainless Steel Flanges from the People's Republic of China: Final Results of the Expedited First Sunset Review of the Countervailing Duty Order,* 88 FR 60640 (September 5, 2023).

[7] *See Stainless Steel Flanges from China and India; Determinations,* 88 FR 73043 (October 24, 2023).

[8] *Id.*

hereby requested. Failure to comply is a violation of the APO which may be subject to sanctions.

**Notification to Interested Parties**

These five-year sunset reviews and this notice are in accordance with sections 751(c) and 751(d)(2) of the Act and published in accordance with section 777(i)(1) of the Act and 19 CFR 351.218(f)(4).

Dated: October 24, 2023.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2023–23990 Filed 10–30–23; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Amended Trade Mission Application Deadline to the Clean EDGE (Enhancing Development and Growth Through Clean Energy) and Environmental Technologies Business Development Mission to India

**AGENCY:** International Trade Administration, Department of Commerce.

**ACTION:** Notice.

**SUMMARY:** The United States Department of Commerce, International Trade Administration (ITA), is organizing an executive-led Clean EDGE and Environmental Technologies Business Development Mission to India from March 4–11, 2024, with stops in New Delhi and Mumbai. In addition to these stops, mission participants can select an optional, additional stop in Hyderabad or Chennai. This notice is to update the prior **Federal Register** notice to reflect that the application deadline is now extended to November 17, 2023.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey Odum, Events Management Task Force, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone (202) 482–6397 or email *Jeffrey.Odum@trade.gov.*

**SUPPLEMENTARY INFORMATION:** Amendment to Revise the Trade Mission Deadline for Submitting Applications.

**Background**

**Clean EDGE (Enhancing Development and Growth Through Clean Energy) and Environmental Technologies Business Development Mission to India**

The International Trade Administration has determined that to allow for optimal execution of recruitment, the application deadline has been extended from October 20, 2023, to November 17, 2023. Applications may be accepted after that date if space remains and scheduling constraints permit. Interested U.S. companies and trade associations/organizations that have not already submitted an application are encouraged to do so. The U.S. Department of Commerce will review applications and make selection decisions on a rolling basis in accordance with the 88 FR 57926 (August 24, 2023). The applicants selected will be notified as soon as possible.

**Contact**

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**Gemal Brangman,**

*Director, Trade Events Management Task Force.*

[FR Doc. 2023–23934 Filed 10–30–23; 8:45 am]

**BILLING CODE 3510–DR–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–862]**

### Foundry Coke Products From the People's Republic of China: Continuation of the 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 foundry coke products (foundry coke) from the People's Republic of China (China) would likely lead to the 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 October 25, 2023.

**FOR FURTHER INFORMATION CONTACT:** Kabir Archuletta, 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) 482–2593.

**SUPPLEMENTARY INFORMATION:**

**Background**

On September 17, 2001, Commerce published in the **Federal Register** the AD order on foundry coke from China.[1] On April 3, 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 likely to prevail should the *Order* be revoked.[4]

On October 25, 2023, the ITC published its determination, pursuant to sections 751(c) and 752(a) of the Act, that revocation of the *Order* would

[1] *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Foundry Coke Products from the People's Republic of China,* 66 FR 48025 (September 17, 2001) (*Order*).

[2] *See Foundry Coke Products from China; Institution of a Five-Year Review,* 88 FR 19674 (April 3, 2023).

[3] *See Initiation of Five-Year (Sunset) Reviews,* 88 FR 19616 (April 3, 2023).

[4] *See Foundry Coke Products from the People's Republic of China: Final Results of the Expedited Fourth Sunset Review of the Antidumping Duty Order,* 88 FR 52114 (August 7, 2023), and accompanying Issues and Decision Memorandum.

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 product covered under the *Order* is coke larger than 100 mm (4 inches) in maximum diameter and at least 50 percent of which is retained on a 100 mm (4 inch) sieve, of a kind used in foundries. The foundry coke products subject to the *Order* were classifiable under subheading 2704.00.00.10 (as of January 1, 2000) and are currently classifiable under subheading 2704.00.00.11 (as of July 1, 2000) of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and Customs purposes, our written description of the scope of the *Order* is dispositive.

**Continuation of the Order**

As a result of the determinations by Commerce and the ITC that revocation of the *Order* would likely lead to 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* is October 25, 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 (APO)**

This notice also serves as the only reminder to parties subject to an APO of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

[5] *See Foundry Coke From China; Determination,* 88 FR 73377 (October 25, 2023).

[6] *Id.*

**Notification to Interested Parties**

This five-year sunset review and this notice are in accordance with section 751(c) and 751(d)(2) of the Act and published in accordance with section 777(i) of the Act, and 19 CFR 351.218(f)(4).

Dated: October 25, 2023.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2023–23963 Filed 10–30–23; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[C–570–159, C–560–841, C–201–861, C–489–851]**

### Aluminum Extrusions From the People's Republic of China, Indonesia, Mexico, and the Republic of Turkey: Initiation of Countervailing Duty Investigations

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**DATES:** Applicable October 24, 2023.

**FOR FURTHER INFORMATION CONTACT:** Eliza DeLong (People's Republic of China (China)) at (202) 482–3878; Thomas Martin (Indonesia) at (202) 482–3936; Christopher Williams (Mexico) at (202) 482–5166; and Megan Goins (Republic of Turkey (Turkey)) at (202) 482–0884, AD/CVD Operations Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

**SUPPLEMENTARY INFORMATION:**

**The Petitions**

On October 4, 2023, the U.S. Department of Commerce (Commerce) received countervailing duty (CVD) petitions concerning imports of aluminum extrusions from China, Indonesia, Mexico, and Turkey filed in proper form on behalf of the U.S. Aluminum Extruders Coalition [1] and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) (collectively, the petitioners).[2] The CVD petitions were accompanied by antidumping duty (AD) petitions concerning imports of aluminum extrusions from China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam.[3]

Between October 6 and 18, 2023, Commerce requested supplemental information pertaining to certain aspects of the Petitions.[4] Subsequently, between October 11 and 20, 2023, the petitioners filed timely responses to these requests for additional information.[5]

[1] The members of the U.S. Aluminum Extruders Coalition are Alexandria Extrusion Company; APEL Extrusions Inc.; Bonnell Aluminum; Brazeway; Custom Aluminum Products; Extrudex Aluminum; International Extrusions; Jordan Aluminum Company; M–D Building Products, Inc.; Merit Aluminum; MI Metals; Pennex Aluminum; Tower Extrusions; and Western Extrusions.

[2] *See* Petitioners' Letter, ''Aluminum Extrusions from Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Malaysia, Mexico, the People's Republic of China, South Korea, Taiwan, Thailand, Turkey, the United Arab Emirates and Vietnam: Petitions for the Imposition of Antidumping and Countervailing Duties,'' dated October 4, 2023 (Petitions).

[3] *Id.*

[4] *See* Commerce's Letters, ''Petitions for the Imposition of Antidumping and Countervailing Duties on Imports of Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Supplemental Questions,'' dated October 6, 2023; ''Petitions for the Imposition of Countervailing Duties on Imports of Aluminum Extrusions from Indonesia: Supplemental Questions,'' dated October 6, 2023; ''Petition for the Imposition of Countervailing Duties on Imports of Aluminum Extrusions from Mexico: Supplemental Questions,'' dated October 6, 2023; ''Petitions for the Imposition of Countervailing Duties on Imports of Aluminum Extrusions from the Republic of Turkey: Supplemental Questions,'' dated October 6, 2023; ''Petitions for the Imposition of Antidumping and Countervailing Duties on Imports of Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Supplemental Questions,'' dated October 10, 2023 (First Scope Questionnaire); ''Countervailing Duty Petition on Aluminum Extrusions from the People's Republic of China: Supplemental Questions,'' dated October 11, 2023; and ''Petitions for the Imposition of Antidumping and Countervailing Duties on Imports of Aluminum Extrusions from the People's Republic of China, Colombia, Ecuador, the Dominican Republic, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Second Scope Supplemental Questionnaire,'' dated October 18, 2023 (Second Scope Questionnaire); *see also* Memoranda, ''Phone Call with Counsel to the Petitioners,'' dated October 11, 2023 (October 11 Memorandum); and ''Phone Call with Counsel to the Petitioners,'' dated October 19, 2023 (October 19 Memorandum).

[5] *See* Petitioners' Letters, ''Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Malaysia, Mexico, the Republic of Korea, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Response to First Supplemental Questions Regarding Common Issues and Injury Petition

Continued

In accordance with section 702(b)(1) of the Tariff Act of 1930, as amended (the Act), the petitioners allege that the Government of China (GOC), Government of Indonesia (GOI), Government of Mexico (GOM), and Government of Turkey (GOT), are providing countervailable subsidies, within the meaning of sections 701 and 771(5) of the Act, to producers of aluminum extrusions from China, Indonesia, Mexico, and Turkey, respectively, and that such imports are materially injuring, or threatening material injury to, the domestic industry producing in the United States. Consistent with section 702(b)(1) of the Act and 19 CFR 351.202(b), for those alleged programs on which we are initiating CVD investigations, the Petitions are supported by information reasonably available to the petitioners.

Commerce finds that the petitioners filed the Petitions on behalf of the domestic industry, because the petitioners are interested parties, as defined in sections 771(9)(D) and (E) of the Act.[6] Commerce also finds that the petitioners demonstrated sufficient industry support with respect to the initiation of the requested CVD investigations.[7]

## Periods of Investigation

Because the Petitions were filed on October 4, 2023, the periods of investigation (POI) for China, Indonesia, Mexico, and Turkey are January 1, 2022, through December 31, 2022.[8]

## Scope of the Investigations

The products covered by these investigations are aluminum extrusions from China, Indonesia, Mexico, and Turkey. For a full description of the scope of these investigations, *see* the appendix to this notice.

## Comments on Scope of the Investigations

On October 10, 11, 18, and 19, 2023, Commerce requested information and clarification from the petitioners regarding the proposed scope to ensure that the scope language in the Petitions is an accurate reflection of the products for which the domestic industry is seeking relief.[9] On October 13 and 20, 2023, the petitioners provided clarifications and revised the scope.[10] The description of merchandise covered by these investigations, as described in the appendix to this notice, reflects these clarifications.

As discussed in the *Preamble* to Commerce's regulations, we are setting aside a period for parties to raise issues regarding product coverage (*i.e.,* scope).[11] We have some concerns related to the administrability of certain provisions in the proposed scope. For example, we find the definition of subassemblies (included) and imported merchandise that is not a part or subassembly of a larger product or system (excluded) remains an outstanding issue. Accordingly, Commerce intends to continue evaluating the scope of these investigations, with the possibility of making additional modifications to clarify further what products are covered and not covered by the scope of these investigations.

Commerce will consider all scope comments received and, if necessary, will consult with interested parties prior to the issuance of the preliminary determinations. If scope comments include factual information,[12] all such factual information should be limited to public information. To facilitate preparation of its questionnaires, Commerce requests that scope comments be submitted by 5 p.m. Eastern Time (ET) on November 13, 2023, which is 20 calendar days from the signature date of this notice. Any rebuttal comments, which may include factual information, must be filed by 5 p.m. ET on November 24, 2023, which is the next business day after 10 calendar days from the initial comment deadline.[13]

Commerce requests that any factual information that the parties consider relevant to the scope of the investigations be submitted during that period. However, if a party subsequently finds that additional factual information pertaining to the scope of the investigations may be relevant, the party may contact Commerce and request permission to submit the additional information. All scope comments must also be filed on the record of each of the concurrent AD and CVD investigations.

## Filing Requirements

All submissions to Commerce must be filed electronically via Enforcement and Compliance's Antidumping Duty and Countervailing Duty Centralized Electronic Service System (ACCESS), unless an exception applies.[14] An electronically filed document must be received successfully in its entirety by the time and date it is due.

## Consultations

Pursuant to sections 702(b)(4)(A)(i) and (ii) of the Act, Commerce notified the GOC, GOI, GOM, and GOT of the receipt of the Petitions and provided each an opportunity for consultations with respect to the Petitions.[15] The GOC

Volume I of the Petition,'' dated October 11, 2023 (General Issues Supplement); ''Aluminum Extrusions from Mexico: Response to First Supplemental Questions Regarding Mexico Countervailing Duty Volume XVII of the Petition,'' dated October 11, 2023; ''Aluminum Extrusions from the Republic of Turkey: Response to First Supplemental Questions Regarding Turkey Countervailing Duty Volume XIX of the Petition,'' dated October 11, 2023; ''Aluminum Extrusions from Indonesia: Response to First Supplemental Questions Regarding Indonesia Countervailing Duty Volume XVI of the Petition,'' dated October 12, 2023; ''Aluminum Extrusions from the People's Republic of China, Indonesia, Mexico, the Republic of Turkey: Response to First Supplemental Questions Regarding China Countervailing Duty Volume XVIII of the Petition,'' dated October 16, 2023; ''Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Malaysia, Mexico, the Republic of Korea, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Response to First Supplemental Scope Questions Regarding Common Issues and Injury Petition Volume I of the Petition,'' dated October 13, 2023 (First Scope Supplement); and ''Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Malaysia, Mexico, the Republic of Korea, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Response to Second Supplemental Scope Questions Regarding Common Issues and Injury Petition Volume I of the Petition,'' dated October 20, 2023 (Second Scope Supplement).

[6] *See* Petitions at Volume I (page 2). The U.S. Aluminum Extruders Coalition is an interested party under section 771(9)(E) of the Act, while the USW is an interested party under section 771(9)(D) of the Act.

[7] *See* ''Determination of Industry Support for the Petitions'' section, *infra.*

[8] *See* 19 CFR 351.204(b)(2).

[9] *See* First Scope Questionnaire; *see also* October 11 Memorandum; Second Scope Questionnaire; and October 19 Memorandum.

[10] *See* First Scope Supplement at 1–19 and Exhibit I–Scope Supp–1; *see also* Second Scope Supplement at 1–3 and Exhibits I–Second Scope Supp–1 and I–Second Scope Supp–2.

[11] *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27323 (May 19, 1997) (*Preamble*); *see also* 19 CFR 351.312.

[12] *See* 19 CFR 351.102(b)(21) (defining ''factual information'').

[13] *See* 19 CFR 351.303(b)(1) (''For both electronically filed and manually filed documents, if the applicable due date falls on a non-business day, the Secretary will accept documents that are filed on the next business day.'') The initial deadline for rebuttal comments falls on November 23, 2023, which is a federal holiday.

[14] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011); *see also Enforcement and Compliance; Change of Electronic Filing System Name,* 79 FR 69046 (November 20, 2014), for details of Commerce's electronic filing requirements, effective August 5, 2011. Information on using ACCESS can be found at *https://access.trade.gov/help.aspx* and a handbook can be found at *https://access.trade.gov/help/Handbook_on_Electronic_Filing_Procedures.pdf.*

[15] *See* Commerce's Letters, ''Countervailing Duty Petition on Aluminum Extrusions from the People's Republic of China,'' dated October 5, 2023; ''Countervailing Duty Petition on Aluminum Extrusions from Indonesia: Invitation for Consultations to Discuss the Countervailing Duty Petition,'' dated October 5, 2023; ''Aluminum Extrusions from Mexico: Invitation for Consultation

requested a consultation,[16] which was held via video conference on October 16, 2023.[17] The GOI requested a consultation,[18] which was held via video conference on October 18, 2023.[19] The GOM requested a consultation,[20] which was held via video conference on October 19, 2023.[21] The GOT requested a consultation,[22] which was held via video conference on October 19, 2023.[23]

**Determination of Industry Support for the Petitions**

Section 702(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 702(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 702(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, Commerce shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the ''industry.''

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs Commerce to look to producers and workers who produce the domestic like product. The U.S. International Trade Commission (ITC), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both Commerce and the ITC must apply the same statutory definition regarding the domestic like product,[24] they do so for different purposes and pursuant to a separate and distinct authority. In addition, Commerce's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law.[25]

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, the petitioners do not offer a definition of the domestic like product distinct from the scope of the investigations.[26] Based on our analysis of the information submitted on the record, we have determined that aluminum extrusions, as defined in the scope, constitute a single domestic like product, and we have analyzed industry support in terms of that domestic like product.[27]

In determining whether the petitioners have standing under section 702(c)(4)(A) of the Act, we considered the industry support data contained in the Petitions with reference to the domestic like product as defined in the ''Scope of the Investigations,'' in the appendix to this notice. To establish industry support, the petitioners provided the total 2022 shipments of the domestic like product for the U.S. producers that support the Petitions, as well as the estimated 2022 production of the domestic like product for the plants represented by the USW, and compared this to the estimated total 2022 shipments of the domestic like product for the entire domestic industry.[28] The petitioners estimated the total 2022 shipments of the domestic like product for the entire U.S. industry based on information derived from the Aluminum Association.[29] Because total industry production data for the domestic like product for 2022 are not reasonably available to the petitioners, and the petitioners have established that shipments are a reasonable proxy for production data,[30] we have relied on the data provided by the petitioners for purposes of measuring industry support.[31]

On October 17, 2023, we received timely filed comments on industry support from Hydro Precision Tubing USA, LLC (Hydro Precision), a U.S. producer of aluminum extrusions.[32] On October 17, 2023, we also received timely filed comments on industry support from Ashley Furniture Industries, LLC and Kimball International Inc. (collectively, Ashley/Kimball), domestic producers of

to Discuss the Countervailing Duty Petition,'' dated October 5, 2023; and ''Countervailing Duty Petition on Aluminum Extrusions from the Republic of Turkey,'' dated October 5, 2023.

[16] *See* GOC's Letter, ''Aluminum Extrusions from the People's Republic of China: Request for Consultations to Discuss the Countervailing Duty Investigation Petitions,'' dated October 9, 2023.

[17] *See* Memorandum, ''Consultations with the Officials from the Government of China,'' dated October 16, 2023.

[18] *See* GOI's Letter, ''Government of Indonesia Response on the Invitation for Consultations to Discuss the Countervailing Duty Petition Concerning Imports of Aluminum Extrusions from Indonesia.,'' dated October 10, 2023.

[19] *See* Memorandum, ''Consultations with the Officials from the Government of Indonesia,'' dated October 19, 2023.

[20] *See* GOM's Letter, ''Aluminum Extrusions from Mexico GOM's submission,'' dated October 16, 2023.

[21] *See* Memorandum, ''Consultations with Officials from the Government of Mexico,'' dated October 19, 2023.

[22] *See* GOT's Letter, ''Response to Invitation for Consultations,'' dated October 9, 2023.

[23] *See* Memorandum, ''Consultations with Officials from the Government of the Republic of Turkey,'' dated October 23, 2023; *see also* GOT's Letter, ''Countervailing Duty Petition on Aluminum Extrusions from Türkiye: Consultations Held on October 19, 2023,'' dated October 23, 2023.

[24] *See* section 771(10) of the Act.

[25] *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (CIT 2001) (citing *Algoma Steel Corp., Ltd.* v. *United States,* 688 F. Supp. 639, 644 (CIT 1988), *aff'd Algoma Steel Corp., Ltd.* v. *United States,* 865 F.2d 240 (Fed. Cir. 1989)).

[26] *See* Petitions at Volume I (pages 23–28); *see also* General Issues Supplement at 1 and Exhibit I-Supp-1.

[27] For a discussion of the domestic like product analysis as applied to these cases and information regarding industry support, *see* Countervailing Duty Investigation Initiation Checklists: Aluminum Extrusions from the People's Republic of China, Indonesia, Mexico, and the Republic of Turkey, dated concurrently with this notice (Country-Specific CVD Initiation Checklists), at Attachment II, Analysis of Industry Support for the Antidumping and Countervailing Duty Petitions Covering Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Mexico, Malaysia, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam (Attachment II). These checklists are on file electronically via ACCESS.

[28] *See* Petitions at Volume I (pages 2–6 and Exhibits I–3, I–4, I–23, and I–58); *see also* General Issues Supplement at 3–7 and Exhibits I-Supp-8 through I-Supp-10.

[29] *See* Petitions at Volume I (pages 3–6 and Exhibits I–4 and I–58); *see also* General Issues Supplement at 3–7 and Exhibit I-Supp-8.

[30] *See* Petitions at Volume I (pages 3–5 and Exhibit I–4); *see also* General Issues Supplement at 4–5.

[31] *See* Petitions at Volume I (pages 2–6 and Exhibits I–1 through I–4, I–23, and I–58); *see also* General Issues Supplement at 2–7 and Exhibits I-Supp-4 through I-Supp-10. For further discussion, *see* Attachment II of the Country-Specific CVD Initiation Checklists.

[32] *See* Hydro Precision's Letter, ''Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Malaysia, Mexico, the Republic of Korea, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Hydro Precision Tubing USA, LLC's Comments on the Lack of Standing of the Petitioner and Request for Polling of the Domestic Industry,'' dated October 17, 2023.

furniture.[33] On October 19, 2023, the petitioners responded to the comments from Hydro Precision and Ashley/Kimball in a timely filed submission.[34]

Our review of the data provided in the Petitions, the General Issues Supplement, the Petitioners' Standing Response, and other information readily available to Commerce indicates that the petitioners have established industry support for the Petitions.[35] First, the Petitions established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, Commerce is not required to take further action in order to evaluate industry support (*e.g.,* polling).[36] Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petitions account for at least 25 percent of the total production of the domestic like product.[37] Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petitions account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petitions.[38] Accordingly, Commerce determines that the Petitions were filed on behalf of the domestic industry within the meaning of section 702(b)(1) of the Act.[39]

[33] *See* Ashley/Kimball's Letter, ''Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Comments on Industry Support,'' dated October 17, 2023.

[34] *See* Petitioners' Letter, ''Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, Malaysia, Mexico, the Republic of Korea, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam: Response to Comments on Industry Support,'' dated October 19, 2023 (Petitioners' Standing Response).

[35] *See* Petitions at Volume I (pages 2–6 and Exhibits I–1 through I–4, I–23, and I–58); *see also* General Issues Supplement at 2–7 and Exhibits I-Supp-4 through I-Supp-10; and Petitioners' Standing Response at 1–23 and Exhibits 1–16. For further discussion, *see* Attachment II of the Country-Specific CVD Initiation Checklists.

[36] *See* Attachment II of the Country-Specific CVD Initiation Checklists; *see also* section 702(c)(4)(D) of the Act.

[37] *See* Attachment II of the Country-Specific CVD Initiation Checklists.

[38] *Id.*

[39] *Id.*

**Injury Test**

Because China, Indonesia, Mexico, and Turkey are ''Subsidies Agreement Countries'' within the meaning of section 701(b) of the Act, section 701(a)(2) of the Act applies to these investigations. Accordingly, the ITC must determine whether imports of the subject merchandise from China, Indonesia, Mexico, and/or Turkey materially injure, or threaten material injury to, a U.S. industry.

**Allegations and Evidence of Material Injury and Causation**

The petitioners allege that imports of the subject merchandise are benefiting from countervailable subsidies and that such imports are causing, or threaten to cause, material injury to the U.S. industry producing the domestic like product. In addition, the petitioners allege that subject imports from China, Indonesia, Mexico, and Turkey exceed the negligibility threshold provided for under section 771(24)(A) of the Act.[40]

The petitioner contends that the industry's injured condition is illustrated by a significant volume of subject imports; reduced market share; underselling and price depression and/or suppression; lost sales and revenues; decline in the domestic industry's production, capacity utilization, and U.S. shipments; declining employment variables; and adverse impact on the domestic industry's profitability and financial performance.[41] We assessed the allegations and supporting evidence regarding material injury, threat of material injury, causation, as well as negligibility, and we have determined that these allegations are properly supported by adequate evidence, and meet the statutory requirements for initiation.[42]

**Initiation of CVD Investigations**

Based upon the examination of the Petitions and supplemental responses, we find that they meet the requirements of section 702 of the Act. Therefore, we are initiating CVD investigations to determine whether imports of aluminum extrusions from China, Indonesia, Mexico, and Turkey benefit from countervailable subsidies conferred by the GOC, GOI, GOM, and GOT, respectively. In accordance with section 703(b)(1) of the Act and 19 CFR 351.205(b)(1), unless postponed, we will make our preliminary determinations no later than 65 days after the date of these initiations.

[40] *See* Petitions at Volume I (pages 37–38 and Exhibit I–16); *see also* General Issues Supplement at 9 and Exhibit I–Supp–11.

[41] *See* Petitions at Volume I (pages 22, 30–60 and Exhibits I–I–9 through I–56); *see also* General Issues Supplement at 7–9 and Exhibit I–Supp–11.

[42] *See* Country-Specific CVD Initiation Checklists at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Antidumping and Countervailing Duty Petitions Covering Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Mexico, Malaysia, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam.

**China**

Based on our review of the Petitions, we find that there is sufficient information to initiate a CVD investigation on 35 of 41 programs alleged by the petitioners. For a full discussion of the basis for our decision to initiate an investigation of each program, *see* the China CVD Initiation Checklist. A public version of the initiation checklist for this investigation is available on ACCESS.

**Indonesia**

Based on our review of the Petitions, we find that there is sufficient information to initiate a CVD investigation on seven of eight programs alleged by the petitioners. For a full discussion of the basis for our decision to initiate an investigation of each program, *see* the Indonesia CVD Initiation Checklist. A public version of the initiation checklist for this investigation is available on ACCESS.

**Mexico**

Based on our review of the Petitions, we find that there is sufficient information to initiate a CVD investigation on 14 of 17 programs alleged by the petitioners. For a full discussion of the basis for our decision to initiate an investigation of each program, *see* the Mexico CVD Initiation Checklist. A public version of the initiation checklist for this investigation is available on ACCESS.

**Turkey**

Based on our review of the Petitions, we find that there is sufficient information to initiate a CVD investigation on 44 of 52 programs alleged by the petitioners. For a full discussion of the basis for our decision to initiate an investigation of each program, *see* the Turkey CVD Initiation Checklist. A public version of the initiation checklist for this investigation is available on ACCESS.

**Respondent Selection**

The petitioner identified 281 companies in China, 18 companies in Indonesia, 14 companies in Mexico, and 39 companies in Turkey as producers

and/or exporters of aluminum extrusions.[43]

Commerce intends to follow its standard practice in CVD investigations and calculate company-specific subsidy rates in these investigations. In the event that Commerce determines that the number of known producers/exporters is large, and it cannot individually examine each company based upon Commerce's resources, Commerce intends to select mandatory respondents based on quantity and value (Q&V) questionnaires issued to the potential respondents. Commerce normally selects mandatory respondents in CVD investigations using U.S. Customs and Border Protection (CBP) entry data for U.S. imports under the appropriate Harmonized Tariff Schedule of the United States (HTSUS) subheadings listed in the scope of the investigations. However, for these investigations, due to the wide variety of individual types of aluminum extrusions products covered by the scope, we cannot rely on CBP entry data in selecting respondents. Notwithstanding the decision to rely on Q&V questionnaires for respondent selection, due to the large number of producers and/or exporters identified in the Petitions for China, Indonesia and Turkey, Commerce has determined to limit the number of Q&V questionnaires that it will issue to exporters and producers based on CBP data for aluminum extrusions from those countries during the POI under the appropriate HTSUS subheadings listed in the ''Scope of the Investigations,'' in the appendix. Accordingly, Commerce will send Q&V questionnaires to the largest producers and exporters that are identified in the CBP data for which there is complete address information on the record. With respect to Mexico, Commerce intends to send Q&V questionnaires to all producers and exporters that are identified in the Petitions for which there is complete address information on the record.

Commerce will post the Q&V questionnaires along with filing instructions on Commerce's website at *https://www.trade.gov/ec-adcvd-case-announcements.* Exporters/producers of aluminum extrusions from China, Indonesia, Mexico, and Turkey that do not receive Q&V questionnaires by mail may still submit a response to the Q&V questionnaire and can obtain the Q&V questionnaire from Enforcement and Compliance's website. Responses to the Q&V questionnaire must be submitted by the relevant producers/exporters no later than 5 p.m. ET on November 7, 2023, which is two weeks from the signature date of this notice. All Q&V responses must be filed electronically via ACCESS. An electronically filed document must be received successfully, in its entirety, by ACCESS no later than 5 p.m. ET on the deadline noted above. Commerce intends to finalize its decision regarding respondent selection within 20 days of publication of this notice.

**Distribution of Copies of the Petitions**

In accordance with section 702(b)(4)(A) of the Act and 19 CFR 351.202(f), a copy of the public version of the Petitions has been provided to the GOC, GOI, GOM, and GOT via ACCESS. Furthermore, to the extent practicable, Commerce will attempt to provide a copy of the public version of the Petitions to each exporter named in the Petitions, as provided under 19 CFR 351.203(c)(2).

**ITC Notification**

Commerce will notify the ITC of its initiation, as required by section 702(d) of the Act.

**Preliminary Determination by the ITC**

The ITC will preliminarily determine, within 45 days after the date on which the Petitions were filed, whether there is a reasonable indication that imports of aluminum extrusions from China, Indonesia, Mexico and/or Turkey are materially injuring, or threatening material injury to, a U.S. industry.[44] A negative ITC determination for a country will result in the investigation being terminated with respect to that country.[45] Otherwise, these CVD investigations will proceed according to statutory and regulatory time limits.

**Submission of Factual Information**

Factual information is defined in 19 CFR 351.102(b)(21) as: (i) evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)-(iv). Section 351.301(b) of Commerce's regulations requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted[46] and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct.[47] Time limits for the submission of factual information are addressed in 19 CFR 351.301, which provides specific time limits based on the type of factual information being submitted. Interested parties should review the regulations prior to submitting factual information in these investigations.

**Extensions of Time Limits**

Parties may request an extension of time limits before the expiration of a time limit established under 19 CFR 351.301, or as otherwise specified by Commerce. In general, an extension request will be considered untimely if it is filed after the expiration of the time limit established under 19 CFR 351.301.[48] For submissions that are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10 a.m. ET on the due date. Under certain circumstances, Commerce may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, Commerce will inform parties in a letter or memorandum of the deadline (including a specified time) by which extension requests must be filed to be considered timely. An extension request must be made in a separate, stand-alone submission; under limited circumstances will we grant untimely filed requests for the extension of time limits, where we determine, based on 19 CFR 351.302, that extraordinary circumstances exist. Parties should review Commerce's regulations concerning the extension of time limits and the *Time Limits Final Rule* prior to submitting factual information in these investigations.[49]

**Certification Requirements**

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information.[50]

[43] *See* Petitions at Volume I (page 18 and Exhibit I–8); *see also* General Issues Supplement at 1–2 and Exhibit I–Supp–3.

[44] *See* section 703(a)(1) of the Act.

[45] *Id.*

[46] *See* 19 CFR 351.301(b).

[47] *See* 19 CFR 351.301(b)(2).

[48] *See* 19 CFR 351.302.

[49] *See* 19 CFR 301; *see also Extension of Time Limits; Final Rule,* 78 FR 57790 (September 20, 2013) (*Time Limits Final Rule*), available at *https://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm.*

[50] *See* section 782(b) of the Act.

Parties must use the certification formats provided in 19 CFR 351.303(g).[51] Commerce intends to reject factual submissions if the submitting party does not comply with the applicable certification requirements.

## Notification to Interested Parties

Interested parties must submit applications for disclosure under administrative protective order in accordance with 19 CFR 351.305. Parties wishing to participate in these investigations should ensure that they meet the requirements of 19 CFR 351.103(d) (*e.g.,* by filing the required letters of appearance). Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[52]

This notice is issued and published pursuant to sections 702 and 777(i) of the Act, and 19 CFR 351.203(c).

Dated: October 24, 2023.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

## Appendix—Scope of the Investigations

The merchandise subject to these investigations are aluminum extrusions, regardless of form, finishing, or fabrication, whether assembled with other parts or unassembled, whether coated, painted, anodized, or thermally improved. Aluminum extrusions are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by the Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 1 contain not less than 99 percent aluminum by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 3 contain manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. Subject aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 6 contain magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The scope also includes merchandise made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) that have a magnesium content accounting for up to but not more than 2.0 percent of total materials by weight.

The country of origin of the aluminum extrusion is determined by where the metal is extruded (*i.e.,* pressed through a die).

Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars, and rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Subject aluminum extrusions are produced and imported with a variety of coatings and surface treatments, and types of fabrication. The types of coatings and treatments applied to aluminum extrusions include, but are not limited to, extrusions that are mill finished (*i.e.,* without any coating or further finishing), brushed, buffed, polished, anodized (including brightdip), liquid painted, electroplated, chromate converted, powder coated, sublimated, wrapped, and/or bead blasted. Subject aluminum extrusions may also be fabricated, *i.e.,* prepared for assembly, or thermally improved. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, stretch-formed, hydroformed, knurled, swedged, mitered, chamfered, threaded, and spun. Performing such operations in third countries does not otherwise remove the merchandise from the scope of the investigations.

The types of products that meet the definition of subject merchandise include but are not limited to, vehicle roof rails and sun/moon roof framing, solar panel racking rails and framing, tradeshow display fixtures and framing, parts for tents or clear span structures, fence posts, drapery rails or rods, electrical conduits, door thresholds, flooring trim, electric vehicle battery trays, heat sinks, signage or advertising poles, picture frames, telescoping poles, or cleaning system components.

Aluminum extrusions may be heat sinks, which are fabricated aluminum extrusions that dissipate heat away from a heat source and may serve other functions, such as structural functions. Heat sinks come in a variety of sizes and shapes, including but not limited to a flat electronic heat sink, which is a solid aluminum extrusion with at least one flat side used to mount electronic or mechanical devices; a heat sink that is a housing for electronic controls or motors; lighting heat sinks, which dissipate heat away from LED devices; and process and exchange heat sinks, which are tube extrusions with fins or plates used to hold radiator tubing. Heat sinks are included in the scope, regardless of whether the design and production of the heat sinks are organized around meeting specified thermal performance requirements and regardless of whether they have been tested to comply with such requirements. For purposes of these investigations on aluminum extrusions from the People's Republic of China, only heat sinks designed and produced around meeting specified thermal performance requirements and tested to comply with such requirements are included in the scope.

Merchandise that is comprised solely of aluminum extrusions or aluminum extrusions and fasteners, whether assembled at the time of importation or unassembled, is covered by the scope in its entirety.

The scope also covers aluminum extrusions that are imported with non-extruded aluminum components beyond fasteners, whether assembled at the time of importation or unassembled, that are a part or subassembly of a larger product or system. Only the aluminum extrusion portion of the merchandise described in this paragraph, whether assembled or unassembled, is subject to duties. Examples of merchandise that is a part or subassembly of a larger product or system include, but are not limited to, window parts or subassemblies; door unit parts or subassemblies; shower and bath system parts or subassemblies; solar panel mounting systems; fenestration system parts or subassemblies, such as curtain wall and window wall units and parts or subassemblies of storefronts; furniture parts or subassemblies; appliance parts or subassemblies, such as fin evaporator coils and systems for refrigerators; railing or deck system parts or subassemblies; fence system parts or subassemblies; motor vehicle parts or subassemblies, such as bumpers for motor vehicles; trailer parts or subassemblies, such as side walls, flooring, and roofings; electric vehicle charging station parts or subassemblies; or signage or advertising system parts or subassemblies. Parts or subassemblies described by this paragraph that are subject to duties in their entirety pursuant to existing antidumping and countervailing duty orders are excluded from the scope of these investigations, so long as they remain subject to the scope of such orders. Any part or subassembly that otherwise meets the requirements of this scope and that is not covered by other antidumping and/or countervailing duty orders remains subject to the scope of these investigations.

The scope excludes assembled merchandise containing non-extruded aluminum components beyond fasteners that is not a part or subassembly of a larger product or system and that is used as imported, without undergoing after importation any processing, fabrication, finishing, or assembly or the addition of parts

[51] *See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (*Final Rule*); *see also* frequently asked questions regarding the *Final Rule,* available at *https://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

[52] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020). Additionally, note that Commerce has modified its regulations to make permanent certain changes to its service procedures that were adopted on a temporary basis due to COVID–19, as well as additional clarifications and corrections to its AD/CVD regulations. Effective October 30, 2023, these changes will apply to all AD/CVD proceedings that are ongoing on the effective date and all AD/CVD proceedings initiated on or after the effective date. *See Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069 (September 29, 2023).

or material, regardless of whether the additional parts or material are interchangeable.

The scope also excludes merchandise containing non-extruded aluminum components beyond fasteners that is not a part or subassembly of a larger product or system that enters unassembled as a packaged combination of parts to be assembled as is for its intended use, without undergoing after importation any processing, fabrication, or finishing or the addition of parts or material, regardless of whether the additional parts or material are interchangeable. To be excluded under this paragraph, the merchandise must be sold and enter as a discrete kit on one Customs entry form.

Examples of such excluded assembled and unassembled merchandise include windows with glass, door units with door panel and glass, motor vehicles, trailers, furniture, and appliances.

The scope also includes aluminum extrusions that have been further processed in a third country, including, but not limited to, the finishing and fabrication processes described above, assembly, whether with other aluminum extrusion components or with non-aluminum extrusion components, or any other processing that would not otherwise remove the merchandise from the scope if performed in the country of manufacture of the in-scope product. Third-country processing; finishing; and/or fabrication, including those processes described in the scope, does not alter the country of origin of the subject aluminum extrusions.

The following aluminum extrusion products are excluded: aluminum extrusions made from an aluminum alloy with an Aluminum Association series designations commencing with the number 2 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 1.5 percent copper by weight; aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 5 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent magnesium by weight; and aluminum extrusions made from an aluminum alloy with an Aluminum Association series designation commencing with the number 7 (or proprietary equivalents or other certifying body equivalents) and containing in excess of 2.0 percent zinc by weight.

The scope also excludes aluminum alloy sheet or plates produced by means other than the extrusion process, such as aluminum products produced by a method of continuous casting or rolling. Cast aluminum products are also excluded. The scope also excludes unwrought aluminum in any form.

The scope also excludes collapsible tubular containers composed of metallic elements corresponding to alloy code 1080A as designated by the Aluminum Association (not including proprietary equivalents or other certifying body equivalents) where the tubular container (excluding the nozzle) meets each of the following dimensional characteristics: (1) length of 37 millimeters (mm) or 62 mm; (2) outer diameter of 11.0 mm or 12.7 mm; and (3) wall thickness not exceeding 0.13 mm.

Also excluded from the scope of these investigations is certain rectangular wire, imported in bulk rolls or precut strips and produced from continuously cast rolled aluminum wire rod, which is subsequently extruded to dimension to form rectangular wire with or without rounded edges. The product is made from aluminum alloy grade 1070 or 1370 (not including proprietary equivalents or other certifying body equivalents), with no recycled metal content allowed. The dimensions of the wire are 2.95 mm to 6.05 mm in width, and 0.65 mm to 1.25 mm in thickness. Imports of rectangular wire are provided for under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7605.19.0000, 7604.10.5000, or 7616.99.5190.

Also excluded from the scope of these antidumping and countervailing duty investigations on aluminum extrusions from the People's Republic of China are all products covered by the scope of the antidumping and countervailing duty orders on *Aluminum Extrusions from the People's Republic of China. See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order,* 76 FR 30,650 (May 26, 2011); and *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order,* 76 FR 30,653 (May 26, 2011) (collectively, *Aluminum Extrusions from the People's Republic of China*). Solely for these investigations on aluminum extrusions from the People's Republic of China, the following is an exhaustive list of products that meet the definition of subject merchandise. Merchandise that is not included in the following list that meets the definition of subject merchandise in the 2011 antidumping and countervailing duty orders on *Aluminum Extrusions from the People's Republic of China* remains subject to the earlier orders. No other section of this scope language that provides examples of subject merchandise is exhaustive. The following products are included in the scope of these investigations on aluminum extrusions from the People's Republic of China, whether assembled or unassembled: heat sinks as described above; cleaning system components like mops and poles; banner stands/back walls; fabric wall systems; drapery rails; side mount valve controls; water heater anodes; solar panel mounting systems; 5050 alloy rails for showers and carpets; auto heating and cooling system components; assembled motor cases with stators; louver assemblies; event décor; window wall units and parts; trade booths; micro channel heat exchangers; telescoping poles, pole handles, and pole attachments; flagpoles; wind sign frames; foreline hose assembly; electronics enclosures; parts and subassemblies for storefronts, including portal sets; light poles; air duct registers; outdoor sporting goods parts and subassemblies; glass refrigerator shelves; aluminum ramps; handicap ramp system parts and subassemblies; frames and parts for tents and clear span structures; parts and subassemblies for screen enclosures, patios, and sunrooms; parts and subassemblies for walkways and walkway covers; aluminum extrusions for LED lights; parts and subassemblies for screen, storm, and patio doors; pontoon boat parts and subassemblies, including rub rails, flooring, decking, transom structures, canopy systems, seating; boat hulls, framing, ladders, and transom structures; parts and subassemblies for docks, piers, boat lifts and mounting; recreational and boat trailer parts and subassemblies, including subframes, crossmembers, and gates; solar tracker assemblies with gears; garage door framing systems; door threshold and sill assemblies; highway and bridge signs; bridge, street, and highway rails; scaffolding, including planks and struts; railing and support systems; parts and subassemblies for exercise equipment; weatherstripping; door bottom and sweeps; door seals; floor transitions and trims; parts and subassemblies for modular walls and office furniture; truck trailer parts and subassemblies; boat cover poles, outrigger poles, and rod holders; bleachers and benches; parts and subassemblies for elevators, lifts, and dumbwaiters; parts and subassemblies for mirror and framing systems; window treatments; parts and subassemblies for air foils and fans; bus and RV window frames; sliding door rails; dock ladders; parts and subassemblies for RV frames and trailers; awning, canopy, and sunshade structures and their parts and subassemblies; marine motor mounts; linear lighting housings; and cluster mailbox systems.

Imports of the subject merchandise are primarily provided for under the following categories of the HTSUS: 7604.10.1000; 7604.10.3000; 7604.10.5000; 7604.21.0010; 7604.21.0090; 7604.29.1010; 7604.29.1090; 7604.29.3060; 7604.29.3090; 7604.29.5050; 7604.29.5090; 7608.10.0030; 7608.10.0090; 7608.20.0030; 7608.20.0090; 7609.00.0000; 7610.10.0010; 7610.10.0020; 7610.10.0030; 7610.90.0040; and 7610.90.0080.

Imports of the subject merchandise, including subject merchandise entered as parts of other products, may also be classifiable under the following additional HTSUS categories, as well as other HTSUS categories: 6603.90.8100; 7606.12.3091; 7606.12.3096; 7615.10.2015; 7615.10.2025; 7615.10.3015; 7615.10.3025; 7615.10.5020; 7615.10.5040; 7615.10.7125; 7615.10.7130; 7615.10.7155; 7615.10.7180; 7615.10.9100; 7615.20.0000; 7616.10.9090; 7616.99.1000; 7616.99.5130; 7616.99.5140; 7616.99.5190; 8302.10.3000; 8302.10.6030; 8302.10.6060; 8302.10.6090; 8302.20.0000; 8302.30.3010; 8302.30.3060; 8302.41.3000; 8302.41.6015; 8302.41.6045; 8302.41.6050; 8302.41.6080; 8302.42.3010; 8302.42.3015; 8302.42.3065; 8302.49.6035; 8302.49.6045; 8302.49.6055; 8302.49.6085; 8302.50.0000; 8302.60.3000; 8302.60.9000; 8305.10.0050; 8306.30.0000; 8414.59.6590; 8415.90.8045; 8418.99.8005; 8418.99.8050; 8418.99.8060; 8419.50.5000; 8419.90.1000; 8422.90.0640; 8424.90.9080; 8473.30.2000; 8473.30.5100; 8479.89.9599; 8479.90.8500; 8479.90.9596; 8481.90.9060; 8481.90.9085; 8486.90.0000; 8487.90.0080; 8503.00.9520; 8508.70.0000; 8513.90.2000; 8515.90.2000; 8516.90.5000; 8516.90.8050; 8517.71.0000; 8517.79.0000; 8529.90.7300;

8529.90.9760; 8536.90.8585; 8538.10.0000; 8541.90.0000; 8543.90.8885; 8547.90.0020; 8547.90.0030; 8708.10.3050; 8708.29.5160; 8708.80.6590; 8708.99.6890; 8807.30.0060; 9031.90.9195; 9401.99.9081; 9403.99.1040; 9403.99.9010; 9403.99.9015; 9403.99.9020; 9403.99.9040; 9403.99.9045; 9405.99.4020; 9506.11.4080; 9506.51.4000; 9506.51.6000; 9506.59.4040; 9506.70.2090; 9506.91.0010; 9506.91.0020; 9506.91.0030; 9506.99.0510; 9506.99.0520; 9506.99.0530; 9506.99.1500; 9506.99.2000; 9506.99.2580; 9506.99.2800; 9506.99.5500; 9506.99.6080; 9507.30.2000; 9507.30.4000; 9507.30.6000; 9507.30.8000; 9507.90.6000; 9547.90.0040; and 9603.90.8050.

While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

[FR Doc. 2023–23961 Filed 10–30–23; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XD462]**

### Permits; Foreign Fishing

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

**ACTION:** Notice of application for transshipment permit; request for comments.

**SUMMARY:** NMFS publishes for public review and comment information regarding a permit application for transshipment of farmed salmon from aquaculture operations in Maine waters to processing plants in Canada by Canadian flagged vessels. The application for a transshipment permit is submitted under provisions of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). This action is necessary for NMFS to make a determination that the permit application can be approved.

**DATES:** Written comments must be received by November 14, 2023.

**ADDRESSES:** Written comments on this action, identified by RTID 0648–XD462 should be sent to Kent Laborde and Jasmine Prat in the NMFS Office of International Affairs, Trade, and Commerce by email at *kent.laborde@noaa.gov* and *jasmine.prat@noaa.gov.*

**FOR FURTHER INFORMATION CONTACT:** Kent Laborde and Jasmine Prat by email at *kent.laborde@noaa.gov* and *jasmine.prat@noaa.gov,* or by phone at 301–956–5472.

**SUPPLEMENTARY INFORMATION:** Section 204(d) of the Magnuson-Stevens Act (16 U.S.C. 1824(d)) authorizes the Secretary of Commerce (Secretary) to issue a transshipment permit for a vessel other than a vessel of the United States to engage in fishing consisting solely of transporting fish or fish products at sea from a point within the United States Exclusive Economic Zone (EEZ) or, with the concurrence of a state, within the boundaries of that state, to a point outside the United States.

Section 204(d)(3)(D) of the Magnuson-Stevens Act provides that an application to transship from U.S. waters to another country using non-U.S. vessels may not be approved until the Secretary determines that ''no owner or operator of a vessel of the United States which has adequate capacity to perform the transportation for which the application is submitted has indicated . . . an interest in performing the transportation at fair and reasonable rates.'' NMFS is publishing this notice as part of its effort to make such a determination with respect to the application described below.

#### Summary of Application

NMFS received an application from True North Salmon Limited Partnership, Kelly Cove Salmon Limited, and 697002 NB, Inc., requesting authorization to transfer salmon from U.S. farm pens in Maine waters to five Canadian vessels for the purpose of transporting the salmon to Blacks Harbour, Canada for processing. The transshipment operations will occur within the boundaries of the State of Maine, and within 12 nautical miles from Maine's seaward boundary. NMFS issued permits for the same vessels for use in calendar year 2023. Those permits will expire December 31, 2023.

Dated: October 26, 2023.

**Alexa Cole,**

*Director, Office of International Affairs, Trade, and Commerce, National Marine Fisheries Service.*

[FR Doc. 2023–24021 Filed 10–30–23; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XD459]**

### Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Pier Maintenance and Bank Stabilization at U.S. Coast Guard Air Station Port Angeles, Port Angeles, Washington

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

**ACTION:** Notice; issuance of an incidental harassment authorization.

**SUMMARY:** In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an authorization to the U.S. Coast Guard (Coast Guard or USCG) to harass marine mammals incidental to construction activities associated with pier maintenance and bank stabilization at USCG Air Station Port Angeles, Port Angeles, Washington.

**DATES:** This authorization is effective from July 16, 2024 through July 15, 2025.

**ADDRESSES:** Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-coast-guard-air-station-port-angeles-pier-maintenance-and.* In case of problems accessing these documents, please call the contact listed below.

**FOR FURTHER INFORMATION CONTACT:** Cara Hotchkin, OPR, NMFS, (301) 427–8401.

**SUPPLEMENTARY INFORMATION:**

#### 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 proposed or, if the taking is limited to harassment, a notice of a proposed incidental harassment authorization (IHA) is provided to the public for review.

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 the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

**Summary of Request**

On August 9, 2022, NMFS received a request from Coast Guard for an IHA to take marine mammals incidental to construction during pier maintenance activities at USCG Air Station Port Angeles in Port Angeles, Washington. Following NMFS' review of the application, Coast Guard submitted revised versions on May 11, 2023 and July 14, 2023. The application was deemed adequate and complete on July 18, 2023. The notice of proposed IHA was published in the **Federal Register** on September 7, 2023 (88 FR 61549). Coast Guard's request is for take of five species of marine mammals by Level B harassment only. Neither Coast Guard nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

**Description of Activity**

Coast Guard plans to conduct pier maintenance and bank stabilization on a portion of the shoreline at USCG Air Station Port Angeles in Port Angeles, Washington. In-water work is expected to take approximately 15 days and will occur during daylight hours during the lowest possible tide conditions. USCG Air Station Port Angeles is located on the south-facing side of Ediz Hook, a peninsula that extends into the Strait of Juan de Fuca, encompassing approximately 8.73 square kilometers ($km^2$) (3.37 square miles ($mi^2$)), opening to the east. The U.S. Army Corps of Engineers has designated an in-water work window between July 16 and February 15 to protect anadromous fishes in the area. In-water work on this project may therefore occur between July 16, 2024 and February 15, 2025. The planned work may result in the incidental take of marine mammals by Level B harassment due to exposure to underwater sound produced during impact and vibratory pile driving.

The purpose of this project is to repair existing facilities and to protect vital mission support infrastructure from continued tidal action erosion and storm events. This project will repair up to 372 feet (ft) (113.4 meters (m)) of eroded riprap shoreline, replace 37 degraded timber piles with steel piles, repair up to 98 timber piles, permanently remove 11 abandoned timber piles and 3 steel camel barrier piles, and demolish 2 camels. Pile installation will be by vibratory and impact driving; pile removal methods would include direct pull and, if necessary, vibratory extraction. Impact and vibratory piling may occur on the same day, but the hammers would not operate simultaneously. Other components of this project include both in-water and upland activities, which are not expected to result in take of marine mammals. Pile repair (*i.e.,* power washing, jacketing, and anti-fouling coating), deck repair and replacement, utility installation, and shoreline stabilization (*i.e.,* removal and replacement of riprap shoreline) are therefore not discussed further in this document.

A detailed description of the planned construction project is provided in the **Federal Register** notice for the proposed IHA (88 FR 61549, September 7, 2023). Since that time, no changes have been made to the planned activities. Therefore, a detailed description is not provided here. Please refer to that **Federal Register** notice for the description of the specific activity. Required mitigation, monitoring, and reporting measures are described in detail later in this document (please see Mitigation and Monitoring and Reporting).

**Comments and Responses**

A notice of NMFS' proposal to issue an IHA to Coast Guard was published in the **Federal Register** on September 7, 2023 (88 FR 61549). That notice described, in detail, Coast Guard's activities, the marine mammal species that may be affected by the activities, and the anticipated effects on marine mammals. In that notice, we requested public input on the request for authorization described therein, our analyses, the proposed authorization, and any other aspect of the notice of proposed IHA, and requested that interested persons submit relevant information, suggestions, and comments. This proposed notice was available for a 30-day public comment period. During the 30-day public comment period, NMFS did not receive any public comments.

**Changes From Proposed IHA to Final IHA**

Between the publication of the proposed IHA (88 FR 61549, September 7, 2023) and this notice, Coast Guard requested that the effective dates of the authorization be shifted from November 15, 2023 through November 14, 2024 to July 16, 2024 through July 15, 2025 due to availability of funding and other logistical constraints. The analysis presented in the proposed IHA remains valid due to the consistent dates of the U.S. Army Corps of Engineers in-water work window (July 16 through February 15 annually). The change to the effective dates of the authorization is reflected in the **DATES** section, above.

**Description of Marine Mammals in the Area of Specified Activities**

Sections 3 and 4 of the IHA application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species. NMFS fully considered all of this information, and we refer the reader to these descriptions, instead of reprinting the information. Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (SARs; *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*https://www.fisheries.noaa.gov/find-species*).

Table 1 lists all species or stocks for which take is expected and authorized for this activity, and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no serious injury or mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species or stocks and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' U.S. Pacific SARs. All values presented in table 1 are the most recent available at the time of publication and are available online at:

*www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.*

TABLE 1—SPECIES LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES [1]

| Common name | Scientific name | Stock | ESA/ MMPA status; strategic (y/n) [2] | Stock abundance (CV, $N_{min}$, most recent abundance survey) [3] | PBR | Annual M/SI [4] |
|---|---|---|---|---|---|---|
| **Order Artiodactyla—Infraorder Cetacea—Mysticeti (baleen whales)** | | | | | | |
| *Family Balaenopteridae (rorquals)* | | | | | | |
| Humpback whale | *Megaptera novaeangliae* | Hawai'i | -, -, N | 11,278 (0.56, 7,265, 2020) | 127 | 27.09 |
| | | Mainland Mexico—CA/OR/WA | T, D, Y | 3,477 (0.101, 3,185, 2022) | 43 | 22 |
| | | Central America/Southern Mexico—CA/OR/WA. | E, D, Y | 1,496 (0.171, 1,284, 2022) | 5.2 | 14.9 |
| **Odontoceti (toothed whales, dolphins, and porpoises)** | | | | | | |
| *Family Delphinidae* | | | | | | |
| Killer whale | *Orcinus orca* | Eastern North Pacific Southern Resident. | E, D, Y | 74 (N/A, 74, 2021) | 0.13 | ≥0.4 |
| | | West Coast Transient | -, -, N | 349 (N/A, 349, 2018) | 3.5 | 0.4 |
| *Family Phocoenidae (porpoises)* | | | | | | |
| Harbor porpoise | *Phocoena phocoena* | Washington Inland Waters | -, -, N | 11,233 (0.37, 8,308, 2015) | 66 | ≥7.2 |
| **Order Carnivora—Pinnipedia** | | | | | | |
| *Family Otariidae (eared seals and sea lions)* | | | | | | |
| Steller sea lion | *Eumetopias jubatus* | Eastern | -, -, N | 43,201 (N/A, 43,201, 2017) | 2,592 | 112 |
| California sea lion | *Zalophus californianus* | U.S | -, -, N | 257,606 (N/A, 233,515, 2014) | 14,011 | >321 |
| *Family Phocidae (earless seals)* | | | | | | |
| Harbor seal | *Phoca vitulina* | Washington Northern Inland Waters. | -, -, N | UNK (UNK, UNK, 1999) | UND | 9.8 |
| Northern elephant seal | *Mirounga angustirostris* | CA Breeding | -, -, N | 187,386 (N/A, 85,369, 2013) | 5,122 | 13.7 |

[1] Information on the classification of marine mammal species can be found on the web page for The Society for Marine Mammalogy's Committee on Taxonomy (*https://marinemammalscience.org/science-and-publications/list-marine-mammal-species-subspecies/;* Committee on Taxonomy (2022)).

[2] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[3] NMFS marine mammal stock assessment reports online at: *www.nmfs.noaa.gov/pr/sars/.* CV is coefficient of variation; $N_{min}$ is the minimum estimate of stock abundance. In some cases, CV is not applicable.

[4] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, vessel strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

A detailed description of the of the species likely to be affected by the USCG Pier Maintenance and Bank Stabilization project, including brief introductions to the species and relevant stocks as well as available information regarding population trends and threats, and information regarding local occurrence, were provided in the **Federal Register** notice for the proposed IHA (88 FR 61549, September 7, 2023); since that time, we are not aware of any changes in the status of these species and stocks; therefore, detailed descriptions are not provided here. Please refer to that **Federal Register** notice for these descriptions. Please also refer to NMFS' website (*https://www.fisheries.noaa.gov/find-species*) for generalized species accounts.

*Marine Mammal Hearing*

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges (behavioral response data, anatomical modeling, etc.). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in table 2.

TABLE 2—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

| Hearing group | Generalized hearing range * |
|---|---|
| Low-frequency (LF) cetaceans (baleen whales) | 7 Hz to 35 kHz. |
| Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales) | 150 Hz to 160 kHz. |
| High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, Cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*). | 275 Hz to 160 kHz. |
| Phocid pinnipeds (PW) (underwater) (true seals) | 50 Hz to 86 kHz. |
| Otariid pinnipeds (OW) (underwater) (sea lions and fur seals) | 60 Hz to 39 kHz. |

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth *et al.,* 2013). This division between phocid and otariid pinnipeds is now reflected in the updated hearing groups proposed in Southall *et al.* (2019).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information.

**Potential Effects of Specified Activities on Marine Mammals and Their Habitat**

The effects of underwater noise from Coast Guard's pile driving activities have the potential to result in behavioral harassment of marine mammals in the vicinity of the project area. The notice of the proposed IHA (88 FR 61549, September 7, 2023) included a discussion of the effects of anthropogenic noise on marine mammals and the potential effects of underwater noise from Coast Guard's pile driving activities on marine mammals and their habitat. That information and analysis is incorporated by reference into this final IHA determination and is not repeated here; please refer to the notice of the proposed IHA (88 FR 61549, September 7, 2023).

**Estimated Take of Marine Mammals**

This section provides an estimate of the number of incidental takes authorized through the IHA, which informed both NMFS' consideration of ''small numbers,'' and the negligible impact determinations.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of 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).

Authorized takes are by Level B harassment only, in the form of disruption of behavioral patterns and/or TTS for individual marine mammals resulting from exposure to noise from impact and vibratory pile driving. Based on the nature of the activity and the anticipated effectiveness of the mitigation measures (*i.e.,* shutdown zones implemented at no less than the distance to the Level A isopleths) discussed in detail below in the Mitigation section, Level A harassment is neither anticipated nor authorized.

As described previously, no serious injury or mortality is anticipated or authorized for this activity. Below we describe how the take numbers are estimated.

For acoustic impacts, generally speaking, we estimate take by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of potential takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the take estimates.

*Acoustic Thresholds*

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

*Level B Harassment*—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source or exposure context (*e.g.,* frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (*e.g.,* bathymetry, other noises in the area, predators in the area), and the receiving animals (hearing, motivation, experience, demography, life stage, depth) and can be difficult to predict (*e.g.,* Southall *et al.,* 2007, 2021, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above root-mean-squared pressure received levels (RMS SPL) of 120 dB (referenced to 1 micropascal (re 1 µPa)) for continuous (*e.g.,* vibratory pile driving, drilling) and above RMS SPL 160 dB re 1 µPa for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources. Generally speaking, Level B harassment take estimates based on these behavioral harassment thresholds are expected to include any likely takes by TTS as, in most cases, the likelihood of TTS occurs at

distances from the source less than those at which behavioral harassment is likely. TTS of a sufficient degree can manifest as behavioral harassment, as reduced hearing sensitivity and the potential reduced opportunities to detect important signals (conspecific communication, predators, prey) may result in changes in behavior patterns that would not otherwise occur.

Coast Guard's planned activity includes the use of continuous (*e.g.,* vibratory pile installation and extraction) and impulsive (*e.g,* impact pile installation) sources, and therefore the RMS SPL thresholds of 120 and 160 dB re 1 µPa are applicable.

*Level A Harassment*—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). Coast Guard's planned construction activity includes the use of non-impulsive (*e.g.,* vibratory pile installation and extraction) and impulsive (*e.g,* impact pile installation) sources.

These thresholds are provided in table 3, below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS' 2018 Technical Guidance, which may be accessed at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 3—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

| Hearing group | PTS onset acoustic thresholds * (received level) | |
|---|---|---|
| | Impulsive | Non-impulsive |
| Low-Frequency (LF) Cetaceans | *Cell 1:* $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB | *Cell 2:* $L_{E,LF,24h}$: 199 dB. |
| Mid-Frequency (MF) Cetaceans | *Cell 3:* $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB | *Cell 4:* $L_{E,MF,24h}$: 198 dB. |
| High-Frequency (HF) Cetaceans | *Cell 5:* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB | *Cell 6:* $L_{E,HF,24h}$: 173 dB. |
| Phocid Pinnipeds (PW) (Underwater) | *Cell 7:* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB | *Cell 8:* $L_{E,PW,24h}$: 201 dB |
| Otariid Pinnipeds (OW) (Underwater) | *Cell 9:* $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB | *Cell 10:* $\leq L_{E,OW,24h}$: 219 dB. |

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

**Note:** Peak sound pressure ($L_{pk}$) has a reference value of 1 µPa, and cumulative sound exposure level ($L_E$) has a reference value of 1µPa$^2$s. In this table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript ''flat'' is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

*Ensonified Area*

Here, we describe operational and environmental parameters of the activity that are used in estimating the area ensonified above the acoustic thresholds, including source levels and transmission loss coefficient.

The sound field in the project area is the existing background noise plus additional construction noise from the project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.,* impact pile driving and vibratory pile installation and removal). Calculation of the area ensonified by the planned action is dependent on source levels of the planned activities and the estimated transmission loss coefficients for the planned activities at the site. These factors are addressed below.

*Sound Source Levels of Activities*—The intensity of pile driving sounds is greatly influenced by factors such as the type of piles (material and diameter), hammer type, and the physical environment (*e.g.,* sediment type) in which the activity takes place. In order to calculate the distances to the Level A harassment and the Level B harassment thresholds for the methods and piles being used in this project, Coast Guard used acoustic monitoring data from sound source verification studies to develop proxy source levels for the various pile types, sizes and methods (table 4).

TABLE 4—PILE INSTALLATION AND EXTRACTION PARAMETERS

| Pile type | Method | Total number | Number per day | Strikes per pile or hours per day | Proxy levels (@10m) | | | Reference |
|---|---|---|---|---|---|---|---|---|
| | | | | | dB re 1 µPa peak | dB re 1 µPa RMS | dB re 1 µPa$^2$s $SEL_{ss}$ | |
| 12-in steel | Impact | 37 | 5 | 100 strikes | 192 | 177 | 166 | CALTRANS 2020. |
| 12-in steel | Vibratory installation. | 37 | 10 | 5 hrs | | 155 | | Greenbusch 2018. |
| 18-in steel | Vibratory installation. | 3 | 2 | 1 hr | | 158 | | CALTRANS 2020. |
| 12–14-in timber | Vibratory extraction. | 48 | 16 | 8 hrs | | 160 | | Greenbusch 2018. |

*Transmission Loss*—Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater TL is:

$TL = B * Log_{10} (R_1/R_2)$, where:

TL = transmission loss in dB,

B = transmission loss coefficient,

$R_1$= the distance of the modeled SPL from the driven pile, and,

$R_2$= the distance from the driven pile of the initial measurement.

This formula neglects loss due to scattering and absorption, which is

assumed to be zero here. The degree to which underwater sound propagates away from a sound source is dependent on a variety of factors, most notably the bathymetry and presence or absence of reflective or absorptive conditions including in-water structures and sediments. Spherical spreading occurs in a perfectly unobstructed (free-field) environment not limited by depth or water surface, resulting in a 6 dB reduction in sound level for each doubling of distance from the source ($20*\log_{10}$[range]). Cylindrical spreading occurs in an environment in which sound propagation is bounded by the water surface and sea bottom, resulting in a reduction of 3 dB in sound level for each doubling of distance from the source ($10*\log_{10}$[range]). A practical spreading value of 15 is often used under conditions where water increases with depth as the receiver moves away from the shoreline, resulting in an expected propagation environment that would lie between spherical and cylindrical spreading loss conditions.

Site-specific transmission loss measurements are not available for Port Angeles Harbor. NMFS has therefore used the practical spreading loss model for both vibratory and impact pile driving in this analysis.

*Estimated Harassment Isopleths*—All Level B harassment isopleths are reported in table 5. Level B harassment isopleths from the project will be limited by the coastline along and across from the project site. The maximum attainable isopleth distance is 4,642 m during vibratory extraction of timber piles (see Figure 1 in the IHA application for further detail).

The ensonified area associated with Level A harassment is more technically challenging to predict due to the need to account for a duration component. Therefore, NMFS developed an optional User Spreadsheet tool to accompany the Technical Guidance that can be used to relatively simply predict an isopleth distance for use in conjunction with marine mammal density or occurrence to help predict potential takes. We note that because of some of the assumptions included in the methods underlying this optional tool, we anticipate that the resulting isopleth estimates are typically going to be overestimates of some degree, which may result in an overestimate of potential take by Level A harassment. However, this optional tool offers the best way to estimate isopleth distances when more sophisticated modeling methods are not available or practical. For stationary sources, including pile driving, the optional User Spreadsheet tool predicts the distance at which, if a marine mammal remained at that distance for the duration of the activity, it would be expected to incur PTS. Inputs used in the User Spreadsheet (*e.g.,* number of piles per day, duration and/or strikes per pile, source levels) are presented in table 4. The resulting isopleths and ensonified areas are reported in table 5 and table 6, respectively.

TABLE 5—ESTIMATED ISOPLETHS BY ACTIVITY

| Activity | Method | Underwater harassment isopleths [m] | | | | | | Airborne Level B harassment isopleths [m] | |
|---|---|---|---|---|---|---|---|---|---|
| | | Level A | | | | | Level B | Harbor seals | Other pinnipeds |
| | | LF | MF | HF | PW | OW | | | |
| 12-in steel | Impact | 46.0 | 1.6 | 55.0 | 25.0 | 2.0 | 136.0 | 150 | 47 |
| 12-in steel | Vibratory installation. | 8.0 | 0.7 | 11.8 | 4.8 | 0.3 | 2,154 | 19 | 6 |
| 18-in steel | Vibratory installation. | 4.3 | 0.4 | 6.4 | 2.6 | 0.2 | 3,415 | | |
| 12–14-in timber | Vibratory extraction. | 23.4 | 2.1 | 34.6 | 14.2 | 1.0 | 4,642 | | |

TABLE 6—AREAS ENSONIFIED (UNDERWATER)

| Activity | Method | Level A harassment [km$^2$] | | | | | Level B harassment [km$^2$] |
|---|---|---|---|---|---|---|---|
| | | LF | MF | HF | PW | OW | |
| 12-in steel | Impact | 0.02 | <0.01 | 0.02 | 0.01 | <0.01 | 0.07 |
| 12-in steel | Vibratory installation. | <0.01 | <0.01 | <0.01 | <0.01 | <0.01 | 7.74 |
| 18-in steel | Vibratory installation. | <0.01 | <0.01 | <0.01 | <0.01 | <0.01 | 14.52 |
| 12–14-in timber | Vibratory extraction. | 0.01 | <0.01 | 0.02 | <0.01 | <0.01 | 17.59 |

*Marine Mammal Occurrence*

In this section we provide information about the occurrence of marine mammals, including density or other relevant information which will inform the take calculations.

For marine mammal density information in the Port Angeles area we used data from the Pacific Navy Marine Species Density Database (U.S. Navy, 2019) to estimate take for marine mammals. The Marine Species Density Database incorporates analyzed literature and research for marine mammal density estimates per season for the Gulf of Alaska and the West Coast of the United States. Density estimates specific to the Strait of Juan de Fuca are not available for any of the species addressed here, and therefore takes were estimated based on the nearest available and most appropriate density estimates, plus site-specific knowledge and professional judgement. Table 7 density estimates are calculated based on the in-water work window (July–February) and based on the highest seasonal density estimates for the relevant area.

TABLE 7—SEASONAL DENSITY OF SPECIES IN THE PROJECT AREA

| Species | Densities (animals/km$^2$) |
|---|---|
| Humpback whale | 0.0027 (summer/fall). |
| Killer whale—Southern Resident. | 0.0012 (summer). |
| Killer whale—Transient. | 0.0208 (fall). |
| Harbor porpoise | 2.16 (annual). |
| Harbor seal | 0.76 (summer/fall). |
| Northern elephant seal. | 0.0029 (fall). |
| Steller sea lion | 0.0027 (fall/winter). |

TABLE 7—SEASONAL DENSITY OF SPECIES IN THE PROJECT AREA—Continued

| Species | Densities (animals/km²) |
|---|---|
| California sea lion ..... | 0.300 (September). |

*Take Estimation*

Here we describe how the information provided above is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur and authorized under the IHA.

Using the overall area of disturbance generated by pile removal and installation given calculated distances to attenuation below disturbance (Level B harassment) thresholds, incidental take for each activity is estimated by the following equation:

*Incidental take estimate = species density * ensonified area* days of pile-related activity*

This equation is a reasonable extrapolation for take estimates, which relies on the likelihood that a species is present within the ensonified area on a day where the planned activity is occurring. Take estimates were calculated with the conservative assumption that each activity (*i.e.,* vibratory extraction of steel piles, vibratory extraction of timber piles, vibratory installation, and impact installation) will occur on separate days, using a maximum of 23 days of in-water work. However, Coast Guard will perform some activities on the same day, resulting in reduced numbers of overall take during the planned 15 days of pile driving.

No take by Level A harassment is authorized for any species of marine mammal due to the small zones, in conjunction with Coast Guard's required shutdown mitigation measure. Shutdown zones will be enforced at the extent of the estimated Level A harassment isopleth for all species groups except for large whales (*i.e.,* baleen whales, including humpbacks, and killer whales). Coast Guard plans to shut down for killer whales upon observation regardless of location in order to prevent potential take of members of the Southern Resident stock, and shutdown zones for other large whale species will be enforced at the extent of the Level B harassment isopleths. Given the remote likelihood of large whale species entering Port Angeles Harbor during the 15 days of pile driving work (see calculated take estimates for humpback and killer whales in table 8) and the locations of Protected Species Observers (PSOs) described in the Monitoring and Reporting section, NMFS agrees that monitoring and shutdown measures are likely to be successful at avoiding take of these species. Therefore, no take of large whale species (including but not limited to humpback and killer whales) has been requested and none is authorized.

Based on sightings reported during the 2016–2017 Navy TPS Port Angeles project (Northwest Environmental Consulting, LLC 2018), Coast Guard anticipates the number of harbor seals present in the project area during the planned in-water activities may exceed calculated exposure estimates. During the 2016–2017 Navy TPS Port Angeles project, 275 harbor seals were observed in the estimated Level B harassment zone over approximately 45 days during which pile driving occurred (Northwest Environmental Consulting, LLC., 2018). Coast Guard project will have only 15 days of in-water pile driving. Therefore, Coast Guard has requested, and NMFS has authorized, 210 incidents of Level B harassment for harbor seals, approximately half the difference in sightings between the 2016–2017 Navy TPS Port Angeles project and the calculated exposure estimate for this project.

TABLE 8—CALCULATED AND AUTHORIZED AMOUNT OF TAKING AND PERCENT OF STOCKS

| Species | Stock | Take by Level A harassment | | Take by Level B harassment | | Total take | Percent of stock |
|---|---|---|---|---|---|---|---|
| | | Calculated | Authorized | Calculated | Authorized | | |
| Humpback whale ..... | Hawai'i ..... | 0 | 0 | 0.51 | 0 | 0 | 0 |
| | Mainland Mexico—CA/OR/WA. | | | | | | |
| | Central America/Southern Mexico—CA/OR/WA. | | | | | | |
| Killer whale ..... | Eastern North Pacific Southern Resident. | 0 | 0 | 0.23 | 0 | 0 | 0 |
| | West Coast Transient ..... | 0 | 0 | 3.94 | 0 | 0 | 0 |
| Harbor porpoise ..... | Washington Inland Waters ..... | 0.73 | 0 | 408.9 | 409 | 409 | 4.92 |
| Harbor seal ..... | Washington Northern Inland Waters. | 0.13 | 0 | 143.9 | 210 | 210 | [1] NA |
| Northern Elephant Seal ..... | CA Breeding ..... | 0 | 0 | 0.55 | 1 | 1 | <0.01 |
| Steller Sea Lion ..... | Eastern ..... | 0 | 0 | 0.51 | 1 | 1 | <0.01 |
| California Sea lion ..... | U.S. ..... | 0.1 | 0 | 56.8 | 57 | 57 | 0.02 |

[1] Stock size for the Washington Northern Inland Waters stock of harbor seals is not available from the most recent SARs due to a lack of recent data.

**Mitigation**

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, NMFS considers two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation

(probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost and impact on operations.

*Shutdown Zones*—The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Construction supervisors and crews, Protected Species Observers (PSO), and relevant Coast Guard staff must avoid direct physical interaction with marine mammals during construction activities, which could include (but are not limited to) the following: (1) barge movement to the pile location; (2) pile positioning on the substrate via a crane (*i.e.,* stabbing the pile); and (3) pile removal from the water column/substrate via a crane (*i.e.,* deadpull). If a marine mammal comes within 10 meters of such activity, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions, as necessary to avoid direct physical interaction.

Further, Coast Guard must implement activity-specific shutdown zones as described in table 9. The shutdown zone for humpback whales or other non-authorized marine mammal species (except killer whales) will be the predicted Level B harassment isopleth. For these species, project activity may resume after the animal has not been observed for 15 minutes, or has been observed leaving the shutdown zone (*i.e.* the Level B harassment zone). As proposed by Coast Guard, killer whales will require a shutdown upon observation no matter location in order to prevent take of members of the Southern Resident stock. If killer whales are sighted, the project activity would resume only after the killer whale is not observed for 15 minutes.

TABLE 9—REQUIRED SHUTDOWN ZONES

| Pile type | Pile driving method | Shutdown zone (m) | | | | | | Monitoring zone (m)—all species |
|---|---|---|---|---|---|---|---|---|
| | | Killer whales | LF | MF | HF | PW | OW | |
| Steel | Vibratory | Any sighting at any distance | 3,415 | 12 | | | | 3,415 |
| | Impact | | 136 | 55 | | | | 136 |
| Timber | Vibratory | | 4,642 | 35 | | | | 4,642 |

*Protected Species Observers*—The placement of PSOs during all construction activities (described in the Monitoring and Reporting section) will ensure that the entire shutdown zone is visible. Coast Guard will employ three PSOs for vibratory installation and extraction of steel and timber piles. Two PSOs will be land-based, while one will be positioned on a vessel to ensure full monitoring coverage to the estimated Level B harassment isopleth. For impact pile driving activities, Coast Guard will employ one PSO.

Pre and Post-Activity Monitoring—Monitoring must take place from 30 minutes prior to initiation of pile driving activity (*i.e.,* pre-start clearance monitoring) through 30 minutes post-completion of pile driving activity. Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead PSO to determine that the shutdown zones indicated in table 9 are clear of marine mammals. Pile driving may commence following 30 minutes of observation when the determination is made that the shutdown zones are clear of marine mammals. If a marine mammal is observed entering or within the shutdown zones, pile driving activity must be delayed or halted. If pile driving is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone or 15 minutes have passed without re-detection of the animal. If a marine mammal for which take by Level B harassment is authorized is present in the Level B harassment zone, activities will begin and Level B harassment take will be recorded.

*Monitoring for Level B Harassment*—PSOs will monitor the shutdown zones and beyond to the extent that PSOs can see. For this activity, the monitoring zone is defined as the largest predicted Level B harassment isopleth for a given activity (table 9). Monitoring beyond the shutdown zones enables observers to be aware of and communicate the presence of marine mammals in the project areas outside the shutdown zones and thus prepare for a potential cessation of activity should the animal enter the shutdown zone. If weather or sea conditions restrict the observer's ability to observe the monitoring zone, pile driving activities must cease until conditions are favorable for observations to resume.

*Soft Start*—Soft-start procedures are used to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, soft start requires contractors to provide an initial set of three strikes at reduced energy, followed by a 30-second waiting period, then two subsequent reduced-energy strike sets. A soft start must be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer.

If unsafe working conditions during ramp ups are reported (*e.g.,* crane failure from excess wear due to the ramp up procedure) by the contractor and verified by an independent safety inspection, Coast Guard may elect to discontinue impact driver ramp ups. Coast Guard will inform NMFS if the ramp up procedure is discontinued. If use of a variable moment driver is infeasible and the model of impact driver was not specifically designed for ramp up procedures, then Coast Guard will not employ impact ramp up procedures due to personnel safety concerns.

*In-water Work Window*—To reduce impacts to marine fishes, Coast Guard will follow the in-water work window designated for the Strait of Juan de Fuca and associated bays and inlets by the U.S. Army Corps of Engineers. The work window extends from July 16 to February 15; no in-water work will be conducted outside of that date range unless a modification is negotiated with the relevant regulatory agencies, including the U.S. Army Corps of Engineers.

NMFS and Coast Guard considered the use of bubble curtains as a mitigation measure during this project. However, based on the limited amount of impact driving expected, the relatively small estimated Level A harassment isopleths, and the potential

for increased turbidity during bubble curtain use, NMFS has determined that use of a bubble curtain would not further reduce take of marine mammals during this project and they are not included in the required mitigation methods.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has determined that the described mitigation measures provide the means of effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

**Monitoring and Reporting**

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that 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 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 while conducting the activities. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the activity; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and
- Mitigation and monitoring effectiveness.

*Visual Monitoring*

Marine mammal monitoring must be conducted in accordance with the Marine Mammal Monitoring Plan, dated July 2023, available online at *https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-coast-guard-air-station-port-angeles-pier-maintenance-and.* Marine mammal monitoring during pile driving and removal must be conducted by NMFS-approved PSOs in a manner consistent with the following:

- PSOs must be independent of the activity contractor (for example, employed by a subcontractor) and have no other assigned tasks during monitoring periods;
- At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization;
- Other PSOs may substitute other relevant experience, education (degree in biological science or related field) or training for experience performing the duties of a PSO during construction activities pursuant to a NMFS-issued incidental take authorization;
- Where a team of three or more PSOs is required, a lead observer or monitoring coordinator must be designated. The lead observer must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization; and
- PSOs must be approved by NMFS prior to beginning any activity subject to this IHA.

PSOs should have the following additional qualifications:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

A team of one to two land based PSOs will be deployed to observe the monitoring zones for vibratory and impact pile driving during this project. PSOs will be located at the best vantage points to see the entirety of the active zone. One PSO will have an unobstructed view of all water within the shutdown zones, and will be stationed at or near the project activity. While the exact monitoring stations have not yet been determined, Coast Guard provided potential locations in Figure 1 of its Marine Mammal Monitoring and Mitigation Plan. Additionally, a PSO will be stationed for monitoring on an observation vessel in order to ensure the entire monitoring zone to the extent of the relevant predicted Level B harassment isopleth can be observed during vibratory pile installation and removal.

Monitoring will be conducted 30 minutes before, during, and 30 minutes after all in water construction activities. In addition, PSOs will record all incidents of marine mammal occurrence, regardless of distance from activity, and will document any behavioral reactions in concert with distance from piles being driven or removed. Pile driving activities include the time to install or remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than 30 minutes.

*Reporting*

Coast Guard will submit a draft report to NMFS within 90 calendar days of the completion of monitoring or 60 calendar days prior to the requested issuance of any subsequent IHA for construction activity at the same location, whichever comes first. The marine mammal monitoring report will include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. Specifically, the report would include:

- Dates and times (begin and end) of all marine mammal monitoring;
- Construction activities occurring during each daily observation period, including: (1) The number and type of piles that were driven and the method (*e.g.,* impact or vibratory); and (2) Total

duration of driving time for each pile (vibratory driving) and number of strikes for each pile (impact driving);

- PSO locations during marine mammal monitoring;
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;
- Upon observation of a marine mammal, the following information: (1) Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting; (2) Time of sighting; (3) Identification of the animal(s) (*e.g.,* genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species; (4) Distance and location of each observed marine mammal relative to the pile being driven for each sighting; (5) Estimated number of animals (min/max/best estimate); (6) Estimated number of animals by cohort (adults, juveniles, neonates, group composition, *etc.*); (7) Animal's closest point of approach and estimated time spent within the harassment zone; (8) Description of any marine mammal behavioral observations (*e.g.,* observed behaviors such as feeding or traveling), including an assessment of behavioral responses thought to have resulted from the activity (*e.g.,* no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);
- Number of marine mammals detected within the harassment zones, by species; and
- Detailed information about implementation of any mitigation (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting changes in behavior of the animal(s), if any.

A final report must be prepared and submitted within 30 calendar days following receipt of any NMFS comments on the draft report. If no comments are received from NMFS within 30 calendar days of receipt of the draft report, the report shall be considered final.

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, Coast Guard must report the incident to the OPR, NMFS (*PR.ITP.MonitoringReports@noaa.gov* and *itp.hotchkin@noaa.gov*) and to the West Coast regional stranding network (866–767–6114) as soon as feasible. If the death or injury was clearly caused by the specified activity, Coast Guard must immediately cease the activities until NMFS OPR is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of this IHA. Coast Guard must not resume their activities until notified by NMFS. The report must include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

**Negligible Impact Analysis and 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). 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 harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (*e.g.,* intensity, duration), the context of any impacts or responses (*e.g.,* critical reproductive time or location, foraging impacts affecting energetics), 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 are incorporated into this analysis via their impacts on the baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, the majority of our analysis applies to all the species listed in table 8, given that many of the anticipated effects of this project on different marine mammal stocks are expected to be relatively similar in nature. Where there are meaningful differences between species or stocks, or groups of species, in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, they are described independently in the analysis below.

Pile driving and removal activities associated with the project, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment, from underwater sounds generated from pile driving and removal. Potential takes could occur if individuals of these species are present in zones ensonified above the thresholds for Level B harassment, identified above, when these activities are underway.

The takes by Level B harassment would be due to potential behavioral disturbance. No mortality or serious injury is anticipated given the nature of the activity, and no Level A harassment is anticipated due to Coast Guard's construction method and the required mitigation measures (see Mitigation section).

Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, would likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring; *e.g.,* Thorson and Reyff 2006; HDR, Inc. 2012; Lerma 2014; ABR 2016). Most likely, individuals would simply move away from the sound source and be temporarily displaced from the areas of pile driving and removal, although even this reaction has been observed primarily only in association with impact pile driving, which Coast Guard anticipates using for only 10 percent of pile driving. If sound produced by project activities is sufficiently disturbing, animals are likely to simply avoid the area while the activity is occurring, particularly as the project is expected to occur over just 15 in-water pile driving days.

The project is also not expected to have significant adverse effects on affected marine mammals' habitats. The project activities would not modify

existing marine mammal habitat for a significant amount of time. The activities may cause some fish to leave the area of disturbance, thus temporarily impacting marine mammals' foraging opportunities in a limited portion of the foraging range. Given the short duration of the activities and the relatively small area of the habitat that may be affected, the impacts to marine mammal habitat, including fish, are not expected to cause significant or long-term negative consequences.

There are two known harbor seal haulouts close to the project site. The first haulout site is directly across Port Angeles Harbor from the USCG Air Station, approximately 2.4 km away. Seals swimming to and from this haulout have the potential to experience Level B harassment due to underwater sound exposure during vibratory or impact pile driving activities. However, the project activities are not expected to occur during any particularly sensitive time (*e.g.,* molting or pupping season), and the project duration is short, with approximately 15 days of in-water work. Given the availability of a second haulout close by (3.5 km (2.17 mi) from the project site on the opposite side of Ediz Hook) which is not expected to be exposed to noise from pile driving, and the short duration of the project, there are no anticipated significant or long-term negative consequences to harbor seals in the project area.

In summary and as described above, the following factors primarily support our determination that the impacts resulting from this activity are not expected to adversely affect any of the species or stocks through effects on annual rates of recruitment or survival:

- No serious injury or mortality is anticipated or authorized;
- The anticipated incidents of Level B harassment would consist of, at worst, temporary modifications in behavior that would not result in fitness impacts to individuals;
- Take estimates were calculated assuming that no activities would occur on the same day. However, in reality, vibratory and impact driving are likely to occur on the same day, reducing the overall impact to marine mammal species;
- The area impacted by the specified activity is very small relative to the overall habitat ranges of all species;
- While impacts will occur within areas that are important for feeding or resting for multiple stocks, because of the small footprint of the activity relative to the area of these important use areas, and the scope and nature of the anticipated impacts of pile driving exposure, we do not expect impacts to the reproduction or survival of any individuals.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the described monitoring and mitigation measures, NMFS finds that the total marine mammal take from the planned activity will have a negligible impact on all affected marine mammal species or stocks.

**Small Numbers**

As noted previously, only take of small numbers of marine mammals may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The number of instances of take for each species or stock authorized to be taken as a result of this project is included in table 8. Our analysis shows that less than one-third of the best available population abundance estimate of each stock could be taken by harassment. The number of animals authorized to be taken for all stocks would be considered small relative to the relevant stock's abundances even if each estimated taking occurred to a new individual, which is an unlikely scenario.

A lack of an accepted stock abundance value for the Washington Northern Inland Waters stock of harbor seal did not allow for the calculation of an expected percentage of the population that would be affected. The most relevant estimate of partial stock abundance is 7,513 seals (CV = 11.5%) (Jefferson *et al.* 2021). Given 210 authorized takes by Level B harassment for the stock, comparison to the best estimate of stock abundance shows, at most, 2.8 percent of the stock would be expected to be impacted.

Based on the analysis contained herein of the planned activity (including the required mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals would be taken relative to the population size of the affected species or stocks.

**Unmitigable Adverse Impact Analysis and Determination**

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

**Endangered Species Act**

Section 7(a)(2) of the ESA of 1973 (16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is authorized or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

**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 review our action (*i.e.,* the issuance of an IHA) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of the IHA qualifies to be categorically excluded from further NEPA review.

**Authorization**

NMFS has issued an IHA to Coast Guard for the potential harassment of

small numbers of five marine mammal species incidental to the Pier Maintenance and Bank Stabilization project in Port Angeles, Washington, that includes the previously explained mitigation, monitoring and reporting requirements. The IHA can be found at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-coast-guard-air-station-port-angeles-pier-maintenance-and.*

Dated: October 25, 2023.

**Catherin Marzin,**

*Acting Director, Office of Protected Resources, National Marine Fisheries Service.*

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**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XD325]**

### Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Eareckson Air Station Fuel Pier Repair in Alcan Harbor on Shemya Island, Alaska

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

**ACTION:** Notice; proposed incidental harassment authorization; request for comments on proposed authorization and possible renewal.

**SUMMARY:** NMFS has received a request from the U.S Army Corps of Engineers (USACE) on behalf of the Pacific Air Forces Regional Support Center (USAF) for authorization to take marine mammals incidental to the Eareckson Air Station (EAS) Fuel Pier Repair in Alcan Harbor, Shemya Island, Alaska. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible one-time, 1-year renewal that could be issued under certain circumstances and if all requirements are met, as described in the Request for Public Comments section at the end of this notice. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorization and agency responses will be summarized in the final notice of our decision.

**DATES:** Comments and information must be received no later than November 30, 2023.

**ADDRESSES:** Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service and should be submitted via email to *ITP.Fleming@noaa.gov.* Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.* In case of problems accessing these documents, please call the contact listed below.

*Instructions:* NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. All comments received are a part of the public record and will generally be posted online at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

**FOR FURTHER INFORMATION CONTACT:** Kate Fleming, Office of Protected Resources, NMFS, (301) 427–8401.

**SUPPLEMENTARY INFORMATION:**

#### 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 proposed or, if the taking is limited to harassment, a notice of a proposed IHA is provided to the public for review.

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 the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

#### 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 review our proposed action (*i.e.,* the issuance of an IHA) with respect to potential impacts on the human environment. This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NAO 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

#### Summary of Request

On May 15, 2023, NMFS received a request from the USACE on behalf of USAF for an IHA to take marine mammals incidental to construction associated with the EAS Fuel Pier Repair in Alcan Harbor on Shemya Island, Alaska. Following NMFS' review of the application, and discussions between NMFS and USAF, the application was deemed adequate and complete on September 19, 2023. The USAF's request is for take of 12 species of marine mammals, by Level B harassment and, for a subset of these species, Level A harassment. Neither USAF nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

This proposed IHA would cover 1 year of a larger 3-year project that involves construction activities that will not result in the take of marine mammals (*i.e.,* movement, mobilization, and staging of equipment; replacing the pier deck; and installing an engineered revetment along the western shoreline).

**Description of Proposed Activity**

*Overview*

The USAF is proposing to conduct long-term repairs on the only existing fuel pier at EAS on Shemya Island, Alaska. The fuel delivered to the pier is used by the island generator systems to aid in the operation of homeland defense early warning radar surveillance and communication systems. EAS also functions as an emergency divert airfield supporting commercial and air traffic destined for Japan, China, and other destinations in Asia and the Pacific. In February 2020, a destructive storm left the fuel pier in critical condition. In 2021, emergency repairs were completed to restore minimal function to the fuel pier. Long-term repairs are planned in order to prevent future degradation and catastrophic loss to the fuel pier, to maintain access to the pier, and to protect the shoreline facilities from further erosion. The activities that have the potential to take marine mammals, by Level A harassment and Level B harassment, include down-the-hole (DTH) drilling, vibratory and impact installation of temporary and permanent steel pipe piles, and vibratory removal of temporary steel pipe piles, and would introduce underwater sounds that may result in take, by Level A harassment and Level B harassment, of marine mammals. The marine construction associated with the proposed activities is planned to occur over 160 days over 1 year, accounting for weather delays and mechanical issues.

*Dates and Duration*

The proposed IHA would be effective from April 1, 2024 to March 31, 2025. The project would occur between April and October 2024 and would require approximately 160 days of pile driving. In-water construction activities would only occur during daylight hours, and typically over a 12-hour work day, up to 7 days per week.

*Specific Geographic Region*

The proposed activities would occur on the EAS Fuel Pier on Shemya Island, located in Section 16, Township 86 South, Range 257 West, of the Seward Meridian, Alaska. Shemya Island is a remote island in the western Aleutians. The fuel pier is located in Alcan Harbor, which opens to Shemya Pass to the west and the Bering Sea to its north and east. Alcan harbor is exposed to strong north winds. The dimensions of the new Pier footprint would be approximately 30 by 104 meters (m), or 100 by 340 feet (ft). Depths at the project site range from 5 to 10 m (16 to 33 ft). However, the area of impact would extend 40 kilometers (km), or 25 miles (mi), into the southwest portion of the Bering Sea, reaching depths of approximately 3,900 m (2.4 mi).

Shemya Island and its waters are within the Alaska Maritime National Wildlife Refuge, which if not for it being a military base, would typically be under the jurisdiction of U.S. Fish and Wildlife Service (USFWS, 2021). The fuel pier is the only pier on Shemya Island; there are no neighboring piers or docks. The next nearest developed location that is inhabited is Nikol'skoe, which is approximately 370 mi (595 km) west on Bering Island, Russia. Adak, Alaska, is approximately 400 mi (644 km) to the east in the Central Aleutians. The United States Coast Guard previously maintained a long-range navigation station on Attu Island, Alaska, 28 mi (45 km) to the west, but that site has been abandoned for several years. All former Alaska Native village sites in the region have been abandoned since World War II.

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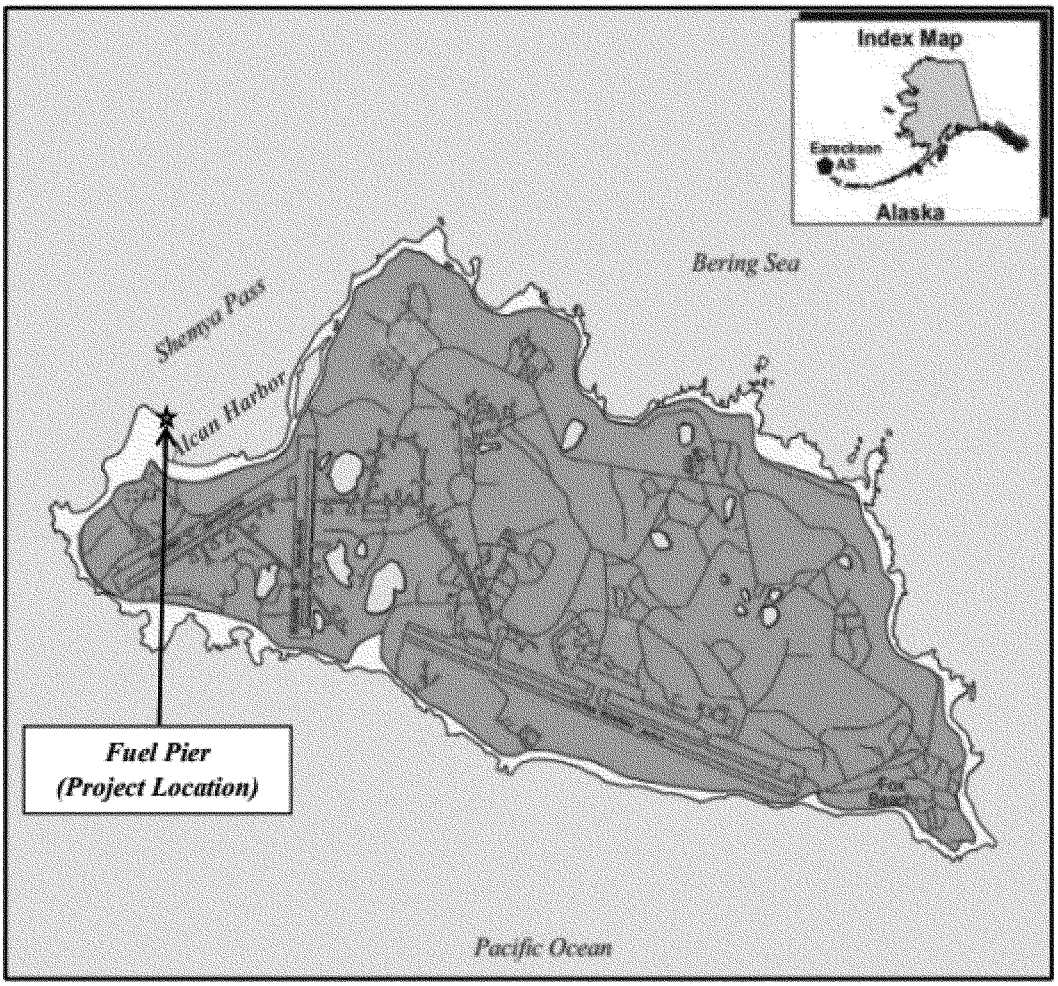


**Figure 1 -- Project Location on Shemya Island, Alaska**

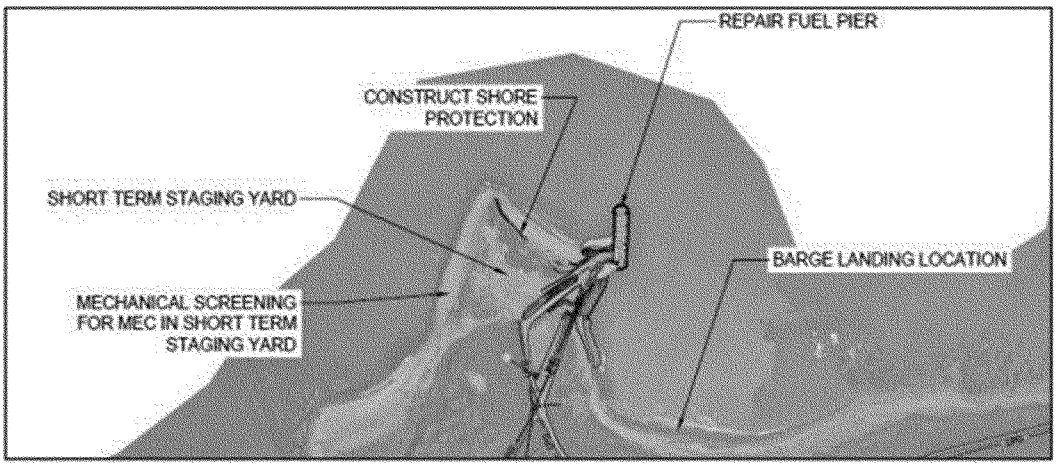


**Figure 2 -- Detailed view of the Fuel Pier location on Shemya Island, Alaska**

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*Detailed Description of the Specified Activity*

The USAF is proposing to repair the fuel pier at EAS on Shemya Island, Alaska. As noted above, this proposed IHA would authorize take associated with Year 1 of a larger 3-year project. Please refer to USAF's application for

additional information about project components planned for the period beyond Year 1.

The USAF estimates that Year 1 activities would include vessel movement and mobilization; pile installation for the fuel pier, screening and clearance for Munitions and Explosives of Concern (MEC) (see explanation below), remote equipment operations, removal of existing precast dolosse from the western shoreline, and crushing/recycling concrete.

The replacement fuel pier is within a Military Munitions Response Program (MMRP) site and although prior surveys and clearance of the Alcan Harbor Ordnance MMRP site have been completed, there is potential for munitions and explosives of concern to migrate within the site. As such, magnetometer-based surveys for MEC will be conducted prior to ground disturbing activities within the boundaries of the MMRP site to detect anomalies and inform follow-on actions to the extent practicable. Excavated material from in-water work will be further screened and cleared to remove any potential MEC. The material would be excavated with a clamshell bucket and placed in a hopper that deposits the material onto a conveyor leading to a 6-inch remote controlled grizzly rock screener. Subsequently, material six inches or larger would be inspected by UXO technicians for MEC prior to transfer by armored equipment to a screening plant with a specialized magnet belt to remove all potential metals and munitions. Cleared material would be transferred to an upland, low-grade staging area while MEC would be transferred from the construction site to the MEC storage and disposal site.

Additionally, USAF anticipates approximately five vessels (*i.e.,* tugboats towing barges) per season would be used for project activities, transiting between Seattle, WA and Shemya Island, AK, with some trips making a stop in Seward, Kodiak, or Anchorage, AK. With the exception of pile driving, these activities are not anticipated to result in take.

The proposed fuel pier replacement project would include the installation of an interlocking steel pipe combi-wall system, which will require the installation and removal of 60 30-inch (in) temporary steel pipe piles and the installation of 208 42-inch round steel interlocking pipe piles using vibratory, impact, and/or DTH methods (table 1). USAF does not plan to operate multiple hammers concurrently.

The interlocking steel pipe combi-wall system would be installed 15 ft (4.6 m) off the existing fuel pier to encapsulate most of the existing structure. The steel combi-wall system would extend approximately 560 ft (171 m) from the northern bulkhead corner, along the entire Pier berthing face, and around the northern perimeter.

Template frames for the pile wall would be installed to construct the new pier exterior structure and subsequently removed; template frames would be constructed to cantilever off the existing fuel pier structure (*i.e.,* not be placed in the water). However, up to 60 30-inch (76-cm) template piles may be installed in the water to provide additional support. A remotely operated vibratory pile driving hammer would be used to drive the piles through the bottom sediment to specified depths. It is anticipated that a diesel or hydraulic impact hammer would be utilized to achieve the specified embedment depth of 44 temporary piles. Up to six temporary piles in the southeast corner, where there is very little overburden, would likely need to be rock socketed into bedrock via a DTH.

The main component of the combi-wall system would require the installation of 208 42-inch (107-cm) interlocking permanent steel pipe piles that would be installed using vibratory and impact pile driving to specified embedment depths. The pile interlocks would be designed to transfer soil and water pressure to the interlocking steel pipe piles, which would carry most of the load. In addition to vibratory and impact pile driving, it is expected that most, if not all permanent piling will require a rock socket into the bedrock, at a minimum of 30 ft (9 m) below the mudline, using a DTH hammer and bit. The bit will be slightly larger than the outside diameter of the permanent pipe pile.

Construction of the proposed dock would follow this sequence:

1. Set one or two cantilevered templates utilizing existing fuel pier as support. These cantilevered templates would not be installed in the water. However, template piles may be installed in some areas to offer additional support (table 1).

2. Within the frame, loft and stab 6–12 each 42-inch permanent pile.

3. Within the frame, vibrate, impact, and DTH drill 42-inch diameter pipe pile. Only one pile would be driven at a time, even if two pile templates are used.

4. Remove the frame and any temporary piles and move to the next permanent pile location.

5. Repeat this process for placement of all the permanent piles.

TABLE 1—SUMMARY OF PILES TO BE INSTALLED AND REMOVED

| Installation or removal | Number of piles | Impact strikers per pile | Vibratory duration per pile, minutes | DTH pile installation, duration per pile, minutes | Maximum piles per day—impact pile driving | Maximum piles per day—vibratory pile driving | Maximum piles per day—DTH pile installation | Days of installation and/or removal [a] |
|---|---|---|---|---|---|---|---|---|
| **42-inch Interlocking Steel Pipe Piles—Permanent** | | | | | | | | |
| Installation | 208 | 1,800 | 30 | 180 | 4 | 4 | 3 | 122 |
| **30-inch Steel Pipe Piles—Template** | | | | | | | | |
| Installation | 60 | 900 | 15 | 150 | 4 | 4 | 3 | 17 |
| Removal | | | | | | 4 | | |

[a] USAF estimates a total of 160 construction days to account for weather delays and mechanical issues.

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see Proposed Mitigation and Proposed Monitoring and Reporting sections).

## Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species. NMFS fully considered all of this information, and we refer the reader to these descriptions, instead of reprinting the information. Additional information regarding population trends

and threats may be found in NMFS' Stock Assessment Reports (SARs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*https://www.fisheries.noaa.gov/find-species*).

Table 2 lists all species or stocks for which take is expected and proposed to be authorized for this activity, and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no serious injury or mortality is anticipated or proposed to be authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species or stocks and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' U.S. Alaska 2022 SARs (Young *et al.,* 2023). All values presented in table 2 are the most recent available at the time of publication and are available online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.*

TABLE 2—SPECIES LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES

| Common name | Scientific name | Stock | ESA/MMPA status; strategic (Y/N) [1] | Stock abundance (CV, $N_{min}$, most recent abundance survey) [2] | PBR | Annual M/SI [3] |
|---|---|---|---|---|---|---|
| **Order Artiodactyla—Infraorder Cetacea—Mysticeti (baleen whales)** | | | | | | |
| *Family Balaenopteridae* | | | | | | |
| Fin Whale | *Balaenoptera physalus* | Northeast Pacific | E, D, Y | UND (UND, UND, 2013) [4] ... | UND | 0.6 |
| Humpback Whale | *Megaptera novaeangliae* | Western North Pacific | E, D, Y | 1,084, (0.088, 1,007, 2006) | 3 | 2.8 |
| | | Mexico—North Pacific | T, D, Y | N/A (N/A, N/A, 2006) [5] | UND | 0.56 |
| | | Hawai'i | -, -, N | 11,278 (0.56, 7,265, 2020) .. | 127 | 19.6 |
| Minke Whale | *Balaenoptera acutorostrata* | Alaska | -, -, - | N/A (N/A, N/A, N/A) [6] | UND | 0 |
| **Odontoceti (toothed whales, dolphins, and porpoises)** | | | | | | |
| *Family Physeteridae* | | | | | | |
| Sperm whale | *Physeter macrocephalus* | North Pacific | E, D, Y | UND (UND, UND, 2015) [7] ... | UND | 3.5 |
| *Family Ziphiidae (beaked whales)* | | | | | | |
| Baird's beaked whale | *Berardius bairdii* | Alaska | -, -, N | N/A (N/A, N/A, N/A) [8] | N/A | 0 |
| Stejneger's Beaked Whale. | *Mesoplodon stejnegeri* | Alaska | -, -, N | N/A (N/A, N/A, N/A) [8] | N/A | 0 |
| *Family Delphinidae* | | | | | | |
| Killer Whale | *Orcinus orca* | ENP Alaska Resident Stock | -, -, N | 1,920 (N/A, 1,920, 2019) | 19 | 1.3 |
| | | ENP Gulf of Alaska, Aleutian Islands, and Bering Sea. | -, -, N | 587 (N/A, 587, 2012) | 5.9 | 0.8 |
| *Family Phocoenidae (porpoises)* | | | | | | |
| Dall's Porpoise | *Phocoenoides dalli* | Alaska | -, -, N | UND (UND, UND, 2015) [9] ... | UND | 37 |
| Harbor Porpoise | *Phocoena phocoena* | Bering Sea | -, -, Y | UNK (UNK, N/A, 2008) [10] | UND | 0.4 |
| **Order Carnivora—Pinnipedia** | | | | | | |
| *Family Otariidae (eared seals and sea lions)* | | | | | | |
| Northern Fur Seal | *Callorhinus ursinus* | Eastern Pacific | -, D, Y | 626,618 (0.2, 530,376, 2019). | 11,403 | 373 |
| Steller Sea Lion | *Eumetopias jubatus* | Western, U.S | E, D, Y | 52,932 (N/A, 52,932, 2019) | 318 | 254 |
| *Family Phocidae (earless seals)* | | | | | | |
| Harbor Seal | *Phoca vitulina* | Aleutian Islands | -, -, N | 5,588 (N/A, 5,366, 2018) | 97 | 90 |

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *https://www.nmfs.noaa.gov/pr/sars/.* CV is coefficient of variation; $N_{min}$ is the minimum estimate of stock abundance. In some cases, CV is not applicable (explain if this is the case).

[3] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, vessel strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

[4] The best available abundance estimate for this stock is not considered representative of the entire stock as surveys were limited to a small portion of the stock's range. Based upon this estimate and the Nmin, the PBR value is likely negatively biased for the entire stock.

[5] Abundance estimates are based upon data collected more than 8 years ago and therefore current estimates are considered unknown.

[6] Reliable population estimates are not available for this stock. Please see Friday *et al.* (2013) and Zerbini *et al.* (2006) for additional information on numbers of minke whales in Alaska.

[7] The most recent abundance estimate is likely unreliable as it covered a small area that may not have included females and juveniles, and did not account for animals missed on the trackline. The calculated PBR is not a reliable index for the stock as it is based upon negatively biased minimum abundance estimate.

[8] Reliable abundance estimates for this stock are currently unavailable.

[9] The best available abundance estimate is likely an underestimate for the entire stock because it is based upon a survey that covered only a small portion of the stock's range.

[10] The best available abundance estimate and Nmin are likely an underestimate for the entire stock because it is based upon a survey that covered only a small portion of the stock's range. PBR for this stock is undetermined due to this estimate being older than 8 years.

As indicated above, all 12 species (with 15 managed stocks) in table 2 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur. All species that could potentially occur in the proposed project area are included in table 3–1 of the IHA application. While blue whale, gray whale, North Pacific right whale, Pacific white-sided dolphin, and ribbon seal could occur in the area, the temporal and/or spatial occurrence of these species is such that take is not expected to occur, and they are not discussed further beyond the explanation provided here. These species all have extremely low abundance and most are observed in areas outside of the project area.

In addition, northern sea otter may be found the western Aleutians. However, this species is managed by the U.S. Fish and Wildlife Service and is not considered further in this document.

*Fin Whale*

Fin whales are found in polar, temperate, and subtropical waters worldwide, where they inhabit deep, offshore waters and often travel in open seas away from coasts. Fin whales in the northeast Pacific are typically distributed off the coast of the Gulf of Alaska and the Bering and Chukchi Seas. In general, the spring and early summer are spent in cold, high latitude feeding waters as far north as Chukchi Sea, the Gulf of Alaska, Prince William Sound, along the Aleutian Islands, and west of Kodiak Island. In the fall, fin whales return to low latitudes for the winter breeding season, though they may remain in residence in their high latitude ranges if food resources remain plentiful.

Although typically observed in groups of 6 to 10 individuals, fin whales are also sighted in pairs, alone, or in feeding aggregations up to 100 individuals. In the central eastern Bering Sea, most sightings have occurred along the continental shelf break in a zone of high prey abundance (Clark, 2008a). Across 119 days of three distinct marine mammal surveys completed from Shemya Island between 2016 and 2021, no fin whales were observed in the project area (see application). Note that Alcan harbor was included in island-wide monitoring of two of these surveys, and the third survey effort was conducted exclusively at the project site during an emergency repair of the fuel pier.

*Humpback Whale*

On September 8, 2016, NMFS divided the once single population into 14 distinct population segments (DPS) under the ESA, removed the species-level listing as endangered, and, in its place, listed four DPSs as endangered and one DPS as threatened (81 FR 62259, September 8, 2016). The remaining nine DPSs were not listed. There are four DPSs in the North Pacific, including the Western North Pacific and Central America, which are listed as endangered, Mexico, which is listed as threatened, and Hawai'i, which is not listed.

The 2022 Alaska and Pacific SARs described a revised stock structure for humpback whales which modifies the previous stocks designated under the MMPA to align more closely with the ESA-designated DPSs (Caretta *et al.,* 2023; Young *et al.,* 2023). Specifically, the three previous North Pacific humpback whale stocks (Central and Western North Pacific stocks and a CA/OR/WA stock) were replaced by five stocks, largely corresponding with the ESA-designated DPSs. These include the Western North Pacific and Hawai'i stocks and a Central America/Southern Mexico—CA/OR/WA stock (which corresponds with the Central America DPS). The remaining two stocks, corresponding with the Mexico DPS, are the Mainland Mexico—CA/OR/WA and Mexico—North Pacific stocks (Caretta *et al.,* 2023; Young *et al.,* 2023). The former stock is expected to occur along the west coast from California to southern British Columbia, while the latter stock may occur across the Pacific, from northern British Columbia through the Gulf of Alaska and Aleutian Islands/Bering Sea region to Russia.

The Hawai'i stock consists of one demographically independent population (DIP)—Hawai'i—Southeast Alaska/Northern British Columbia DIP and one unit—Hawai'i—North Pacific unit, which may or may not be composed of multiple DIPs (Wade *et al.,* 2021). The DIP and unit are managed as a single stock at this time, due to the lack of data available to separately assess them and lack of compelling conservation benefit to managing them separately (NMFS, 2023; NMFS, 2019; NMFS, 2022b). The DIP is delineated based on two strong lines of evidence: genetics and movement data (Wade *et al.,* 2021). Whales in the Hawai'i—Southeast Alaska/Northern British Columbia DIP winter off Hawai'i and largely summer in Southeast Alaska and Northern British Columbia (Wade *et al.,* 2021). The group of whales that migrate from Russia, western Alaska (Bering Sea and Aleutian Islands), and central Alaska (Gulf of Alaska excluding Southeast Alaska) to Hawai'i have been delineated as the Hawai'i—North Pacific unit (Wade *et al.,* 2021). There are a small number of whales that migrate between Hawai'i and southern British Columbia/Washington, but current data and analyses do not provide a clear understanding of which unit these whales belong to (Wade *et al.,* 2021; Caretta *et al.,* 2023; Young *et al.,* 2023).

The Mexico—North Pacific unit is likely composed of multiple DIPs, based on movement data (Martien *et al.,* 2021; Wade, 2021; Wade *et al.,* 2021). However, because currently available data and analyses are not sufficient to delineate or assess DIPs within the unit, it was designated as a single stock (NMFS, 2023a; NMFS, 2019; NMFS, 2022c). Whales in this stock winter off Mexico and the Revillagigedo Archipelago and summer primarily in Alaska waters (Martien *et al.,* 2021; Carretta *et al.,* 2023; Young *et al.,* 2023).

The Western North Pacific stock consists of two units—the Philippines/Okinawa—North Pacific unit and the Marianas/Ogasawara—North Pacific unit. The units are managed as a single stock at this time, due to a lack of data. Recognition of these units is based on movements and genetic data (Oleson *et al.,* 2022). Whales in the Philippines/Okinawa—North Pacific unit winter near the Philippines and in the Ryukyu Archipelago and migrate to summer feeding areas primarily off the Russian mainland (Oleson *et al.,* 2022). Whales that winter off the Mariana Archipelago, Ogasawara, and other areas not yet identified and then migrate to summer feeding areas off the Commander Islands, and to the Bering Sea and Aleutian Islands comprise the Marianas/Ogasawara—North Pacific unit.

Humpback whales that occur in the project area are predominantly members of the Hawai'i stock, which corresponds to the Hawai'i DPS (91 percent probability in the Aleutian Islands), and is not listed under the ESA. However, members of the Mexico North Pacific stock, which include the Mexico DPS and is listed as threatened, have a small potential to occur in the project location (7 percent probability in the Aleutians), and the Western North Pacific Stock, which corresponds to the Western North Pacific DPS and is listed as endangered, have an even smaller potential to occur

in the project location (2 percent, Wade, 2021).

Humpback whales migrate to the North Pacific, including the Aleutian Islands, to feed after months of fasting in equatorial breeding grounds. Humpback whales generally travel alone or in small groups that persist only a few hours. Groups may stay together for longer in the summer in order to feed cooperatively. During the 2016 and 2021 Shemya Island marine mammal surveys, seven humpback whales were observed in the project area (see application).

*Minke Whale*

Minke whales occur in polar, temperate, and tropical waters worldwide in a range extending from the ice edge in the Arctic during the summer to near the equator during winter. However, they are known to prefer temperate to boreal waters due to the abundance of prey (Guerrero, 2008b). When comparing distribution and abundance in the years 2002, 2008, and 2010, it was found that that minke whales were scattered throughout all oceanographic domains: coastal, middle shelf, and outer shelf/slope (Muto *et al.,* 2021). The minke whale mostly migrates seasonally and can travel long distances; although, some minke whale individuals and stocks have resident home ranges and are not highly migratory (Guerrero, 2008b). The Alaska Stock of minke whales are migratory and are common in the waters of the Bering Sea, Gulf of Alaska, and Southeast Alaska in the spring and summer (NMFS, 2023c).

The distribution of minke whales vary according to age, sex, and reproductive status. Older mature males are commonly found in small social groups around the ice edge of polar regions during the summer feeding season. Comparatively, adult females will migrate farther into the higher latitudes but generally remain in coastal waters. Immature minke whales tend to be solitary and stay in lower latitudes during the summer (Guerrero, 2008b). Although the minke whale tends to be solitary or in groups of two to three individuals, they can congregate in larger groups containing up to 400 individuals at the higher latitude foraging areas (NOAA, 2021). During surveys in Alaska, minke whales are predominately observed alone (Wade *et al.,* 2003; Waite, 2003). Breeding season typically occurs from December to March, but in some regions minke whales breed year-round. When migrating north in spring and summer, they will travel along in coastal waters, whereas in fall and winter, they move farther offshore (NMFS, 2023c). In 2003, a minke whale was observed in July when a sea otter survey was being conducted at Attu Island (Doroff *et al.,* 2004), 28 mi to the west of Shemya Island. During the 2016 and 2021 Shemya Island marine mammal surveys, no minke whales were observed in the project area (see application).

*Sperm Whale*

Sperm whales are the most sighted and recorded cetacean in marine mammal surveys in high latitude regions of the North Pacific, including the Bering Sea and the Aleutian Islands (Young *et al.,* 2023). However, sperm whales exhibit sex-specific latitudinal segregation, where females and their young form social groups and are usually found in temperate and tropical latitudes, while males forage at higher latitudes and tends to only return to tropical and subtropical regions to breed (Whitehead, 2009). As such, males are more frequently encountered in the Aleutians than females; social groups typically occur in this area only during the winter when males are less likely to be present (Posdalijian, 2023).

Sperm whales tend to occur offshore in submarine canyons at the edge of the continental shelf in water 1,000 m (3,300 ft) deep (Jaquet and Whitehead, 1996). They hunt for food during deep dives that routinely reach depths of 2,000 feet and can last for 45 minutes. Because sperm whales spend most of their time in deep waters, their diet consists of species such as squid, sharks, skates, and fish that also occupy deep ocean waters.

The Aleutian Islands are considered a biologically important area (BIA) for feeding for sperm whale (Brower, 2022). This BIA overlaps with the project area and is active April through September. The BIA scored a three for importance and intensity, and a two for data support and boundary certainty, indicating that it is of high importance, has moderately certain boundaries, and moderate data to support the identification of the BIA (see Harrison *et al.* (2023) for additional information about the scoring process used to identify BIAs). The BIA was identified as having dynamic spatiotemporal variability.

During the 2016 and 2021 marine mammal surveys completed on Shemya Island, four sperm whales were observed on a single day (see application).

*Baird's Beaked Whale*

Baird's beaked whale occurs in the North Pacific and Bering Sea along the Aleutian Islands as well as the adjacent waters of the Gulf of Alaska, Sea of Okhotsk, and the Sea of Japan (Guerrero, 2008a). Within the North Pacific Ocean, Baird's beaked whales have been sighted north of 30° N in deep, cold waters over the continental shelf (Muto *et al.,* 2021), particularly in regions with 1,000 m (3,300 ft) or deeper contours, submarine canyons, and seamounts. However, they can be occasionally found in nearshore environments along narrow continental shelves. Baird's beaked whales migrate seasonally based on the temperature of surface water (NMFS, 2023a). They occur in waters of the continental slope during summer and fall months when surface water temperatures are the highest (Muto *et al.,* 2021). They have also been observed in the nearshore waters of the Bering Sea and Okhotsk Sea in May to October (NMFS, 2023a). Baird's beaked whales are usually found in tight social groups (schools or pods) averaging between five and 20 individuals, but they have occasionally been observed in larger groups of up to 50 animals.

During the 2016 and 2021 Shemya Island marine mammal surveys, no Baird's beaked whales were observed in the project area (see application).

*Stejneger's Beaked Whale*

Stejneger's beaked whale prefer cold, temperate, and subarctic waters of the North Pacific Ocean and are generally found in deep, offshore waters on or beyond the continental slope between 2,500 and 5,000 ft. Most records are from Alaskan waters, and the Aleutian Islands appear to be its center of distribution (Mead, 1989; Wade *et al.,* 2003).They are usually found in small, tight social groups averaging between 5 and 15 individuals. This whale is rarely sighted at sea, but they have been detected acoustically in the Aleutian waters in summer, fall, and spring (Baumann-Pickering *et al.,* 2014; Muto, 2021). Most data on Stejneger's beaked whale have been collected and inferred from stranded individuals. Though most strandings in the Aleutians occur in the central portion of the island chain, there was a stranding of an adult male Stejneger's beaked whale on the southeast coast of Shemya Island on September 1, 2005 (Savage *et al.,* 2021). During the 2016 and 2021 marine mammal surveys completed on Shemya Island, no Stejneger's beaked whale were observed.

*Killer Whale*

Killer whales occur in every ocean in the world and are the most widely distributed of all cetaceans. Along the west coast of North America, killer whales occur along the entire Alaska coast (Braham and Dahlheim, 1982).

This proposed IHA considers only the Eastern North Pacific Alaska Resident stock (Alaska Resident stock), and the Eastern North Pacific Gulf of Alaska, Aleutian Islands and Bering Sea Transient stocks because all other killer whale stocks occur outside the geographic area under consideration (Muto *et al.,* 2021).

There are three distinct ecotypes, or forms, of killer whales recognized: Resident, Transient, and Offshore. The three ecotypes differ morphologically, ecologically, behaviorally, and genetically. Spatial distribution has been shown to vary among the different ecotypes, with resident and, to a lesser extent, transient killer whales more commonly observed along the continental shelf, and offshore killer whales more commonly observed in pelagic waters (Rice *et al.,* 2021).

When comparing movement, residents tend to have more predictable movements and the smallest home ranges and they return annually, whereas transients are less predictable due to their larger home ranges and quick transits through local areas. Offshore ecotypes have the largest home ranges that are generally farther offshore compared to the other two ecotypes. (Zimmerman and Small, 2008). Resident killer whales live in large, stable groups ranging normally from 5 to 50 individuals and up to 100 or more. They feed only on fish, especially Pacific salmon. Transient killer whales, on the other hand, hunt marine mammals, like pinnipeds and porpoises, in smaller groups of 10 individuals or less (Forney and Wade, 2006).

During the 2016 and 2021 marine mammal surveys at Shemya Island, Killer whales were frequently documented within the project area and around the island during these surveys. Within the project area alone, the average daily observation rate was 0.6 killer whales (see application).

*Dall's Porpoise*

Dall's porpoises are widely distributed across the North Pacific Ocean, ranging from Japan to southern California and up to Alaska and the Bering Sea in coastal and pelagic waters between 28° N and 65° N (Wells, 2008; Muto *et al.,* 2021). They inhabit all strata on the continental shelf, slope, and pelagic waters with the greatest densities occurring in deeper inshore and slope habitats (Rone *et al.,* 2017). Throughout most of the eastern North Pacific they are present during all months of the year, although there may winter movements out of areas of ice like Prince William Sound and the Bering Sea or onshore-offshore movements along the west coast of the continental U.S. (Muto *et al.,* 2021). Depending on morphology/type, geography, and seasonality, they have inshore-offshore and north-south migration patterns (NMFS, 2023b).

They generally travel in groups of 10 to 20 individuals but can occur in groups with over hundreds of individuals (Wells, 2008). These groups appear to be fluid as they form and break-up during play and feeding.

During the 2016 and 2021 Shemya Island marine mammal surveys, no Dall's porpoise were observed in the project area (see application)

*Harbor Porpoise*

The Bering Sea stock of harbor porpoise occurs within the project area, ranging from throughout the Aleutian Islands and into all waters north of Unimak Pass. The harbor porpoise frequents nearshore waters and coastal embayments throughout their range, including bays, harbors, estuaries, and fjords less than 650 ft (198 m) deep (NMFS, 2023d). They are most often observed in groups of two or three. During the 2016 and 2021 marine mammal surveys completed on Shemya Island, one group of two to three harbor porpoise were observed (see application).

*Northern Fur Seal*

Northern fur seals occur from southern California north to the Bering Sea and west to the Sea of Okhotsk and Honshu Island, Japan. They are highly pelagic, spending most of their time each year alone at sea. During the summer breeding season, most of the worldwide population is found on the Pribilof Islands in the southern Bering Sea, with the remaining animals on rookeries in Russia, on Bogoslof Island in the southern Bering Sea, on San Miguel Island off southern California (Lander and Kajimura, 1982; NMFS, 1993), and on the Farallon Islands off central California. Non-breeding northern fur seals may occasionally haul out on land at other sites in Alaska, British Columbia, and on islets along the west coast of the United States (Fiscus, 1983).

During the reproductive season, adult males usually are on shore during the 4-month period from May to August, although some may be present until November. Adult females are ashore during a 6-month period (June–November). Following their respective times ashore, Alaska northern fur seals of both genders the move south and remain at sea until the next breeding season (Roppel, 1984). Adult females and pups from the Pribilof Islands move through the Aleutian Islands into the North Pacific Ocean, often to the waters offshore of Oregon and California (Ream *et al.,* 2005). Adult males generally move only as far south as the Gulf of Alaska in the eastern North Pacific (Kajimura, 1984) and the Kuril Islands in the western North Pacific (Loughlin *et al.,* 1999). In Alaska, pups are born during the summer months and leave the rookeries in the fall, on average around mid-November. They generally remain at sea for 22 months before returning to land (Kenyon and Wilke, 1953).

During the 2016 and 2021 marine mammal surveys completed on Shemya Island, no northern fur seals were observed (see application).

*Steller Sea Lion*

Steller sea lions in the project area are anticipated to be from the Western stock, which includes all Steller sea lions originating from rookeries west of Cape Suckling (144° W longitude). The centers of abundance and distribution for western DPS Steller sea lions are located in the Gulf of Alaska and Aleutian Islands. At sea, Steller sea lions commonly occur near the 656-ft (200-m) depth contour but have been found from nearshore to well beyond the continental shelf (Kajimura and Loughlin, 1988). Sea lions move offshore to pelagic waters for feeding excursions.

Steller sea lions are frequently observed around Shemya Island outside of the ensonified area, though only occasionally observed in low numbers in Alcan Harbor and Shemya Pass (see application). The ensonified area would intersect with the aquatic zone of Steller sea lion haulouts designated as critical habitat. The Shemya Island Major Haulout is 2.75 nmi to the east of the project site, Alaid Island Major Haulout is 5 nmi northwest of the project site, and Attu/Chirikof Point Major Haulout is 24 nmi to the northwest of the project site. However, no Steller sea lions have been observed on the Shemya Island Major Haulout during surveys completed between 2015 and 2017, and only one Steller sea lion was observed at Attu/Chirkock Point during surveys conducted during the same time frame. An average of 68 non-pups and 7 pups were observed annually during this time at Alaid Island Major Haulout (see application).

*Harbor Seal*

Harbor seals inhabit coastal and estuarine waters off Alaska. They haul out on rocks, reefs, beaches, and drifting glacial ice. They are generally non-migratory, with local movements

associated with such factors as tides, weather, season, food availability, and reproduction (Muto *et al.,* 2021). They are opportunistic feeders and often adjust their distribution to take advantage of locally and seasonally abundant prey (Womble *et al.,* 2010; Allen and Angliss, 2015). Although they tend to be solitary when in the water, they can form groups of about 30 or less individuals of both sexes and all ages when hauling out. Harbor seals haul out to rest periodically, give birth or nurse.

Harbor seals in the project area are recognized as part of the Aleutian Island stock, occurring along the entire Aleutian island chain from Attu Island to Ugamak Island. Pupping season in the Aleutian Islands is occurs between mid-June to mid-July. (Sease, 1992). Harbor seals haul out on beaches all around Shemya Island, with largest numbers observed on the east side of the island, away from the ensonified area. However, harbor seals are occasionally observed occurring inside the ensonified area. During the 2016 and 2021 marine mammal surveys completed on Shemya Island, an average of 0.45 harbor seals were observed each day.

*Marine Mammal Hearing*

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges (behavioral response data, anatomical modeling, *etc.*). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65-decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in table 3.

TABLE 3—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

| Hearing Group | Generalized Hearing Range * |
|---|---|
| Low-frequency (LF) cetaceans (baleen whales) | 7 Hz to 35 kHz |
| Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales) | 150 Hz to 160 kHz |
| High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, Cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*). | 275 Hz to 160 kHz |
| Phocid pinnipeds (PW) (underwater) (true seals) | 50 Hz to 86 kHz |
| Otariid pinnipeds (OW) (underwater) (sea lions and fur seals) | 60 Hz to 39 kHz |

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65-dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.,* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information.

**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 of Marine Mammals 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 of Marine Mammals 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.

Acoustic effects on marine mammals during the specified activity can occur from impact and vibratory pile driving and removal and DTH. The effects of underwater noise from USAF's proposed activities have the potential to result in Level A harassment and Level B harassment of marine mammals.

*Description of Sound Sources*

The marine soundscape is comprised of both ambient and anthropogenic sounds. Ambient sound is defined as the all-encompassing sound in a given place and is usually a composite of sound from many sources both near and far (American National Standards Institute 1995). The sound level of an area is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* waves, wind, precipitation, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic sound (*e.g.,* vessels, dredging, aircraft, construction).

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise ''ambient'' or ''background'' sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and shipping activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a

given frequency and location can vary by 10 to 20 dB from day to day (Richardson *et al.,* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

In-water construction activities associated with the project would include impact pile driving, vibratory pile driving and removal, and use of DTH equipment. The sounds produced by these activities fall into one of two general sound types: Impulsive and non-impulsive. Impulsive sounds (*e.g.,* explosions, gunshots, sonic booms, impact pile driving) are typically transient, brief (less than 1 second), broadband, and consist of high peak sound pressure with rapid rise time and rapid decay (American National Standards Institute (ANSI), 1986; National Institute of Occupational Safety and Health (NIOSH), 1998; NMFS, 2018). Non-impulsive sounds (*e.g.,* aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems) can be broadband, narrowband or tonal, brief or prolonged (continuous or intermittent), and typically do not have the high peak sound pressure with rapid rise/decay time that impulsive sounds do (ANSI, 1995; NIOSH, 1998; NMFS, 2018). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward 1997 in Southall *et al.,* 2007).

Three types of hammers would be used on this project: impact, vibratory, and DTH. Impact hammers operate by repeatedly dropping and/or pushing a heavy piston onto a pile to drive the pile into the substrate. Sound generated by impact hammers is characterized by rapid rise times and high peak levels, a potentially injurious combination (Hastings and Popper, 2005). Vibratory hammers install piles by vibrating them and allowing the weight of the hammer to push them into the sediment. Vibratory hammers produce significantly less sound than impact hammers. Peak Sound Pressure Levels (SPLs) may be 180 dB or greater, but are generally 10 to 20 dB lower than SPLs generated during impact pile driving of the same-sized pile (Oestman *et al.,* 2009). Rise time is slower, reducing the probability and severity of injury, and sound energy is distributed over a greater amount of time (Nedwell and Edwards, 2002; Carlson *et al.,* 2005).

A DTH hammer is essentially a drill bit that drills through the bedrock using a rotating function like a normal drill, in concert with a hammering mechanism operated by a pneumatic (or sometimes hydraulic) component integrated into to the DTH hammer to increase speed of progress through the substrate (*i.e.,* it is similar to a ''hammer drill'' hand tool). The sounds produced by the DTH method contain both a continuous, non-impulsive component from the drilling action and an impulsive component from the hammering effect. Therefore, we treat DTH systems as both impulsive and continuous, non-impulsive sound source types simultaneously.

The likely or possible impacts of USAF's proposed activities on marine mammals could be generated from both non-acoustic and acoustic stressors. Potential non-acoustic stressors include the physical presence of the equipment, vessels, and personnel; however, any impacts to marine mammals are expected to primarily be acoustic in nature. Acoustic stressors include effects of heavy equipment operation during pile installation and removal and DTH.

*Acoustic Impacts*

The introduction of anthropogenic noise into the aquatic environment from pile driving and removal and DTH equipment is the primary means by which marine mammals may be harassed from USAF's specified activities. In general, animals exposed to natural or anthropogenic sound may experience behavioral, physiological, and/or physical effects, ranging in magnitude from none to severe (Southall *et al.,* 2007). Generally, exposure to pile driving and removal and DTH noise has the potential to result in behavioral reactions (*e.g.,* avoidance, temporary cessation of foraging and vocalizing, changes in dive behavior) and, in limited cases, auditory threshold shifts. Exposure to anthropogenic noise can also lead to non-observable physiological responses such as an increase in stress hormones. Additional noise in a marine mammal's habitat can mask acoustic cues used by marine mammals to carry out daily functions such as communication and predator and prey detection. The effects of pile driving and removal and DTH noise on marine mammals are dependent on several factors, including, but not limited to, sound type (*e.g.,* impulsive vs. non-impulsive), the species, age and sex class (*e.g.,* adult male vs. mother with calf), duration of exposure, the distance between the pile and the animal, received levels, behavior at time of exposure, and previous history with exposure (Wartzok *et al.,* 2003; Southall *et al.,* 2007). Here we discuss physical auditory effects (threshold shifts) followed by behavioral effects and potential impacts on habitat.

NMFS defines a noise-induced threshold shift (TS) as a change, usually an increase, in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). The amount of threshold shift is customarily expressed in dB. A TS can be permanent or temporary. As described in NMFS (2018), there are numerous factors to consider when examining the consequence of TS, including, but not limited to, the signal temporal pattern (*e.g.,* impulsive or non-impulsive), likelihood an individual would be exposed for a long enough duration or to a high enough level to induce a TS, the magnitude of the TS, time to recovery (seconds to minutes or hours to days), the frequency range of the exposure (*i.e.,* spectral content), the hearing and vocalization frequency range of the exposed species relative to the signal's frequency spectrum (*i.e.,* how animal uses sound within the frequency band of the signal; *e.g.,* Kastelein *et al.,* 2014), and the overlap between the animal and the source (*e.g.,* spatial, temporal, and spectral).

*Permanent Threshold Shift (PTS)*—NMFS defines PTS as a permanent, irreversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). Available data from humans and other terrestrial mammals indicate that a 40-dB threshold shift approximates PTS onset (Ward *et al.,* 1958; Ward *et al.,* 1959; Ward, 1960; Kryter *et al.,* 1966; Miller, 1974; Henderson *et al.,* 2008). PTS levels for marine mammals are estimates, because there are limited empirical data measuring PTS in marine mammals (*e.g.,* Kastak *et al.,* 2008), largely due to the fact that, for various ethical reasons, experiments involving anthropogenic noise exposure at levels inducing PTS are not typically pursued or authorized (NMFS, 2018).

*Temporary Threshold Shift (TTS)*—A temporary, reversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). Based on data from cetacean TTS measurements (Southall *et al.,* 2007), a TTS of 6 dB is considered the minimum threshold shift clearly larger than any day-to-day or session-to-session variation in a subject's normal hearing

ability (Schlundt *et al.,* 2000; Finneran *et al.,* 2000; Finneran *et al.,* 2002). As described in Finneran (2016), marine mammal studies have shown the amount of TTS increases with cumulative sound exposure level ($SEL_{cum}$) in an accelerating fashion: At low exposures with lower $SEL_{cum,}$ the amount of TTS is typically small and the growth curves have shallow slopes. At exposures with higher $SEL_{cum,}$ the growth curves become steeper and approach linear relationships with the noise SEL.

Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious (similar to those discussed in *Masking,* below). For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical for successful mother/calf interactions could have more serious impacts. We note that reduced hearing sensitivity as a simple function of aging has been observed in marine mammals, as well as humans and other taxa (Southall *et al.,* 2007), so we can infer that strategies exist for coping with this condition to some degree, though likely not without cost.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin (*Tursiops truncatus*), beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocoena asiaeorientalis*) and five species of pinnipeds exposed to a limited number of sound sources (*i.e.,* mostly tones and octave-band noise) in laboratory settings (Finneran, 2015). TTS was not observed in trained spotted (*Phoca largha*) and ringed (*Pusa hispida*) seals exposed to impulsive noise at levels matching previous predictions of TTS onset (Reichmuth *et al.,* 2016). In general, harbor seals and harbor porpoises have a lower TTS onset than other measured pinniped or cetacean species (Finneran, 2015). Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species. No data are available on noise-induced hearing loss for mysticetes. For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see Southall *et al.* (2007), Finneran and Jenkins (2012), Finneran (2015), and table 5 in NMFS (2018).

Activities for this project include impact and vibratory pile driving, vibratory pile removal, and DTH activities. There would likely be pauses in activities producing the sound during each day. Given these pauses and the fact that many marine mammals are likely moving through the project areas and not remaining for extended periods of time, the potential for threshold shift declines.

*Behavioral harassment*—Exposure to noise from pile driving and removal and DTH also has the potential to behaviorally disturb marine mammals. Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant [*e.g.,* Lusseau and Bejder, 2007; Weilgart, 2007; National Research Council (NRC), 2005].

The following subsections provide examples of behavioral responses that provide an idea of the variability in behavioral responses that would be expected given the differential sensitivities of marine mammal species to sound and the wide range of potential acoustic sources to which a marine mammal may be exposed. Behavioral responses that could occur for a given sound exposure should be determined from the literature that is available for each species, or extrapolated from closely related species when no information exists, along with contextual factors. Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. There are broad categories of potential response, which we describe in greater detail here, that include alteration of dive behavior, alteration of foraging behavior, effects to respiration, interference with or alteration of vocalization, avoidance, and flight.

Pinnipeds may increase their haul out time, possibly to avoid in-water disturbance (Thorson and Reyff, 2006). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.,* 2012), and can vary depending on characteristics associated with the sound source (*e.g.,* whether it is moving or stationary, number of sources, distance from the source). In general, pinnipeds seem more tolerant of, or at least habituate more quickly to, potentially disturbing underwater sound than do cetaceans, and generally seem to be less responsive to exposure to industrial sound than most cetaceans.

*Alteration of Dive Behavior*—Changes in dive behavior can vary widely, and may consist of increased or decreased dive times and surface intervals as well as changes in the rates of ascent and descent during a dive (*e.g.,* Frankel and Clark, 2000; Costa *et al.,* 2003; Ng and Leung, 2003; Nowacek *et al.,* 2004; Goldbogen *et al.,* 2013). Seals exposed to non-impulsive sources with a received sound pressure level within the range of calculated exposures (142–193 dB re 1 μPa), have been shown to change their behavior by modifying diving activity and avoidance of the sound source (Götz and Janik, 2010; Kvadsheim *et al.,* 2010). Variations in dive behavior may reflect interruptions in biologically significant activities (*e.g.,* foraging) or they may be of little biological significance. The impact of an alteration to dive behavior resulting from an acoustic exposure depends on what the animal is doing at the time of the exposure and the type and magnitude of the response.

*Alteration of Feeding Behavior*—Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.,* bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.,* Croll *et al.,* 2001; Nowacek *et al.,* 2004; Madsen *et al.,* 2006; Yazvenko *et al.,* 2007; Melcón *et al.,* 2012). In addition, behavioral state of the animal plays a role in the type and severity of a behavioral response, such as disruption to foraging (*e.g.,* Silve *et al.,* 2016; Wensveen *et al.,* 2017). An evaluation of whether foraging disruptions would be likely to incur fitness consequences considers temporal

and spatial scale of the activity in the context of the available foraging habitat and, in more severe cases may necessitate consideration of information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal. Goldbogen *et al.* (2013) indicate that disruption of feeding and displacement could impact individual fitness and health. However, for this to be true, we would have to assume that an individual could not compensate for this lost feeding opportunity by either immediately feeding at another location, by feeding shortly after cessation of acoustic exposure, or by feeding at a later time. There is no indication this is the case here, particularly since prey would likely still be available in the environment in most cases following the cessation of acoustic exposure.

*Respiration*—Respiration naturally varies with different behaviors, and variations in respiration rate as a function of acoustic exposure can be expected to co-occur with other behavioral reactions, such as a flight response or an alteration in diving. However, respiration rates in and of themselves may be representative of annoyance or an acute stress response. Studies with captive harbor porpoises showed increased respiration rates upon introduction of acoustic alarms (Kastelein *et al.,* 2001; Kastelein *et al.,* 2006a) and emissions for underwater data transmission (Kastelein *et al.,* 2005). Various studies also have shown that species and signal characteristics are important factors in whether respiration rates are unaffected or change, again highlighting the importance in understanding species differences in the tolerance of underwater noise when determining the potential for impacts resulting from anthropogenic sound exposure (*e.g.,* Kastelein *et al.,* 2005; Kastelein *et al.,* 2006; Kastelein *et al.,* 2018; Gailey *et al.,* 2007; Isojunno *et al.,* 2018).

*Vocalization*—Marine mammals vocalize for different purposes and across multiple modes, such as whistling, echolocation click production, calling, and singing. Changes in vocalization behavior in response to anthropogenic noise can occur for any of these modes and may result from a need to compete with an increase in background noise or may reflect increased vigilance or a startle response. For example, in the presence of potentially masking signals, humpback whales and killer whales (*Orcinus orca*) have been observed to increase the length of their songs (Miller *et al.,* 2000; Fristrup *et al.,* 2003; Foote *et al.,* 2004), while right whales have been observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.,* 2007; Rolland *et al.,* 2012). Killer whales off the northwestern coast of the United States have been observed to increase the duration of primary calls once a threshold in observing vessel density (*e.g.,* whale watching) was reached, which has been suggested as a response to increased masking noise produced by the vessels (Foote *et al.,* 2004; NOAA, 2014). In some cases, however, animals may cease or alter sound production in response to underwater sound (*e.g.,* Bowles *et al.,* 1994; Castellote *et al.,* 2012; Cerchio *et al.,* 2014). Studies also demonstrate that even low levels of noise received far from the noise source can induce changes in vocalization and/or behavioral responses (Blackwell *et al.,* 2013; Blackwell *et al.,* 2015).

*Avoidance*—Avoidance is the displacement of an individual from an area or migration path as a result of the presence of a sound or other stressors, and is one of the most obvious manifestations of disturbance in marine mammals (Richardson *et al.,* 1995). Avoidance is qualitatively different from the flight response, but also differs in the magnitude of the response (*i.e.,* directed movement, rate of travel, *etc.*). Often avoidance is temporary, and animals return to the area once the noise has ceased. Acute avoidance responses have been observed in captive porpoises and pinnipeds exposed to a number of different sound sources (Kastelein *et al.,* 2001; Finneran *et al.,* 2003; Kastelein *et al.,* 2006a; Kastelein *et al.,* 2006b; Kastelein *et al.,* 2015b; Kastelein *et al.,* 2015c; Kastelein *et al.,* 2018). Short-term avoidance of seismic surveys, low frequency emissions, and acoustic deterrents have also been noted in wild populations of odontocetes (Bowles *et al.,* 1994; Goold, 1996; Goold and Fish, 1998; Morton and Symonds, 2002; Hiley *et al.,* 2021) and to some extent in mysticetes (Malme *et al.,* 1984; McCauley *et al.,* 2000; Gailey *et al.,* 2007). Longer-term displacement is possible, however, which may lead to changes in abundance or distribution patterns of the affected species in the affected region if habituation to the presence of the sound does not occur (*e.g.,* Blackwell *et al.,* 2004; Bejder *et al.,* 2006; Teilmann *et al.,* 2006).

Forney *et al.* (2017) described the potential effects of noise on marine mammal populations with high site fidelity, including displacement and auditory masking. In cases of western gray whales (*Eschrichtius robustus*) and beaked whales (*Ziphius cavirostris*), anthropogenic effects in areas where they are resident or exhibit site fidelity could cause severe biological consequences, in part because displacement may adversely affect foraging rates, reproduction, or health, while an overriding instinct to remain in the area could lead to more severe acute effects. Avoidance of overlap between disturbing noise and areas and/or times of particular importance for sensitive species may be critical to avoiding population-level impacts because (particularly for animals with high site fidelity) there may be a strong motivation to remain in the area despite negative impacts.

*Flight Response*—A flight response is a dramatic change in normal movement to a directed and rapid movement away from the perceived location of a sound source. The flight response differs from other avoidance responses in the intensity of the response (*e.g.,* directed movement, rate of travel). Relatively little information on flight responses of marine mammals to anthropogenic signals exist, although observations of flight responses to the presence of predators have occurred (Connor and Heithaus, 1996). The result of a flight response could range from brief, temporary exertion and displacement from the area where the signal provokes flight to, in extreme cases, marine mammal strandings (Evans and England, 2001). There are limited data on flight response for marine mammals in water; however, there are examples of this response in species on land. For instance, the probability of flight responses in Dall's sheep *Ovis dalli dalli* (Frid, 2003), hauled out ringed seals (*Phoca hispida*) (Born *et al.,* 1999), Pacific brant (*Branta bernicla nigricans*), and Canada geese (*B. canadensis*) increased as a helicopter or fixed-wing aircraft more directly approached groups of these animals (Ward *et al.,* 1999). However, it should be noted that response to a perceived predator does not necessarily invoke flight (Ford and Reeves, 2008), and whether individuals are solitary or in groups may influence the response.

Behavioral disturbance can also impact marine mammals in more subtle ways. Increased vigilance may result in costs related to diversion of focus and attention (*i.e.,* when a response consists of increased vigilance, it may come at the cost of decreased attention to other critical behaviors such as foraging or resting). These effects have generally not been observed in marine mammals, but studies involving fish and terrestrial animals have shown that increased

vigilance may substantially reduce feeding rates and efficiency (*e.g.,* Beauchamp and Livoreil, 1997; Fritz *et al.,* 2002; Purser and Radford, 2011). In addition, chronic disturbance can cause population declines through reduction of fitness (*e.g.,* decline in body condition) and subsequent reduction in reproductive success, survival, or both (*e.g.,* Harrington and Veitch, 1992; Daan *et al.,* 1996; Bradshaw *et al.,* 1998).

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hour cycle). Disruption of such functions resulting from reactions to stressors such as sound exposure are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than 1 day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007). Note that there is a difference between multi-day substantive behavioral reactions and multi-day anthropogenic activities. For example, just because an activity lasts for multiple days does not necessarily mean that individual animals are either exposed to activity-related stressors for multiple days or, further, exposed in a manner resulting in sustained multi-day substantive behavioral responses.

To assess the strength of behavioral changes and responses to external sounds and SPLs associated with changes in behavior, Southall *et al.* (2007) developed and utilized a severity scale, which is a 10-point scale ranging from no effect (labeled 0), effects not likely to influence vital rates (low; labeled from one to three), effects that could affect vital rates (moderate; labeled from four to six), to effects that were thought likely to influence vital rates (high; labeled from seven to nine). Southall *et al.* (2021) updated the severity scale by integrating behavioral context (*i.e.,* survival, reproduction, and foraging) into severity assessment. For non-impulsive sounds (*i.e.,* similar to the sources used during the proposed action), data suggest that exposures of pinnipeds to sources between 90 and 140 dB re 1 µPa do not elicit strong behavioral responses; no data were available for exposures at higher received levels for Southall *et al.* (2007) to include in the severity scale analysis. Reactions of harbor seals were the only available data for which the responses could be ranked on the severity scale. For reactions that were recorded, the majority (17 of 18 individuals/groups) were ranked on the severity scale as a 4 (defined as moderate change in movement, brief shift in group distribution, or moderate change in vocal behavior) or lower. The remaining response was ranked as a 6 (defined as minor or moderate avoidance of the sound source).

*Habituation*—Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.,* 2003). Animals are most likely to habituate to sounds that are predictable and unvarying. It is important to note that habituation is appropriately considered as a ''progressive reduction in response to stimuli that are perceived as neither aversive nor beneficial,'' rather than as, more generally, moderation in response to human disturbance (Bejder *et al.,* 2009). The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure. As noted, behavioral state may affect the type of response. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.,* 1995; NRC, 2003; Wartzok *et al.,* 2003). Controlled experiments with captive marine mammals have showed pronounced behavioral reactions, including avoidance of loud sound sources (Ridgway *et al.,* 1997; Finneran *et al.,* 2003). Observed responses of wild marine mammals to loud impulsive sound sources (typically seismic airguns or acoustic harassment devices) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Morton and Symonds, 2002; Richardson *et al.,* 1995; Nowacek *et al.,* 2007).

*Stress responses*—An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (*e.g.,* Seyle, 1950; Moberg, 2000). In many cases, an animal's first and sometimes most economical (in terms of energetic costs) response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness. Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (*e.g.,* Moberg, 1987; Blecha, 2000). Increases in the circulation of glucocorticoids are also equated with stress (Romano *et al.,* 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and ''distress'' is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficient to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well-studied through controlled experiments and for both laboratory and free-ranging animals (*e.g.,* Holberton *et al.,* 1996; Hood *et al.,* 1998; Jessop *et al.,* 2003; Krausman *et al.,* 2004; Lankford *et al.,* 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker, 2000; Romano *et al.,* 2002b) and, more rarely, studied in wild populations (*e.g.,* Romano *et al.,* 2002a). For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as ''distress.'' In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2003), however distress is an unlikely result of these projects based on observations of marine mammals during previous, similar projects.

*Auditory Masking*—Sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate

between acoustic signals of interest (*e.g.,* those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation) (Richardson *et al.,* 1995). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (*e.g.,* snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.,* pile driving, shipping, sonar, seismic exploration) in origin. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.,* signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (*e.g.,* sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions. Masking of natural sounds can result when human activities produce high levels of background sound at frequencies important to marine mammals. Conversely, if the background level of underwater sound is high (*e.g.,* on a day with strong wind and high waves), an anthropogenic sound source would not be detectable as far away as would be possible under quieter conditions and would itself be masked.

*Airborne Acoustic Effects*—Pinnipeds that occur near the project site could be exposed to airborne sounds associated with pile driving and removal that have the potential to cause behavioral harassment, depending on their distance from pile driving activities. Cetaceans are not expected to be exposed to airborne sounds that would result in harassment as defined under the MMPA. Airborne noise would primarily be an issue for pinnipeds that are swimming or hauled out near the project site within the range of noise levels elevated above the acoustic criteria. We recognize that pinnipeds in the water could be exposed to airborne sound that may result in behavioral harassment when looking with their heads above water. Most likely, airborne sound would cause behavioral responses similar to those discussed above in relation to underwater sound. For instance, anthropogenic sound could cause hauled out pinnipeds to exhibit changes in their normal behavior, such as reduction in vocalizations, or cause them to temporarily abandon the area and move further from the source. However, these animals would likely previously have been 'taken' because of exposure to underwater sound above the behavioral harassment thresholds, which are generally larger than those associated with airborne sound. Thus, the behavioral harassment of these animals is already accounted for in these estimates of potential take. Therefore, we do not believe that authorization of additional incidental take resulting from airborne sound for pinnipeds is warranted, and airborne sound is not discussed further.

*Marine Mammal Habitat Effects*

USAF's proposed construction activities could have localized, temporary impacts on marine mammal habitat, including prey, by increasing in-water sound pressure levels and slightly decreasing water quality. Increased noise levels may affect acoustic habitat (see *Masking* discussion above) and adversely affect marine mammal prey in the vicinity of the project areas (see discussion below). Elevated levels of underwater noise would ensonify the project areas where both fishes and mammals occur and could affect foraging success. Additionally, marine mammals may avoid the area during construction; however, displacement due to noise is expected to be temporary and is not expected to result in long-term effects to the individuals or populations.

*In-water Construction Effects on Potential Prey*—Construction activities would produce continuous (*i.e.,* vibratory pile driving and DTH) and intermittent (*i.e.,* impact driving and DTH) sounds. Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (*e.g.,* crustaceans, cephalopods, fish, zooplankton). Marine mammal prey varies by species, season, and location. Here, we describe studies regarding the effects of noise on known marine mammal prey.

Fish utilize the soundscape and components of sound in their environment to perform important functions such as foraging, predator avoidance, mating, and spawning (*e.g.,* Zelick and Mann, 1999; Fay, 2009). Depending on their hearing anatomy and peripheral sensory structures, which vary among species, fishes hear sounds using pressure and particle motion sensitivity capabilities and detect the motion of surrounding water (Fay *et al.,* 2008). The potential effects of noise on fishes depends on the overlapping frequency range, distance from the sound source, water depth of exposure, and species-specific hearing sensitivity, anatomy, and physiology. Key impacts to fishes may include behavioral responses, hearing damage, barotrauma (pressure-related injuries), and mortality.

Fish react to sounds that are especially strong and/or intermittent low-frequency sounds, and behavioral responses such as flight or avoidance are the most likely effects. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. The reaction of fish to noise depends on the physiological state of the fish, past exposures, motivation (*e.g.,* feeding, spawning, migration), and other environmental factors. Hastings and Popper (2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pile driving on fish; several are based on studies in support of large, multiyear bridge construction projects (*e.g.,* Scholik and Yan, 2001; Scholik and Yan, 2002; Popper and Hastings, 2009). Several studies have demonstrated that impulse sounds might affect the distribution and behavior of some fishes, potentially impacting foraging opportunities or increasing energetic costs (*e.g.,* Fewtrell and McCauley, 2012; Pearson *et al.,* 1992; Skalski *et al.,* 1992; Santulli *et al.,* 1999; Paxton *et al.,* 2017). However, some studies have shown no or slight reaction to impulse sounds (*e.g.,* Pena *et al.,* 2013; Wardle *et al.,* 2001; Jorgenson and Gyselman, 2009).

SPLs of sufficient strength have been known to cause injury to fish and fish mortality. However, in most fish species, hair cells in the ear continuously regenerate and loss of auditory function likely is restored when damaged cells are replaced with new cells. Halvorsen *et al.* (2012a) showed that a TTS of 4 to 6 dB was recoverable within 24 hours for one species. Impacts would be most severe when the individual fish is close to the source and when the duration of exposure is long. Injury caused by barotrauma can range from slight to severe and can cause death, and is most likely for fish with swim bladders. Barotrauma injuries have been documented during controlled exposure to impact pile driving (Halvorsen *et al.,* 2012b; Casper *et al.,* 2013).

The most likely impact to fishes from pile driving activities at the project area would be temporary behavioral avoidance of the area. The duration of fish avoidance of this area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution, and behavior is anticipated.

Construction activities have the potential to have adverse impacts on forage fish in the project area in the form of increased turbidity. Forage fish form a significant prey base for many marine mammal species that occur in the project area. Turbidity within the water column has the potential to reduce the level of oxygen in the water and irritate the gills of prey fish in the proposed project area. However, fish in the proposed project area would be able to move away from and avoid the areas where increase turbidity may occur. Given the limited area affected and ability of fish to move to other areas, any effects on forage fish are expected to be minor or negligible.

In summary, given the short daily duration of sound associated with individual pile driving and removal events and the relatively small areas being affected, pile driving and removal activities associated with the proposed actions are not likely to have a permanent, adverse effect on any fish habitat, or populations of fish species. Any behavioral avoidance by fish of the disturbed area would still leave significantly large areas of fish and marine mammal foraging habitat in the nearby vicinity. Thus, we conclude that impacts of the specified activities are not likely to have more than short-term adverse effects on any prey habitat or populations of prey species. Further, any impacts to marine mammal habitat are not expected to result in significant or long-term consequences for individual marine mammals, or to contribute to adverse impacts on their populations.

**Estimated Take of Marine Mammals**

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of ''small numbers,'' and the negligible impact determinations.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of 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).

Authorized takes would primarily be by Level B harassment, as use of the acoustic sources (*i.e.,* impact and vibratory pile driving and removal and DTH) has the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result, primarily for mysticetes and/or high frequency species and/or phocids because predicted auditory injury zones are larger than for mid-frequency species and/or otariids. Auditory injury is unlikely to occur for other groups. The proposed mitigation and monitoring measures are expected to minimize the severity of the taking to the extent practicable.

As described previously, no serious injury or mortality is anticipated or proposed to be authorized for this activity. Below we describe how the proposed take numbers are estimated.

For acoustic impacts, generally speaking, we estimate take by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of potential takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the proposed take estimates.

*Acoustic Thresholds*

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

*Level B Harassment*—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source or exposure context (*e.g.,* frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (*e.g.,* bathymetry, other noises in the area, predators in the area), and the receiving animals (hearing, motivation, experience, demography, life stage, depth) and can be difficult to predict (*e.g.,* Southall *et al.,* 2007; Southall *et al.,* 2021; Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above root-mean-squared pressure received levels (RMS SPL) of 120 dB (referenced to 1 micropascal (re 1 μPa)) for continuous (*e.g.,* vibratory pile driving, drilling) and above RMS SPL 160 dB re 1 μPa for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources. Generally speaking, Level B harassment take estimates based on these behavioral harassment thresholds are expected to include any likely takes by TTS as, in most cases, the likelihood of TTS occurs at distances from the source less than those at which behavioral harassment is likely. TTS of a sufficient degree can manifest as behavioral harassment, as reduced hearing sensitivity and the potential reduced opportunities to detect important signals (conspecific communication, predators, prey) may result in changes in behavior patterns that would not otherwise occur. USAF's proposed activity includes the use of continuous (vibratory pile driving and removal and DTH) and impulsive (impact pile driving and DTH) sources, and therefore the RMS SPL thresholds of 120 and 160 dB re 1 μPa is/are applicable.

*Level A harassment*—NMFS' ''Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing'' (Version 2.0, Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). USAF's proposed activity includes the use of impulsive (impact pile driving and DTH) and non-impulsive (vibratory pile driving and removal and DTH) sources.

These thresholds are provided in the table below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS' 2018 Technical Guidance, which may be accessed at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/*

*marine-mammal-acoustic-technical-guidance.*

TABLE 4—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

| Hearing group | PTS onset acoustic thresholds * (received level) | |
|---|---|---|
| | Impulsive | Non-impulsive |
| Low-Frequency (LF) Cetaceans | *Cell 1:* $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB | *Cell 2:* $L_{E,LF,24h}$: 199 dB. |
| Mid-Frequency (MF) Cetaceans | *Cell 3:* $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB | *Cell 4:* $L_{E,MF,24h}$: 198 dB. |
| High-Frequency (HF) Cetaceans | *Cell 5:* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB | *Cell 6:* $L_{E,HF,24h}$: 173 dB. |
| Phocid Pinnipeds (PW) (Underwater) | *Cell 7:* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB | *Cell 8:* $L_{E,PW,24h}$: 201 dB. |
| Otariid Pinnipeds (OW) (Underwater) | *Cell 9:* $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB | *Cell 10:* $L_{E,OW,24h}$: 219 dB. |

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

**Note:** Peak sound pressure ($L_{pk}$) has a reference value of 1 µPa, and cumulative sound exposure level ($L_E$) has a reference value of 1µPa$^2$s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript "flat" is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

*Ensonified Area*

Here, we describe operational and environmental parameters of the activity that are used in estimating the area ensonified above the acoustic thresholds, including source levels and transmission loss coefficient.

The sound field in the project area is the existing background noise plus additional construction noise from the proposed project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.,* pile driving and removal and DTH). The maximum (underwater) area ensonified above the thresholds for behavioral harassment referenced above is 1286 km$^2$ (496 mi$^2$), and the calculated distance to the farthest behavioral harassment isopleth is approximately 39,811 m (24,737.4 mi).

The project includes vibratory pile installation and removal, impact pile driving, and DTH. Source levels for these activities are based on reviews of measurements of the same or similar types and dimensions of piles available in the literature. Source levels for each pile size and activity are presented in table 5. Source levels for vibratory installation and removal of piles of the same diameter are assumed to be the same.

NMFS recommends treating DTH systems as both impulsive and continuous, non-impulsive sound source types simultaneously. Thus, impulsive thresholds are used to evaluate Level A harassment, and continuous thresholds are used to evaluate Level B harassment. With regards to DTH mono-hammers, NMFS recommends proxy levels for Level A harassment based on available data regarding DTH systems of similar sized piles and holes (Denes *et al.,* 2019; Reyff and Heyvaert, 2019; Reyff, 2020; Heyvaert and Reyff, 2021) (table 1 includes number of piles and duration; table 5 includes sound pressure and sound exposure levels for each pile type).

TABLE 5—ESTIMATES OF MEAN UNDERWATER SOUND LEVELS GENERATED DURING VIBRATORY AND IMPACT PILE INSTALLATION, DTH, AND VIBRATORY PILE REMOVAL

| Continuous sound sources | SSL at 10 m dB rms | Literature source |
|---|---|---|
| **Vibratory Hammer** | | |
| 42-inch steel piles | 168.2 | Port of Anchorage Test Pile Program (Table 16 in Austin *et al.,* 2016). |
| 30-inch steel piles | 166 | * NMFS Analysis (C. Hotchkin, April 24, 2023). |
| **DTH** | | |
| 42-inch steel piles | 174 | Reyff & Heyvaert, 2019; Reyff, 2020. |
| 30-inch steel piles | 174 | Reyff & Heyvaert, 2019; Reyff, 2020. |

| Impulsive sound sources | dB rms | dB SEL | dB peak | Literature source |
|---|---|---|---|---|
| **Impact Hammer** | | | | |
| 42-inch steel piles | 192 | 179 | 213 | Caltrans, 2020. |
| 30-inch steel piles | 191 | 177 | 212 | Caltrans, 2020. |
| **DTH** | | | | |
| 42-inch steel piles | N/A | 164 | 194 | Reyff & Heyvaert, 2019; Reyff, 2020; Denes *et al.,* 2019. |

| Impulsive sound sources | dB rms | dB SEL | dB peak | Literature source |
|---|---|---|---|---|
| 30-inch steel piles ..... | N/A | 164 | 194 | Reyff & Heyvaert, 2019; Reyff, 2020; Denes *et al.,* 2019. |

**Note:** dB peak = peak sound level; DTH = down-the-hole drilling; rms = root mean square; SEL = sound exposure level.
* NMFS generated this source level by completing a completed a comprehensive review of source levels relevant to Southeast Alaska; NMFS compiled all available data from Puget Sound and Southeast Alaska and adjusted the data to standardize distance from the measured pile to 10 m. NMFS then calculated average source levels for each project and for each pile type. NMFS weighted impact pile driving project averages by the number of strikes per pile following the methodology in Navy (2015).

Transmission loss (*TL*) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. *TL* parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater *TL* is:

$TL = B * \mathrm{Log10}\ (R1/R2)$,

where

*TL* = transmission loss in dB
*B* = transmission loss coefficient
*R*1 = the distance of the modeled SPL from the driven pile, and
*R*2 = the distance from the driven pile of the initial measurement

Absent site-specific acoustical monitoring with differing measured transmission loss, a practical spreading value of 15 is used as the transmission loss coefficient in the above formula. Site-specific transmission loss data for the Shemya Island are not available; therefore, the default coefficient of 15 is used to determine the distances to the Level A harassment and Level B harassment thresholds.

The ensonified area associated with Level A harassment is more technically challenging to predict due to the need to account for a duration component. Therefore, NMFS developed an optional User Spreadsheet tool to accompany the Technical Guidance that can be used to relatively simply predict an isopleth distance for use in conjunction with marine mammal density or occurrence to help predict potential takes. We note that because of some of the assumptions included in the methods underlying this optional tool, we anticipate that the resulting isopleth estimates are typically going to be overestimates of some degree, which may result in an overestimate of potential take by Level A harassment. However, this optional tool offers the best way to estimate isopleth distances when more sophisticated modeling methods are not available or practical. For stationary sources such as pile driving, the optional User Spreadsheet tool predicts the distance at which, if a marine mammal remained at that distance for the duration of the activity, it would be expected to incur PTS. Inputs used in the optional User Spreadsheet tool, and the resulting estimated isopleths, are reported below.

TABLE 6—USER SPREADSHEET INPUTS

| | Vibratory | | Impact | | DTH | |
|---|---|---|---|---|---|---|
| | 30-inch steel piles | 42-inch steel piles | 30-inch steel piles | 42-inch steel piles | 30-inch steel piles | 42-inch steel piles |
| | Installation or removal | Installation | Installation | Installation | Installation | Installation |
| Spreadsheet Tab Used | A.1) Vibratory Pile Driving | A.1) Vibratory Pile Driving | E.1) Impact Pile Driving | E.1) Impact Pile Driving | E.2) DTH Pile Driving | E.2) DTH Pile Driving |
| Source Level (SPL) | 166 RMS | 168.2 RMS | 177 SEL | 179 SEL | 174 RMS, 164 SEL | 174 RMS, 164 SEL |
| Transmission Loss Coefficient | 15 | 15 | 15 | 15 | 15 | 15 |
| Weighting Factor Adjustment (kHz) | 2.5 | 2.5 | 2 | 2 | 2 | 2 |
| Activity Duration per day (minutes) | 60 | 120 | 120 | 180 | 150 | 180 |
| Strike Rate per second | ..... | ..... | ..... | ..... | 10 | 10 |
| Number of strikes per pile | ..... | ..... | 900 | 1,800 | ..... | ..... |
| Number of piles per day | 4 | 4 | 4 | 4 | 3 | 3 |
| Distance of sound pressure level measurement | 10 | 10 | 10 | 10 | 10 | 10 |

TABLE 7—LEVEL A HARASSMENT AND LEVEL B HARASSMENT ISOPLETHS FROM VIBRATORY AND IMPACT PILE DRIVING AND DTH

| Pile type | Level A harassment isopleths (m) | | | | | Level B harassment isopleth (m) |
|---|---|---|---|---|---|---|
| | LF | MF | HF | PW | OW | |
| **Vibratory** | | | | | | |
| 42-inch steel pipe piles | 32.7 | 2.9 | 48.4 | 19.9 | 1.4 | 16,343 |
| 30-inch Steel pipe piles | 14.7 | 1.3 | 21.8 | 8.9 | 0.6 | 11,659 |
| **DTH** | | | | | | |
| 42-inch Steel pipe piles | 2,549.4 | 90.7 | 3,036.7 | 1,364.3 | 99.3 | 39,811 |
| 30-inch Steel pipe piles | 2,257.6 | 80.3 | 2,689.2 | 1,208.2 | 88.0 | 39,811 |
| **Impact** | | | | | | |
| 42-inch steel pipe piles | 2,015.1 | 71.7 | 2,400.3 | 1,078.4 | 78.5 | 1,359 |
| 30-inch Steel pipe piles | 933.8 | 33.2 | 1,112.3 | 499.7 | 36.4 | 1,166 |

*Marine Mammal Occurrence and Take Estimation*

In this section we provide information about the occurrence of marine mammals, including density or other relevant information which will inform the take calculations. We describe how the information provided is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur and proposed for authorization.

As described above, for some species (humpback whale, killer whale, Steller sea lion and harbor seal) observations within the project area from the prior monitoring were available to directly inform the take estimates, while for other species (fin whale, minke whale, sperm whale, Baird's beaked whale, Stejneger's beaked whale, Dall's porpoise, harbor porpoise and northern fur seal) they were not. Prior surveys include Protected Species Observer (PSO) monitoring completed at the project site on 60 days between June and August 2021 during the emergency fuel pier repair, island-wide faunal surveys completed by the USACE Engineer Research Development Center (ERDC) across 33 days between 2016 and 2019 (primarily in the spring and fall), and island-wide marine mammal surveys completed by the USACE Civil Works Environmental Resource Section on 26 days between May and October 2021. From all three surveys, data that were collected within the project area are primarily the basis for the take estimates because those data best represents what might be encountered there. Average group sizes used to inform Level B take estimates (which also underlie the estimates for Level A harassment) for all species with prior observations in the project area are primarily based on those data. Alternate methods utilizing average group sizes informed primarily by Alaska's Wildlife Notebook Series are used for species without prior observations.

Also of note, while the results are not significantly different, in some cases we recommended modified methods for estimating take from those presented by the applicant and have described them below. A summary of proposed take, including as a percentage of population for each of the species, is shown in table 8.

*Fin Whale*

No fin whale were reported during monitoring conducted for the EAS fuel pier emergency repair completed in 2021, nor during other surveys completed from Shemya Island (see application). Accordingly, average group size, estimated group size based on information shared in the Alaska Wildlife Notebook Series (Clark 2008a), is used as the basis for the take estimates.

USAF requested 17 takes of fin whales by Level B harassment, using a calculation based on of 0.002 groups of eight fin whales per hour of construction activity. NMFS concurs with USAF's predicted group size of fin whale (8 individuals), but since there are no observations of this species from Shemya Island, NMFS finds it more appropriate to estimate take by Level B harassment using a less granular occurrence estimate (monthly) rather than USAF's hourly occurrence estimate. Specifically, 1 group of 8 fin whales is predicted every 2 construction months, based on the applicant's prediction that this species would be rare in the project area. The duration of the construction is 160 days (2.65 × the basic 60 day period) and 8 * 2.65 = 21 takes by Level B harassment).

Although the shutdown zone is larger than the Level A harassment zone for low frequency cetaceans, USAF indicates that at ≥2,000 m, it becomes more challenging to reliably detect low frequency cetaceans in some environmental conditions, and therefore it is possible that a fin whale could enter the Level A harassment zone during DTH activities and stay long enough to incur PTS before USAF detects the animal and shuts down. As such, USAF requested and NMFS proposed to authorize a small amount of take by Level A harassment of fin whales. NMFS calculated takes by Level A harassment by first determining the proportion of the area of largest Level A harassment zone (42-inch DTH, 2,549 m) that occurs beyond the readily observable 2,000 m from the pile driving location (*i.e.,* 7.5 $km^2 - 5$ $km^2/7.5$ $km^2$ = 0.33). This ratio was multiplied by the estimated fin whale exposures, which is generally one group of eight fin whale that would occur every 2 construction months (or 60 days, adjusted by 1.2 to account for the 70 days that DTH activities are planned). Multiplying these factors (8 * 1.2 * 0.33) results in = 3 takes by Level A harassment).

Any individuals exposed to the higher levels associated with the potential for PTS closer to the source might also be behaviorally disturbed, however, for the purposes of quantifying take we do not count those exposures of one individual as both a Level A harassment take and a Level B harassment take, and therefore takes by Level B harassment calculated as described above are further modified to deduct the proposed amount of take by Level A harassment (*i.e.,* 21 − 3 = 18).

Therefore, NMFS proposes to authorize 3 takes by Level A harassment and 18 takes by Level B harassment for fin whales, for a total of 21 takes.

*Humpback Whale*

Across 119 days of marine mammal surveys completed from Shemya Island between 2016 and 2021, seven humpback whales were observed in the project area. The average group size for humpback whales detected in the project area was 2 humpback whales per group detected.

For estimating take by Level B harassment where monitoring data confirmed the presence of the marine mammal species, NMFS concurred with USAF's proposed approach. USAF requested take by Level B harassment by predicting that 0.07 groups of humpback whales would be sighted every hour, which was based on the applicant predicting this species would commonly occur within the project area. This was then multiplied by the average group size for humpback whales (2 individuals), to achieve an hourly humpback rate. Finally, these numbers are multiplied by the hours of construction activity. (0.07 * 2 * 1,101 = 154 takes by Level B harassment).

Although the shutdown zone is larger than the Level A harassment zone for low frequency cetaceans, USAF indicates that at ≥2,000 m, it becomes more challenging to reliably detect low frequency cetaceans in some environmental conditions, and therefore it is possible that humpback whales could enter the Level A harassment zone during DTH activities and stay long enough to incur PTS before USAF detects the animal and shuts down. As such, USAF requested and NMFS proposed to authorize a small amount of take by Level A harassment of humpback whales. NMFS calculated takes by Level A harassment by determining the proportion of the area of largest Level A harassment zone (42-inch DTH, 2,549 m) that occurs beyond 2,000 m from the pile driving location (*i.e.,* 7.5 $km^2 - 5$ $km^2/7.5$ $km^2$ = 0.33) and multiplying this ratio by the estimated humpback whale exposures (0.07 groups of 2 humpback whale) that would occur every construction hour that DTH activities are planned (624 hours) (0.07 * 2 * 624 * 0.33 = 29 takes by Level A harassment).

For the reasons described above, takes by Level B harassment were modified to deduct the proposed amount of take by Level A harassment (*i.e.,* 154 − 29 = 125).

Therefore, NMFS proposes to authorize 29 takes by Level A harassment and 125 takes by Level B

harassment for humpback whales, for a total of 154 takes.

*Minke Whale*

No minke whales were reported during monitoring conducted for the EAS fuel pier emergency repair completed in 2021, nor during other surveys completed from Shemya Island (*e.g.,* see application). Accordingly, average group size, estimated based on group size information shared in the Alaska Wildlife Notebook Series (Clark 2008a), is used as the basis for the take estimates (Guerrero 2008b).

USAF requested 7 takes of minke whales by Level B harassment, using a calculation of of 0.002 groups of three minke whales per hour of construction activity. NMFS concurs with USAF's predicted group size of minke whale (three individuals), but since there are no observations of this species from Shemya Island, NMFS finds it more appropriate to estimate take by Level B harassment using a less granular occurrence estimate (monthly) rather than USAF's hourly occurrence estimate. Specifically, one group of three minke whales is predicted every 2 construction months, based on the applicant's prediction that this species would be rare in the project area. The duration of construction is 160 days (2.65 * the basic 60 day period, which corresponds to two months) and 3 * 2.65 = 8 takes by Level B harassment.

Although the shutdown zone is larger than the Level A harassment zone for low frequency cetaceans, USAF indicates that at ≥2,000 m, it becomes more challenging to reliably detect low frequency cetaceans in some environmental conditions, and therefore it is possible that a minke whale could enter the Level A harassment zone during DTH activities and stay long enough to incur PTS before USAF detects the animal and shuts down. As such, USAF requested and NMFS proposed to authorize a small amount of take by Level A harassment of minke whales. NMFS calculated takes by Level A harassment by determining the proportion of the area of largest Level A harassment zone (42-inch DTH, 2,549 m) that occurs beyond the readily observable 2,000 m from the pile driving location (*i.e.,* 7.5 $km^2 - 5$ $km^2/7.5$ $km^2$ = 0.33). This ratio was multiplied by the estimated minke whale exposures, which is generally one group of three minke whales every 2 construction months (or 60 days), adjusted by 1.2 to account for the 70 days that DTH activities are planned. Multiplying these factors 1.2 * 0.33 results in 1 take by Level A harassment. Since the predicted average group size of minke whale is three, NMFS proposes to authorize three takes by Level A harassment of minke whale.

For reasons described above, takes by Level B harassment were modified to deduct the proposed amount of take by Level A harassment (*i.e.,* 8 − 3 = 5).

Therefore, NMFS proposes to authorize three takes by Level A harassment and five takes by Level B harassment for minke whales, for a total of eight takes.

*Sperm Whale*

Across 119 monitoring days between 2016 and 2021, four sperm whales were observed on a single day from Shemya Island, though outside of the project area (see application).

USAF requested 27 takes of sperm whale by Level B harassment, using a calculation based on of 0.006 groups of four sperm whales per hour of construction activity. NMFS concurs with USAF's predicted group size of sperm whale (4 individuals, which corresponds to the number of sperm whales detected on a single day during Shemya Island marine mammal surveys), but since there are few observations of this species from Shemya Island, NMFS finds it more appropriate to estimate take by Level B harassment using a less granular occurrence estimate (monthly) rather than USAF's hourly occurrence estimate. Specifically, two groups of four sperm whales is predicted every 1 construction month based on sperm whales being one of the most frequently sighted marine mammals in the high latitude regions of the North Pacific, including the Bering Sea and the Aleutian Islands. The duration of the construction is 5 months and 2 * 4 * 5 = 40 takes by Level B harassment.

Due to the small Level A harassment zones (table 9), which do not reach deep water where sperm whales are expected to be encountered, coupled with the implementation of shutdown zones, which will be larger than Level A harassment zones for mid-frequency cetaceans (described in the Proposed Mitigation section), NMFS concurs with USAF's assessment that take by Level A harassment is not anticipated for sperm whale. Therefore, NMFS proposed to authorize all 40 estimated exposures as takes by Level B harassment. Takes by Level A harassment for sperm whales are not requested nor are they proposed for authorization.

*Baird's Beaked Whale*

Baird's beaked whales are usually found in tight social groups (schools or pods) averaging between 5 and 20 individuals, but they have occasionally been observed in larger groups of up to 50 animals. Across 119 days of marine mammal surveys completed from Shemya Island between 2016 and 2021, no observations of Baird's beaked whale were recorded (see application). Accordingly, average group size, estimated based on group size information shared in the Alaska Wildlife Notebook Series (Guerrero 2008a), is used as the basis for take estimates.

USAF requested 11 takes by Level B harassment, using a calculation based on 0.001 groups of ten Baird's beaked whales per hour of construction activity. NMFS concurs with USAF's predicted group size of Baird's beaked whale (10 individuals), but since there are no observations of this species from Shemya Island, NMFS finds it more appropriate to estimate take by Level B harassment using a less granular occurrence estimate (monthly) rather than USAF's hourly occurrence estimate. Specifically, 1 group of 10 Baird's beaked whales is predicted across the project, which is based on this species being shy and preferring deep waters and as such the applicant predicted they would be very rare in the project area. Therefore, NMFS proposes to authorize 10 takes of Baird's beaked whale by Level B harassment.

Due to the small Level A harassment zones (table 9), which do not reach deep water where Baird's beaked whales are expected to be encountered, coupled with the implementation of shutdown zones, which will be larger than Level A harassment zones for mid-frequency cetaceans (described in the Proposed Mitigation section), NMFS concurs with USAF's assessment that take by Level A harassment is not anticipated for Baird's beaked whale. Therefore, NMFS proposed to authorize all 10 estimated exposures as takes by Level B harassment. Takes by Level A harassment for Baird's beaked whales are not requested nor are they proposed for authorization.

*Stejneger's Beaked Whale*

Across 119 days of marine mammal surveys completed from Shemya Island between 2016 and 2021, no observations of Stejneger's beaked whale were recorded (see application). Accordingly, average group size, estimated based on group size information shared in the Alaska Wildlife Notebook Series (Guerrero 2008a), is used as the basis for take estimates.

USAF requested 9 takes of Stejneger's beaked whale by Level B harassment, using a calculation based on of 0.001 groups of eight Stejneger's beaked whales per hour of construction activity.

NMFS concurs with USAF's predicted group size of Stejneger's beaked whale (eight individuals), but since there are no observations of this species from Shemya Island, NMFS finds it more appropriate to estimate take by Level B harassment using a less granular occurrence estimate (monthly) rather than USAF's hourly occurrence estimate. Specifically, one group of eight Stejneger's beaked whales is predicted across the entirety of the project, based on this species being shy and preferring deep waters and as such the applicant predicted they would only be very rarely encountered in the project area. Therefore NMFS proposes to authorize 8 Stejneger's beaked whale by level B harassment.

Due to the small Level A harassment zones (table 9), which do not reach deep water where Stejneger's beaked whales are expected to be encountered, coupled with the implementation of shutdown zones, which will be larger than Level A harassment zones for mid-frequency cetaceans (described in the Proposed Mitigation section), NMFS concurs with USAF's assessment that take by Level A harassment is not anticipated for Stejneger's beaked whale. Therefore, NMFS proposed to authorize all eight estimated exposures as takes by Level B harassment. Takes by Level A harassment for Stejneger's beaked whales are not requested nor are they proposed for authorization.

*Killer Whale*

Across 119 days of marine mammal surveys completed from Shemya Island between 2016 and 2021, 69 killer whales were observed in the project area. The average group size for killer whales detected in the project area was 8 killer whales per group detected.

For estimating take by Level B harassment where monitoring data confirmed the presence of the marine mammal species, NMFS concurred with USAF's proposed approach. USAF requested take by Level B harassment by predicting that 0.02 groups of killer whales would be sighted every hour, which was based on the applicant's prediction that this species would commonly be encountered in the project area. This was then multiplied by the average group size for humpback whales (8 individuals), to achieve an hourly killer whale rate. Finally, these numbers are multiplied by the hours of construction activity. (0.02 * 8 * 1,101 = 176 takes by Level B harassment).

Due to the small Level A harassment zones (table 9), coupled with the implementation of shutdown zones, which will be larger than Level A harassment zones for mid-frequency cetaceans (described in the Proposed Mitigation section), NMFS concurs with USAF's assessment that take by Level A harassment is not anticipated for killer whale. Therefore, NMFS proposed to authorize all 176 estimated exposures as takes by Level B harassment. Takes by Level A harassment for killer whale are not requested nor are they proposed for authorization.

*Dall's Porpoise*

No Dall's porpoise were reported during monitoring conducted for the EAS fuel pier emergency repair completed in 2021, nor during other surveys completed from Shemya Island (see application). Dall's porpoise generally travel in groups of 10 to 20 individuals but can occur in groups with over hundreds of individuals (Wells, 2008). Accordingly, average group size, estimated based group size information shared in the Alaska Wildlife Notebook Series (Wells 2008), is used as the basis for the take estimates, is used as the basis for take estimates.

USAF requested 33 takes of Dall's porpoise by Level B harassment, using a calculation based on of 0.002 groups of 15 Dall's porpoise per hour of construction activity. NMFS concurs with USAF's predicted group size of Dall's porpoise (15 individuals), but since there are no observations of this species from Shemya Island, NMFS finds it more appropriate to estimate take by Level B harassment using a less granular occurrence estimate (monthly) rather than USAF's hourly occurrence estimate. Specifically, 1 group of 15 Dall's porpoise is predicted every 2 construction months, based on the applicant's prediction that this species would be rarely encountered in the project area. The duration of the construction is 160 days (2.65 * the basic 60 day period that corresponds to two construction months) and 15 * 2.65 = 40 takes by Level B harassment.

For most activities, NMFS calculated takes by Level A harassment by determining the ratio of the largest Level A harassment area for 42-inch DTH activities (*i.e.,* 10.2 $km^2$ for a Level A harassment distance of 3,037 m) minus the area of the proposed shutdown zone for Dall's porpoise (*i.e.,* 0.5 $km^2$ for a shutdown zone distance of 500 m) to the area of the Level B harassment isopleth (1,285.9 $km^2$) for a Level B harassment distance of 39,811 m (*i.e.,* (10.2 $km^2 - 0.5$ $km^2$)/1,285.9 $km^2$ = 0.008). We then multiplied this ratio by the number of estimated Dall's porpoise exposures calculated as described above for Level B harassment to determine take by Level A harassment (*i.e.,* 0.008 * 40 exposures = 0.32 takes by Level A harassment).

For Level A harassment during impact pile driving of 42-inch piles, for which the Level A harassment zone is larger than the Level B harassment zone, NMFS estimates take based on 1 group of 15 Dall's porpoise every 2 months, or 60 days, in consideration of the 52 days (0.87 of 60) of impact driving of 42-in piles (15 Dall's porpoise * 0.87 months = 13.05) for a total of 13.37 takes by Level A harassment (0.32 + 13.05 = 13).

For reasons described above, takes by Level B harassment were modified to deduct the proposed amount of take by Level A harassment (*i.e.,* 40 − 13 = 27).

Therefore, NMFS proposes to authorize 13 takes by Level A harassment and 27 takes by Level B harassment for Dall's porpoise, for a total of 40 takes.

*Harbor Porpoise*

Across 119 monitoring days between 2016 and 2021, one group of two to three harbor porpoise were observed from Shemya Island (see application), though outside of the project area. Average group size, estimated based on the Alaska Wildlife Notebook Series (Schmale 2008), is used as the basis for take estimates.

USAF requested 11 takes of harbor porpoise by Level B harassment, using a calculation based on of 0.01 groups of one harbor porpoise per hour of construction activity. NMFS concurs with USAF's predicted group size of harbor porpoise (1 individual), but since there are few observations of this species from Shemya Island, NMFS finds it more appropriate to estimate take by Level B harassment using a less granular occurrence estimate (monthly) rather than USAF's hourly occurrence estimate. Specifically, 3 groups of 1 harbor porpoise is predicted every 1 construction month. The duration of construction is 5 months and 3 * 5 = 15 takes by Level B harassment.

For most activities, NMFS calculated takes by Level A harassment by determining the ratio of the largest Level A harassment area for 42-inch DTH activities (*i.e.,* 10.2 $km^2$ for a Level A harassment distance of 3,037 m) minus the area of the proposed shutdown zone for harbor porpoise (*i.e.,* 0.5 $km^2$ for a shutdown zone distance of 500 m) to the area of the Level B harassment isopleth (1,285.9 $km^2$) for a Level B harassment distance of 39,811 m (*i.e.,* (10.2 $km^2 - 0.5$ $km^2$)/1,285.9 $km^2$ = 0.008). We then multiplied this ratio by the number of estimated harbor porpoise exposures calculated as described above for Level B harassment to determine take by Level

A harassment (*i.e.,* 0.008 * 15 exposures = 0.12 takes by Level A harassment).

For Level A harassment during impact pile driving of 42-inch piles, for which the Level A harassment zone is larger than the Level B harassment zone, NMFS estimates take based on 3 groups of 1 harbor porpoise could be taken by Level A harassment every 1 month, or 30 days in consideration of the 52 days (1.7 * 30) of impact pile driving of 42-inch piles (3 groups of1 harbor porpoise * 1.7 = 5.1) for a total of five takes by Level A harassment (0.12 + 5.1 = 5).

For reasons described above, takes by Level B harassment were modified to deduct the proposed amount of take by Level A harassment (*i.e.,* 15 − 5 = 10).

Therefore, NMFS proposes to authorize 5 takes by Level A harassment and 10 takes by Level B harassment for harbor porpoise, for a total of 15 takes.

*Northern Fur Seal*

USAF requested 33 takes of northern fur seal by Level B harassment using a calculation based on 0.003 groups of eight northern fur seals per hour of construction activity. NMFS disagrees with USAF's predicted group size of northern fur seal, as these animals are typically solitary when at sea. Additionally, because there are no records of northern fur seal in the area, NMFS finds it more appropriate to estimate take by Level B harassment according to a less granular occurrence estimate (monthly) rather than USAF's hourly occurrence estimate. Specifically, one group of one northern fur seal every 1 construction month is predicted and 1 * 5 = 5 takes by Level B harassment.

Due to the small Level A harassment zones (table 9), coupled with the implementation of shutdown zones, which will be larger than Level A harassment zones for otariids (described in the Proposed Mitigation section), NMFS concurs with USAF's assessment that take by Level A harassment is not anticipated for northern fur seal. Therefore, NMFS proposed to authorize all five estimated exposures as takes by Level B harassment. Takes by Level A harassment for northern fur seals are not requested nor are they proposed for authorization.

*Steller Sea Lion*

Steller sea lions are frequently observed around Shemya Island outside of the ensonified area, but only occasionally observed in Alcan Harbor and Shemya Pass (see application). Across 119 monitoring days between 2016 and 2021, 16 Steller sea lions were observed within the project area. The average group size for Steller sea lion detected in the project area as well as around Shemya Island was 1 Steller sea lion per detection.

For estimating take by Level B harassment where monitoring data confirmed the presence of the marine mammal species, NMFS concurred with USAF's proposed approach. USAF requested take by Level B harassment by predicting that 0.09 groups of Steller sea lion would be sighted every hour, which was based on the applicant's prediction that this species would be more commonly encountered in the project area. This was then multiplied by the average group size for Steller sea lion (1 individual), to achieve an hourly steller sea lion rate. Finally, these numbers are multiplied by the hours of construction activity. (0.09 * 1 * 1,101 = 99 takes by Level B harassment).

Due to the small Level A harassment zones (table 9), coupled with the implementation of shutdown zones, which will be larger than Level A harassment zones for otariids (described in the Proposed Mitigation section), NMFS concurs with USAF's assessment that take by Level A harassment is not anticipated for Steller sea lion. Therefore, NMFS proposed to authorize all 99 estimated exposures as takes by Level B harassment. Takes by Level A harassment for Steller sea lion are not requested nor are they proposed for authorization.

*Harbor Seal*

Across 119 monitoring days between 2016 and 2021, 54 harbor seals were observed within the project area. The average group size for harbor seals detected in the project area was 1 harbor seals per group.

For estimating take by Level B harassment where monitoring data confirmed the presence of the marine mammal species, NMFS concurred with USAF's proposed approach. USAF requested take by Level B harassment by predicting that 0.14 groups of harbor seals would be sighted every hour, which was based on the fact that this species is expected to more commonly occur within the project area. This was then multiplied by the average group size for harbor seal (1 individual), to achieve an hourly harbor seal rate. Finally, these numbers are multiplied by the hours of construction activity. (0.14 * 1 * 1,101 = 154 takes by Level B harassment).

NMFS initially calculated takes by Level A harassment by determining the ratio of the largest Level A harassment area for 42-inch DTH activities (*i.e.,* 2.6 $km^2$ for a Level A harassment distance of 1364 m) minus the area of the proposed shutdown zone for harbor seal (*i.e.,* 0.37 $km^2$ for a shutdown zone distance of 400 m) to the area of the Level B harassment isopleth (1,285.9 $km^2$) for a Level B harassment distance of 39,811 m (*i.e.,* (2.6 $km^2$ − 0.37 $km^2$)/ 1,285.9 $km^2$ = 0.002). We then multiplied this ratio by the number of estimated harbor seal exposures calculated as described above for Level B harassment to determine take by Level A harassment (*i.e.,* 0.002 * 154 exposures = 0.3 takes by Level A harassment).

Because harbor seals typically inhabit areas closer to shore rather than distances represented by the largest level B zone (39,811 m), NMFS determined that the method above could underestimate potential take by Level A harassment. NMFS accordingly estimated additional takes by Level A harassment by determining the ratio of harbor seals that were observed beyond the proposed shutdown zone isopleth compared to the harbor seals that were observed closer to construction activities during the EAS fuel pier emergency repair that was completed in 2021 (*i.e.,* 11/38 = 0.29 harbor seals). We then multiplied this ratio by the total number of estimated harbor seal exposures to determine take by Level A harassment (*i.e.,* 0.29 * 154 exposures = 45) for a total of 45 takes by Level A harassment (0.3 + 45 = 45.3).

For reasons described above, takes by Level B harassment were modified to deduct the proposed amount of take by Level A harassment (*i.e.,* 154 − 45 = 109).

Therefore, NMFS proposes to authorize 45 takes by Level A harassment and 109 takes by Level B harassment for harbor seal, for a total of 154 takes.

TABLE 8—PROPOSED TAKE BY STOCK AND HARASSMENT TYPE AND AS A PERCENTAGE OF STOCK ABUNDANCE

| Species | Stock | Proposed authorized take | | Proposed take as a percentage of stock abundance |
|---|---|---|---|---|
| | | Level B harassment | Level A harassment | |
| Fin Whale | Northeast Pacific | 18 | 3 | >1 |
| Humpback Whale | Western North Pacific | 3 | 1 | >1 |
| | Mexico—North Pacific | 9 | 2 | 1.2 |
| | Hawai'i | 113 | 26 | 1.2 |
| Minke Whale | Alaska | 5 | 3 | >1 |
| Sperm Whale | North Pacific | 40 | 0 | 16.4 |
| Baird's beaked whale | Alaska | 10 | 0 | -* |
| Stejneger's beaked whale | Alaska | 8 | 0 | -* |
| Killer whale | ENP Alaska Resident Stock | 176 | 0 | 9.2 |
| | ENP Gulf of Alaska, Aleutian Islands, and Bering Seal. | | | 30 |
| Dall's Porpoise | Alaska | 26 | 13 | <1 |
| Harbor Porpoise | Bering Seal | 10 | 5 | <1 |
| Northern Fur Seal | Eastern Pacific | 5 | 0 | <1 |
| Steller Sea Lion | Western, U.S. | 99 | 0 | <1 |
| Harbor Seal | Aleutian Islands | 109 | 45 | 2.8 |

* Reliable abundance estimates for these stock are currently unavailable.

**Proposed Mitigation**

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, NMFS considers two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat, as well as subsistence uses. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, and impact on operations.

USAF must ensure that construction supervisors and crews, the monitoring team and relevant USAF staff are trained prior to the start of all pile driving and DTH activity, so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood. New personnel joining during the project must be trained prior to commencing work.

*Mitigation for Marine Mammals and Their Habitat*

*Shutdown Zones*—For all pile driving/removal and DTH activities, USAF would implement shutdowns within designated zones. The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Shutdown zones vary based on the activity type and marine mammal hearing group (table 9). In most cases, the shutdown zones are based on the estimated Level A harassment isopleth distances for each hearing group, as requested by USAF. However, in cases where it would be challenging to detect marine mammals at the Level A isopleth, (*e.g.,* for high frequency cetaceans and phocids during DTH activities and impact pile driving), smaller shutdown zones have been proposed (table 9). Additionally, USAF has agreed to implement a minimum shutdown zone of 25 m during all pile driving and removal activities and DTH.

Finally, construction supervisors and crews, PSOs, and relevant USAF staff must avoid direct physical interaction with marine mammals during construction activity. If a marine mammal comes within 10 m of such activity, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions, as necessary to avoid direct physical interaction. If an activity is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone indicated in table 9 or 15 minutes have passed for delphinids or pinnipeds or 30 minutes for all other species without re-detection of the animal.

Construction activities must be halted upon observation of a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met entering or within the harassment zone.

TABLE 9—PROPOSED SHUTDOWN ZONES

| Activity | Pile diameter | Shutdown zones (m) | | | | |
|---|---|---|---|---|---|---|
| | | LF | MF | HF | PW | OW |
| Vibratory Installation or Removal | 42-in | 50 | | | | |
| | 30-in | 25 | | | | |
| DTH | 42-in | 2,600 | 100 | 500 | 400 | 100 |
| | 30-in | 2,300 | 80 | | | 90 |
| Impact Pile | 42-in | 2,100 | | | | 80 |
| | 30-in | 1,000 | 50 | | | 50 |

*Protected Species Observers*—The number and placement of PSOs during all construction activities (described in the Proposed Monitoring and Reporting section) would ensure that the entire shutdown zone is visible. USAF would employ at least two PSOs for all pile driving and DTH activities.

*Monitoring for Level B Harassment*—PSOs would monitor the shutdown zones and beyond to the extent that PSOs can see. Monitoring beyond the shutdown zones enables observers to be aware of and communicate the presence of marine mammals in the project areas outside the shutdown zones and thus prepare for a potential cessation of activity should the animal enter the shutdown zone. If a marine mammal enters the Level B harassment zone, PSOs will document the marine mammal's presence and behavior.

*Pre and Post-Activity Monitoring*—Prior to the start of daily in-water construction activity, or whenever a break in pile driving of 30 minutes or longer occurs, PSOs will observe the shutdown, Level A harassment, and Level B harassment for a period of 30 minutes. Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead PSO to determine that the shutdown zones are clear of marine mammals. If the shutdown zone is obscured by fog or poor lighting conditions, in-water construction activity will not be initiated until the entire shutdown zone is visible. Pile driving may commence following 30 minutes of observation when the determination is made that the shutdown zones are clear of marine mammals. If a marine mammal is observed entering or within shutdown zones, pile driving activity must be delayed or halted. If pile driving is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone or 15 minutes have passed for delphinids or pinnipeds or 30 minutes have passed for all other species without re-detection of the animal. If a marine mammal for which Level B harassment take is authorized is present in the Level B harassment zone, activities would begin and Level B harassment take would be recorded.

*Soft Start*—The use of soft-start procedures are believed to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, contractors would be required to provide an initial set of three strikes from the hammer at reduced energy, with each strike followed by a 30-second waiting period. This procedure would be conducted a total of three times before impact pile driving begins. Soft start would be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer. Soft start is not required during vibratory pile driving and removal activities.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

## Proposed Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that 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 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 while conducting the activities. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the activity; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and,
- Mitigation and monitoring effectiveness.

*Visual Monitoring*—Marine mammal monitoring must be conducted in accordance with the Marine Mammal Monitoring and Mitigation Plan. Marine mammal monitoring during pile driving and removal and DTH activities must be conducted by NMFS-approved PSOs in a manner consistent with the following:

- PSOs must be independent of the activity contractor (for example, employed by a subcontractor), and have no other assigned tasks during monitoring periods;

- At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization;
- Other PSOs may substitute other relevant experience, education (degree in biological science or related field) or training for experience performing the duties of a PSO during construction activities pursuant to a NMFS-issued incidental take authorization.
- Where a team of three or more PSOs is required, a lead observer or monitoring coordinator will be designated. The lead observer will be required to have prior experience working as a marine mammal observer during construction activity pursuant to a NMFS-issued incidental take authorization; and,
- PSOs must be approved by NMFS prior to beginning any activity subject to this IHA.

PSOs must also have the following additional qualifications:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including, but not limited to, the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was note implemented when required); and marine mammal behavior; and
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

Visual monitoring will be conducted by a minimum of two trained PSOs positioned at suitable vantage points. One PSO will have an unobstructed view of all water within the shutdown zone and will be stationed at or near the pier. Remaining PSOs will be placed at one or more of the observer monitoring locations identified on Figure 3–3 of the marine mammal monitoring and mitigation plan, in order to observe as much as the Level A and Level B harassment zone as possible. All PSOs will have access to 20 by 60 spotting scope on a window mount or tripod.

Monitoring will be conducted 30 minutes before, during, and 30 minutes after all in water construction activities. In addition, PSOs will record all incidents of marine mammal occurrence, regardless of distance from activity, and will document any behavioral reactions in concert with distance from piles being driven or removed. Pile driving activities include the time to install or remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than 30 minutes.

**Reporting**

USAF will submit a draft marine mammal monitoring report to NMFS within 90 days after the completion of pile driving activities, or 60 days prior to a requested date of issuance of any future IHAs for the project, or other projects at the same location, whichever comes first. The marine mammal monitoring report will include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. Specifically, the report will include:

- Dates and times (begin and end) of all marine mammal monitoring;
- Construction activities occurring during each daily observation period, including: (1) The number and type of piles that were driven and the method (*e.g.,* impact, vibratory, DTH); (2) Total duration of driving time for each pile (vibratory driving) and number of strikes for each pile (impact driving); and (3) For DTH drilling, duration of operation for both impulsive and non-pulse components;
- PSO locations during marine mammal monitoring;
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;
- Upon observation of a marine mammal, the following information: (1) Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting; (2) Time of sighting; (3) Identification of the animal(s) (*e.g.,* genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species; (4) Distance and location of each observed marine mammal relative to the pile being driven for each sighting; (5) Estimated number of animals (min/max/best estimate); (6) Estimated number of animals by cohort (adults, juveniles, neonates, group composition, *etc.*); (7) Animal's closest point of approach and estimated time spent within the harassment zone; (8) Description of any marine mammal behavioral observations (*e.g.,* observed behaviors such as feeding or traveling), including an assessment of behavioral responses thought to have resulted from the activity (*e.g.,* no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);
- Number of marine mammals detected within the harassment zones, by species; and,
- Detailed information about implementation of any mitigation (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting changes in behavior of the animal(s), if any.

A final report must be prepared and submitted within 30 calendar days following receipt of any NMFS comments on the draft report. If no comments are received from NMFS within 30 calendar days of receipt of the draft report, the report shall be considered final. All PSO datasheets and/or raw sighting data would be submitted with the draft marine mammal report.

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Holder must report the incident to the Office of Protected Resources (OPR), NMFS (*PR.ITP.MonitoringReports@noaa.gov* and *itp.fleming@noaa.gov*) and to the Alaska regional stranding network (877–925–7773) as soon as feasible. If the death or injury was clearly caused by the specified activity, the Holder must immediately cease the activities until NMFS OPR is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of this IHA. The Holder must not resume their activities until notified by NMFS. The report must include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

**Negligible Impact Analysis and 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). 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 harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (*e.g.,* intensity, duration), the context of any impacts or responses (*e.g.,* critical reproductive time or location, foraging impacts affecting energetics), 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 are incorporated into this analysis via their impacts on the baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, the majority of our analysis applies to all the species listed in table 2, given that many of the anticipated effects of this project on different marine mammal stocks are expected to be relatively similar in nature. Where there are meaningful differences between species or stocks, or groups of species, in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, they are described independently in the analysis below.

Pile driving and DTH activities associated with the EAS fuel pier repair project, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment and, for some species Level A harassment, from underwater sounds generated by pile driving and DTH. Potential takes could occur if marine mammals are present in zones ensonified above the thresholds for Level B harassment or Level A harassment, identified above, while activities are underway.

No serious injury or mortality would be expected, even in the absence of required mitigation measures, given the nature of the activities. Further, no take by Level A harassment is anticipated for otariids and mid-frequency cetaceans, due to the application of proposed mitigation measures, such as shutdown zones that encompass Level A harassment zones for these species. The potential for harassment would be minimized through the implementation of planned mitigation measures (see Proposed Mitigation section).

Take by Level A harassment is proposed for six species (harbor porpoise, Dall's porpoise, harbor seal, fin whale, humpback whale, and minke whale) as the Level A harassment zone exceeds the size of the shutdown zones (high frequency cetaceans and phocids), or, in the case of low frequency cetaceans, the shutdown zone is so large that it is possible that a minke whale, fin whale, or humpback whale could enter the Level A harassment zone and remain within the zone for a duration long enough to incur PTS before being detected.

Any take by Level A harassment is expected to arise from, at most, a small degree of PTS (*i.e.,* minor degradation of hearing capabilities within regions of hearing that align most completely with the energy produced by impact pile driving such as the low-frequency region below 2 kHz), not severe hearing impairment or impairment within the ranges of greatest hearing sensitivity. Animals would need to be exposed to higher levels and/or longer duration than are expected to occur here in order to incur any more than a small degree of PTS.

Given the small degree anticipated, any PTS potential incurred would not be expected to affect the reproductive success or survival of any individuals, much less result in adverse impacts on the species or stock.

Additionally, some subset of the individuals that are behaviorally harassed could also simultaneously incur some small degree of TTS for a short duration of time. However, since the hearing sensitivity of individuals that incur TTS is expected to recover completely within minutes to hours, it is unlikely that the brief hearing impairment would affect the individual's long-term ability to forage and communicate with conspecifics, and would therefore not likely impact reproduction or survival of any individual marine mammal, let alone adversely affect rates of recruitment or survival of the species or stock.

As described above, NMFS expects that marine mammals would likely move away from an aversive stimulus, especially at levels that would be expected to result in PTS, given sufficient notice through use of soft start. USAF would also shut down pile driving activities if marine mammals enter the shutdown zones (table 9) further minimizing the likelihood and degree of PTS that would be incurred.

Effects on individuals that are taken by Level B harassment in the form of behavioral disruption, on the basis of reports in the literature as well as monitoring from other similar activities, would likely be limited to reactions such as avoidance, increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring) (*e.g.,* Thorson and Reyff, 2006). Most likely, individuals would simply move away from the sound source and temporarily avoid the area where pile driving is occurring. If sound produced by project activities is sufficiently disturbing, animals are likely to simply avoid the area while the activities are occurring. We expect that any avoidance of the project areas by marine mammals would be temporary in nature and that any marine mammals that avoid the project areas during construction would not be permanently displaced. Short-term avoidance of the project areas and energetic impacts of interrupted foraging or other important behaviors is unlikely to affect the reproduction or survival of individual marine mammals, and the effects of behavioral disturbance on individuals is not likely to accrue in a manner that would affect the rates of recruitment or survival of any affected stock.

The project area does overlap a BIA identified as important for feeding by sperm whale (Brower *et al.,* 2022). The BIA that overlaps the project area is active April through September, which overlaps USAF's proposed work period (April to October). White the BIA is considered to be of higher importance, the area of the BIA is very large, spanning the island chain, and the project area is very small in comparison. Further sperm whales utilize deeper waters to feed, and while the Level B harassment zone does extend into deeper waters, the sound levels at the distances that overlay deeper water where sperm whales might be foraging would be of comparatively lower levels. Given the extensive options for high quality foraging area near and outside of the project area, any impacts to feeding sperm whales would not be expected to

impact the survival or reproductive success of any individuals.

The ensonfied area also overlaps ESA-designated critical habitat for western DPS Steller sea lion. Specifically, the Level B ensonified area overlaps with the aquatic zones of three designated major haulouts to the east and northwest of the project site: Shemya Island Major Haulout, Alaid Island Major Haulout, Attu/Chirikof Point Major Haulout. The ensonified area Level B harassment zone related to implementation of the proposed project, described in the Estimated Take of Marine Mammals section, overlaps with the designated aquatic zone of all three designated major haulouts. No terrestrial or in-air critical habitat of any major haulout overlaps with the project area. No Steller sea lions have been observed on Shemya Island Major Haulout during the most recent surveys (between 2015 and 2017) and only one Steller sea lion was observed at Attu/Chirikof Point Major Haulout. An average of 68 non-pups and 7 pups were observed annually during this time at Alaid Island Major Haulout, which is 5 nmi northwest of the project site. The construction site itself does not overlap with critical habitat.

The project is also not expected to have significant adverse effects on affected marine mammals' habitats. The project activities would not modify existing marine mammal habitat for a significant amount of time. The activities may cause some fish to leave the area of disturbance, thus temporarily impacting marine mammals' foraging opportunities in a limited portion of the foraging range. We do not expect pile driving activities to have significant consequences to marine invertebrate populations. Given the short duration of the activities and the relatively small area of the habitat that may be affected, the impacts to marine mammal habitat, including fish and invertebrates, are not expected to cause significant or long-term negative consequences.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect any of the species or stocks through effects on annual rates of recruitment or survival:

- No serious injury or mortality is anticipated or authorized;
- No Level A harassment of six species is proposed;
- Level A harassment takes of six species proposed for authorization are expected to be of a small degree;
- While impacts would occur within areas that are important for feeding for sperm whale, because of the small footprint of the activity relative to the area of these important use areas, we do not expect impacts to the reproduction and survival of any individuals;
- Effects on species that serve as prey for marine mammals from the activities are expected to be short-term and, therefore, any associated impacts on marine mammal feeding are not expected to result in significant or long-term consequences for individuals, or to accrue to adverse impacts on their populations;
- The lack of anticipated significant or long-term negative effects to marine mammal habitat; and
- The efficacy of the mitigation measures in reducing the effects of the specified activities on all species and stocks.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

**Small Numbers**

As noted previously, only take of small numbers of marine mammals may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The instances of take NMFS proposes to authorize are below one-third of the estimated stock abundance for all stocks (table 8). The number of animals that we expect to authorize to be taken from these stocks would be considered small relative to the relevant stocks' abundances even if each estimated taking occurred to a new individual, which is an unlikely scenario.

The best available abundance estimate for fin whale is not considered representative of the entire stock as surveys were limited to a small portion of the stock's range, but there are known to be over 2,500 fin whales in the northeast Pacific stock (Muto *et al.,* 2021). As such, the 18 takes by Level B harassment and 3 takes by Level A harassment proposed for authorization, compared to the abundance estimate, shows that less than 1 percent of the stock would be expected to be impacted.

The most recent abundance estimate for the Mexico-North Pacific stock of humpback whale is likely unreliable as it is more than 8 years old. The most relevant estimate of this stock's abundance in the Bering Sea and Aleutian Islands is 918 humpback whales (Wade, 2021), so the 9 proposed takes by Level B harassment and 2 proposed takes by Level A harassment, is small relative to the estimated abundance (1.2 percent), even if each proposed take occurred to a new individual.

A lack of an accepted stock abundance value for the Alaska stock of minke whale did not allow for the calculation of an expected percentage of the population that would be affected. The most relevant estimate of partial stock abundance is 1,233 minke whales in coastal waters of the Alaska Peninsula and Aleutian Islands (Zerbini *et al.,* 2006), so the 5 proposed takes by Level B harassment, and 3 proposed takes by Level A harassment, compared to the abundance estimate, shows that less than 1 percent of the stock would be expected to be impacted.

The most recent abundance estimate for sperm whale in the North Pacific is likely unreliable as it is more than 8 years old and was derived from data collected in a small area that may not have included females and juveniles, and did not account for animals missed on the trackline. The minimum population estimate for this stock is 244 sperm whales, so the 40 proposed takes by Level B harassment is small relative to the estimated survey abundance, even if each proposed take occurred to a new individual.

There is no abundance information available for any Alaskan stock of beaked whale. However, the take numbers are sufficiently small (8 and 10 takes by Level B harassment for Stejneger's beaked whale and Baird's beaked whale, respectively) that we can safely assume that they are small relative to any reasonable assumption of likely population abundance for these stocks. For reference, current abundance estimates for other beaked whale stocks in the Pacific include 1,363 Baird's beaked whales (California, Oregon/Washington stock), 3,044 Mesoplodont beaked whales (CA/OR/WA stock),

5,454 Cuvier's beaked whales (CA/OR/WA stock), 564 Blainville's beaked whales (Hawai'i Pelagic stock), 2,550 Longman's beaked whales (Hawai'i stock), and 3,180 Cuvier's beaked whales (Hawai'i Pelagic stock).

The Alaska stock of Dall's porpoise has no official NMFS abundance estimate for this area, as the most recent estimate is greater than 8 years old. The most recent estimate was 13,110 animals for just a portion of the stock's range. Therefore, the 26 takes by Level B harassment and 13 takes by Level A harassment of this stock proposed for authorization, compared to the abundance estimate, shows that less than 1 percent of the stock would be expected to be impacted.

For the Bering Sea stock of harbor porpoise, the most reliable abundance estimate is 5,713, a corrected estimate from a 2008 survey. However, this survey covered only a small portion of the stock's range, and therefore, is considered to be an underestimate for the entire stock (Muto *et al.,* 2022). Given the proposed 10 takes by Level B harassment for the stock, and 5 takes by Level A harassment for the stock, compared to the abundance estimate, which is only a portion of the Bering Sea Stock, shows that, at most, less than 1 percent of the stock would be expected to be impacted.

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals would be taken relative to the population size of the affected species or stocks.

**Unmitigable Adverse Impact Analysis and Determination**

In order to issue an IHA, NMFS must find that the specified activity will not have an ''unmitigable adverse impact'' on the subsistence uses of the affected marine mammal species or stocks by Alaskan Natives. NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as an impact resulting from the specified activity: (1) that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by, (i) causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

No subsistence hunting occurs on Shemya Island, which is a USAF Air Station; Access to the island is only provided by military aircraft and USAF-contracted charter planes for crews and workers. The nearest community that engages in subsistence hunting is located on Adak, Alaska which is 640 km (399 mi) to the east. Historically, an Alaska Native community on Attu, 60 km (37 mi) to the west, hunted for subsistence, but that community was destroyed during WWII and the residents that survived internment did not return to the island.

Based on the description of the specified activity, NMFS has preliminarily determined that there will not be an unmitigable adverse impact on subsistence uses from USAF's proposed activities.

**Endangered Species Act**

Section 7(a)(2) of the ESA (16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species, in this case with the Alaska Regional Office.

NMFS is proposing to authorize take of western DPS Steller sea lion, fin whale (northeast Pacific), and humpback whale (Mexico—North Pacific and western North Pacific), and sperm whale (North Pacific) which are listed under the ESA. The Permits and Conservation Division has requested initiation of section 7 consultation with the Alaska Regional Office for the issuance of this IHA. NMFS will conclude the ESA consultation prior to reaching a determination regarding the proposed issuance of the authorization.

**Proposed Authorization**

As a result of these preliminary determinations, NMFS proposes to issue an IHA to USAF for conducting the EAS Fuel Pier Replacement project in Alcan Harbor on Shemya Island, Alaska during April through October 2024, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act*.

**Request for Public Comments**

We request comment on our analyses, the proposed authorization, and any other aspect of this notice of proposed IHA for the proposed construction project. We also request comment on the potential renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform decisions on the request for this IHA or a subsequent renewal IHA.

On a case-by-case basis, NMFS may issue a one-time, 1-year renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical or nearly identical activities as described in the Description of Proposed Activity section of this notice is planned or (2) the activities as described in the Description of Proposed Activity section of this notice would not be completed by the time the IHA expires and a renewal would allow for completion of the activities beyond that described in the *Dates and Duration* section of this notice, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to the needed renewal IHA effective date (recognizing that the renewal IHA expiration date cannot extend beyond 1 year from expiration of the initial IHA).
- The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the requested renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take); and,

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: October 25, 2023.

**Catherine Marzin,**

*Acting Director, Office of Protected Resources, National Marine Fisheries Service.*

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**BILLING CODE 3510–22–P**

## CONSUMER FINANCIAL PROTECTION BUREAU

### Credit Union Advisory Council Meeting

**AGENCY:** Consumer Financial Protection Bureau.

**ACTION:** Notice of public meeting.

**SUMMARY:** Under the Federal Advisory Committee Act (FACA), this notice sets forth the announcement of a public meeting of the Credit Union Advisory Council (CUAC or Council) of the Consumer Financial Protection Bureau (CFPB or Bureau). The notice also describes the functions of the Council.

**DATES:** The meeting date is Thursday, November 16, 2023, from approximately 1 p.m. to 3 p.m., eastern daylight time. This meeting will be held virtually and is open to the general public. Members of the public will receive the agenda and dial-in information when they RSVP.

**FOR FURTHER INFORMATION CONTACT:** Kim George, Outreach and Engagement Associate, Advisory Board and Councils, External Affairs Division, at 202–450–8617, or email: *CFPB_CABandCouncilsEvents@cfpb.gov.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Section 2 of the CUAC charter provides that pursuant to the executive and administrative powers conferred on the CFPB by section 1012 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), the Director of the CFPB renews the discretionary Credit Union Advisory Council under agency authority in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. 10.

Section 3 of the CUAC charter states that the purpose of the CUAC is to advise the CFPB in the exercise of its functions under the Federal consumer financial laws as they pertain to credit unions with total assets of $10 billion or less.

#### II. Agenda

The CUAC will discuss broad policy matters related to the Bureau's Unified Regulatory Agenda and general scope of authority.

If you require any additional reasonable accommodation(s) in order to attend this event, please contact the Reasonable Accommodations team at *CFPB_ReasonableAccommodations@cfpb.gov,* 48 business hours prior to the start of this event.

Written comments will be accepted from interested members of the public and should be sent to *CFPB_CABandCouncilsEvents@cfpb.gov,* a minimum of seven (7) days in advance of the meeting. The comments will be provided to the CUAC members for consideration. Individuals who wish to join this meeting must RSVP via this link *https://surveys.consumerfinance.gov/jfe/form/SV_b9H4zHzWtrtXxZQ.*

#### III. Availability

The Council's agenda will be made available to the public on Tuesday, October 31, 2023, via *consumerfinance.gov.*

A recording and summary of this combined meeting will be available after the meeting on the Bureau's website *consumerfinance.gov.*

**Jocelyn Sutton,**

*Deputy Chief of Staff, Consumer Financial Protection Bureau.*

[FR Doc. 2023–23897 Filed 10–30–23; 8:45 am]

**BILLING CODE 4810–AM–P**

## CONSUMER FINANCIAL PROTECTION BUREAU

### Consumer Advisory Board Meeting

**AGENCY:** Consumer Financial Protection Bureau.

**ACTION:** Notice of public meeting.

**SUMMARY:** Under the Federal Advisory Committee Act (FACA), this notice sets forth the announcement of a public meeting of the Consumer Advisory Board (CAB or Board) of the Consumer Financial Protection Bureau (CFPB or Bureau). The notice also describes the functions of the Board.

**DATES:** The meeting date is Tuesday, November 14, 2023, from approximately 1 p.m. to 3:30 p.m., eastern daylight time. This meeting will be held virtually and is open to the general public. Members of the public will receive the agenda and dial-in information when they RSVP.

**FOR FURTHER INFORMATION CONTACT:** Kim George, Outreach and Engagement Associate, Advisory Board and Councils, External Affairs Division, at 202–450–8617, or email: *CFPB_CABandCouncilsEvents@cfpb.gov.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Section 3 of the charter of the Board states that: The purpose of the CAB is outlined in section 1014(a) of the Dodd-Frank Act, which states that the CAB shall ''advise and consult with the Bureau in the exercise of its functions under the Federal consumer financial laws'' and ''provide information on emerging practices in the consumer financial products or services industry, including regional trends, concerns, and other relevant information.''

To carry out the CAB's purpose, the scope of its activities shall include providing information, analysis, and recommendations to the CFPB. The CAB will generally serve as a vehicle for trends and themes in the consumer finance marketplace for the CFPB. Its objectives will include identifying and assessing the impact on consumers and other market participants of new, emerging, and changing products, practices, or services.

#### II. Agenda

The CAB will discuss broad policy matters related to the Bureau's Unified Regulatory Agenda and general scope of authority.

If you require any additional reasonable accommodation(s) in order to attend this event, please contact the Reasonable Accommodations team at *CFPB_ReasonableAccommodations@cfpb.gov* 48 hours prior to the start of this event.

Written comments will be accepted from interested members of the public and should be sent to *CFPB_CABandCouncilsEvents@cfpb.gov,* a minimum of seven (7) days in advance of the meeting. The comments will be provided to the CAB members for consideration. Individuals who wish to join this meeting must RSVP via this link *https://surveys.consumerfinance.gov/jfe/form/SV_aVSwdg1vAHHzgKW.*

#### III. Availability

The Board's agenda will be made available to the public on Tuesday, October 31, 2023, via *consumerfinance.gov.*

A recording and summary of this meeting will be available after the meeting on the Bureau's website *consumerfinance.gov.*

**Jocelyn Sutton,**

*Deputy Chief of Staff, Consumer Financial Protection Bureau.*

[FR Doc. 2023–23895 Filed 10–30–23; 8:45 am]

**BILLING CODE 4810–AM–P**

## CONSUMER FINANCIAL PROTECTION BUREAU

### Community Bank Advisory Council Meeting

**AGENCY:** Consumer Financial Protection Bureau.

**ACTION:** Notice of public meeting.

**SUMMARY:** Under the Federal Advisory Committee Act (FACA), this notice sets forth the announcement of a public meeting of the Community Bank Advisory Council (CBAC or Council) of the Consumer Financial Protection Bureau (CFPB or Bureau). The notice also describes the functions of the Council.

**DATES:** The meeting date is Wednesday, November 15, 2023, from approximately 1 p.m. to 3 p.m., eastern daylight time. This meeting will be held virtually and is open to the general public. Members of the public will receive the agenda and dial-in information when they RSVP.

**FOR FURTHER INFORMATION CONTACT:** Kim George, Outreach and Engagement Associate, Advisory Board and Councils, External Affairs Division, at 202–450–8617, or email: *CFPB_CABandCouncilsEvents@cfpb.gov.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Section 2 of the CBAC charter provides that pursuant to the executive and administrative powers conferred on the CFPB by section 1012 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), the Director of the CFPB renews the discretionary Community Bank Advisory Council under agency authority in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. 10.

Section 3 of the CBAC charter states that the purpose of the CBAC is to advise the CFPB in the exercise of its functions under the Federal consumer financial laws as they pertain to community banks with total assets of $10 billion or less.

#### II. Agenda

The CBAC will discuss broad policy matters related to the Bureau's Unified Regulatory Agenda and general scope of authority.

If you require any additional reasonable accommodation(s) in order to attend this event, please contact the Reasonable Accommodations team at *CFPB_ReasonableAccommodations@cfpb.gov,* 48 business hours prior to the start of this event.

Written comments will be accepted from interested members of the public and should be sent to *CFPB_CABandCouncilsEvents@cfpb.gov,* a minimum of seven (7) days in advance of the meeting. The comments will be provided to the CBAC members for consideration. Individuals who wish to join this meeting must RSVP via this link *https://surveys.consumerfinance.gov/jfe/form/SV_83a1jImzGdFkcMS.*

#### III. Availability

The Council's agenda will be made available to the public on Tuesday, October 31, 2023, via *consumerfinance.gov.*

A recording and summary of this combined meeting will be available after the meeting on the Bureau's website *consumerfinance.gov.*

**Jocelyn Sutton,**

*Deputy Chief of Staff, Consumer Financial Protection Bureau.*

[FR Doc. 2023–23899 Filed 10–30–23; 8:45 am]

**BILLING CODE 4810–AM–P**

## DEPARTMENT OF EDUCATION

### National Assessment Governing Board

### Committee and Quarterly Board Meetings

**AGENCY:** National Assessment Governing Board, Department of Education.

**ACTION:** Notice of open and closed meetings.

**SUMMARY:** This notice sets forth the agenda, time, and instructions to access the National Assessment Governing Board's (hereafter referred to as Governing Board or Board) standing committee meetings and quarterly Board meeting. This notice provides information about the meetings to members of the public who may be interested in attending the meetings and/or providing written comments related to the work of the Governing Board. Notice of the meetings is required under the Federal Advisory Committee Act. The meetings will be held either in person and/or virtually, as noted below. Members of the public must register in advance to attend the virtual meetings. A registration link will be posted on *www.nagb.gov* five business days prior to each meeting.

**DATES:** The Quarterly Board Meeting will be held on the following dates:

- November 16, 2023, from 8:30 a.m. to 6 p.m., EDT
- November 17, 2023, from 7:30 a.m. to 2:30 p.m., EDT

**ADDRESSES:** Westin Arlington Gateway, 801 North Glebe Rd., Arlington, VA 22203.

**FOR FURTHER INFORMATION CONTACT:** Munira Mwalimu, Executive Officer/Designated Federal Official (DFO) for the Governing Board, 800 North Capitol Street NW, Suite 825, Washington, DC 20002, telephone: (202) 357–6906, fax: (202) 357–6945, email: *Munira.Mwalimu@ed.gov.*

**SUPPLEMENTARY INFORMATION:**

*Statutory Authority and Function:* The Governing Board is established under the National Assessment of Educational Progress Authorization Act, (20 U.S.C. 9621). Information on the Governing Board and its work can be found at *www.nagb.gov.*

The Governing Board formulates policy for the National Assessment of Educational Progress (NAEP) administered by the National Center for Education Statistics (NCES). The Governing Board's responsibilities include:

(1) selecting the subject areas to be assessed; (2) developing appropriate student achievement levels; (3) developing assessment objectives and testing specifications that produce an assessment that is valid and reliable, and are based on relevant widely accepted professional standards; (4) developing a process for review of the assessment which includes the active participation of teachers, curriculum specialists, local school administrators, parents, and concerned members of the public; (5) designing the methodology of the assessment to ensure that assessment items are valid and reliable, in consultation with appropriate technical experts in measurement and assessment, content and subject matter, sampling, and other technical experts who engage in large scale surveys; (6) measuring student academic achievement in grades 4, 8, and 12 in the authorized academic subjects; (7) developing guidelines for reporting and disseminating results; (8) developing standards and procedures for regional and national comparisons; (9) taking appropriate actions needed to improve the form, content use, and reporting of results of an assessment; and (10) planning and executing the initial public release of NAEP reports.

#### Standing Committee Meetings

The Governing Board's standing committees will meet to conduct regularly scheduled work. Standing

committee meeting agendas and meeting materials will be posted on the Governing Board's website, *www.nagb.gov,* no later than five business days prior to the meetings. For the virtual standing committee meetings, a registration link will be posted on *www.nagb.gov* five business days prior to the meetings. Registration is required to join the meetings virtually. Minutes of prior standing committee meetings are available at *https://www.nagb.gov/governing-board/quarterly-board-meetings.html.*

**Standing Committee Meetings**

*Tuesday, October 31, 2023*

Executive Committee (Virtual)

2 p.m.–4 p.m. (EDT) Closed Session

The Executive Committee will meet in closed session on Tuesday, October 31, 2023, from 2 p.m. to 4 p.m. to receive a briefing on the NAEP Assessment Schedule and Budget. The briefing and Governing Board discussions may impact current and future NAEP contracts and budgets and must be kept confidential to maintain the integrity of the federal acquisition process. Public disclosure of this confidential information would significantly impede implementation of the NAEP assessment program if conducted in open session. Such matters are protected by exemption 9(B) of section 552b(c) of title 5 of the United States Code.

*Thursday, November 16, 2023*

Assessment Development Committee (In-Person Meeting)

4 p.m.–4:15 p.m. (EDT), Open Session
4:15 p.m.–6 p.m. (EDT), Closed Session

The Assessment Development Committee will meet in open session on Thursday, November 16, 2023, from 4 p.m. to 4:15 p.m., to discuss the action on the 2028 Science Assessment Framework. From 4:15 p.m. to 4:35 p.m. the committee will meet in closed session to receive an update on potential members of the Social Studies Content Advisory Group. These discussions pertain solely to personnel rules and practices of an agency and information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy. As such, the discussions are protected by exemptions 2 and 6 of the Government Sunshine Act, 5 U.S.C. 552b(c). From 4:35 p.m. to 6 p.m. the committee will meet in closed session to review the 2028 NAEP Reading concept passages and sketches. These items have not been released to the public. Public disclosure of this confidential information would significantly impede implementation of the NAEP assessment program if conducted in open session. Such matters are protected by exemption 9(B) of the Government Sunshine Act, 5 U.S.C. 552b(c).

Committee on Standards, Design and Methodology (In-Person Meeting)

4 p.m.–4:55 p.m. (EDT), Open Session
4:55 p.m.–6 p.m. (EDT), Closed Session

The Committee on Standards, Design and Methodology will meet in open session on Thursday, November 16, 2023, from 4 p.m. to 4:55 p.m. to discuss the automated scoring contest and shadow scoring for NAEP Mathematics. From 4:55 p.m. to 6 p.m., the committee will meet in closed session to discuss NAEP modernization plans to move towards a device agnostic administration. The session will be closed because it will include presentations of item displays across device-types including operational test items that have not been released to the public. Public disclosure of this confidential information would significantly impede implementation of the NAEP assessment program if conducted in open session. Such matters are protected by exemption 9(B) of section 552b(c) of title 5 of the United States Code.

Reporting and Dissemination Committee (In-Person Meeting)

4 p.m. to 6 p.m. (EDT) Open Session

The Reporting and Dissemination Committee will meet in open session on Thursday, November 16, 2023, from 4 p.m. to 6 p.m. The committee will open with remarks by the new committee leadership, followed by a discussion of the new strategic communications plan which will cover the next 16 months of work, and effective ways of interpreting NAEP scores.

*Friday, November 17, 2023*

Nominations Committee (In-Person Meeting)

7:30 a.m.–8:45 a.m. (EDT) Closed Session

The Nominations Committee will meet in closed session on Friday, November 17, 2023, from 7:30 a.m. to 8:45 a.m., to review applications for Board vacancies for the 2024–2025 term and discuss the rating process and member assignments for the ratings. These discussions pertain solely to internal personnel rules and practices of an agency and information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy. As such, the discussions are protected by exemptions 2 and 6 of the Government Sunshine Act, 5 U.S.C. 552b(c).

**Quarterly Governing Board Meeting**

The plenary sessions of the Governing Board's November 2023 quarterly meeting will be held on the following dates and times:

*Thursday, November 16, 2023*

Open Meeting: 8:30 a.m.–2:45 p.m. (Hybrid Meeting)

Closed Meeting: 2:45 p.m.–3:45 p.m. (Hybrid Meeting)

On Thursday, November 16, 2023, the plenary session of the Governing Board meeting will convene in open session. From 8:30 a.m. to 8:35 a.m. Beverly Perdue, Chair of the Governing Board, will welcome members, followed by a motion to approve the November 16–17, 2023, quarterly Governing Board meeting agenda and minutes from the August 3–4, 2023, Governing Board meeting. From 8:35 a.m. to 9:45 a.m., new and reappointed members will take the oath of office, followed by remarks. From 9:45 a.m. to 10:15 a.m., Lesley Muldoon, Executive Director of the Governing Board, will provide updates on the Board's work, followed by an update from NCES Commissioner, Peggy Carr from 10:15 a.m.–10:45 a.m.

From 10:45 a.m. to 12:15 p.m., the Board will receive updates from and discuss priorities for the NAEP Assessment Schedule with the Council of Chief State School Officers (CCSSO) State Policy Task Force and the Trial Urban District Assessment (TUDA) Task Force. The Board will discuss and take action on the NAEP Assessment Schedule from 12:15–2:30 p.m.

Following a fifteen-minute break, the Board will convene in a closed session from 2:45 p.m. to 3:45 p.m. to receive a briefing on the NAEP Budget and planned contract actions. This session must be closed to maintain the integrity of the federal budgeting and acquisition processes. Public disclosure of this confidential information would significantly impede implementation of the NAEP assessment program if conducted in open session. Such matters are protected by exemption 9(B) of the Government Sunshine Act, 5 U.S.C. 552b(c).

Following a transitional break, the Board will meet in standing committees from 4 p.m. to 6 p.m. A schedule of the standing committee meetings is listed above. The November 16, 2023, session of the Governing Board meeting will adjourn at 6 p.m.

*Friday, November 17, 2023*

Open Meeting: 9:00 a.m.–2:30 p.m. (Hybrid Meeting)

On Friday, November 17, 2023, the Board will convene in open session from 9:00 a.m. to 9:45 a.m. to discuss and take action on the 2028 NAEP Science Assessment Framework. From 9:45 a.m. to 10:30 a.m., the Board will engage in open discussion. The Board will continue discussions and take action on the NAEP Assessment Schedule from 10:30 a.m. to 1 p.m. followed by a fifteen-minute break from 1 p.m.–1:15 p.m. From 1:15 p.m. to 2:30 p.m., the Board will receive an update on Artificial Intelligence and NAEP. The November 17, 2023, session of the Governing Board meeting will adjourn at 2:30 p.m.

**Instructions for Accessing and Attending the Meetings**

*Registration:* Members of the public may attend the November 16 and November 17, 2023, meetings of the full Governing Board either in person or virtually. A link to the final meeting agenda and information on how to register for virtual attendance for the open sessions will be posted on the Governing Board's website at *www.nagb.gov* no later than five business days prior to the meeting. Registration is required to join the meeting virtually.

*Public Comment:* Written comments related to the work of the Governing Board and its standing committees may be submitted to the attention of the Executive Officer/DFO no later than 10 business days prior to the meeting. Written comments may be submitted either via email to *Munira.Mwalimu@ed.gov* or in hard copy to the address listed above. Written comments should reference the relevant agenda item.

*Access to Records of the Meeting:* Pursuant to 5 U.S.C. 1009, the public may inspect the meeting materials at *www.nagb.gov,* which will be posted no later than five business days prior to each meeting. The public may also inspect the meeting materials and other Governing Board records at 800 North Capitol Street NW, Suite 825, Washington, DC 20002, by emailing *Munira.Mwalimu@ed.gov* to schedule an appointment. The official verbatim transcripts of the open meeting sessions will be available for public inspection no later than 30 calendar days following each meeting and will be posted on the Governing Board's website. Requests for the verbatim transcriptions may be made via email to the DFO.

*Reasonable Accommodations:* The meeting location is accessible to individuals with disabilities. If you will need an auxiliary aid or service to participate in the meeting (*e.g.,* interpreting service, assistive listening device, or materials in an alternate format), notify the DFO listed in this notice no later than ten working days prior to each meeting date.

*Electronic Access to This Document:* The official version of this document is the document published in the **Federal Register**. Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* 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 Adobe Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the Adobe website. 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.

*Authority:* Pub. L. 107–279, title III, section 301—National Assessment of Educational Progress Authorization Act (20 U.S.C. 9621).

**Lesley Muldoon,**

*Executive Director, National Assessment Governing Board (NAGB), U.S. Department of Education.*

[FR Doc. 2023–23987 Filed 10–30–23; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Submission of Data by State Educational Agencies; Submission Dates for State Revenue and Expenditure Reports for Fiscal Year 2023, Revisions to Those Reports, and Revisions to Prior Fiscal Year Reports

**AGENCY:** National Center for Education Statistics, Institute of Education Sciences, U.S. Department of Education.

**ACTION:** Notice.

**SUMMARY:** The Secretary announces dates for State educational agencies (SEAs) to submit expenditure and revenue data and average daily attendance statistics on ED Form 2447 (the National Public Education Financial Survey (NPEFS)) for fiscal year (FY) 2023, revisions to those reports, and revisions to reports for previous fiscal years. The Secretary sets these dates to ensure that data are available to serve as the basis for timely distribution of Federal funds. The U.S. Census Bureau is the data collection agent for this request of the U.S. Department of Education's (Department) National Center for Education Statistics (NCES). The data will be published by NCES and will be used by the Secretary in the calculation of allocations for FY 2025 appropriated funds.

**DATES:** SEAs can begin submitting data for FY 2023 and revisions to previously submitted data for FY 2022 on Wednesday, January 31, 2024. SEAs are urged to submit accurate and complete data by Friday, March 29, 2024, to facilitate timely processing. The deadline for the final submission of all data, including any revisions to previously submitted data for FY 2022 and FY 2023, is Thursday, August 15, 2024. Any resubmissions of FY 2022 or FY 2023 data by SEAs in response to requests for clarification, reconciliation, or other inquiries by NCES or the Census Bureau must be completed as soon as possible, but no later than Tuesday, September 3, 2024. All outstanding data issues must be reconciled or resolved by the SEAs, NCES, and the Census Bureau as soon as possible, but no later than September 3, 2024.

**ADDRESSES:** SEAs are encouraged to submit data online using the interactive survey form on the NPEFS data collection website at: *http://surveys.nces.ed.gov/ccdnpefs.* The NPEFS interactive survey includes a digital confirmation page where a personal identification number (PIN) may be entered. A successful entry of the PIN serves as a signature by the authorizing official. Alternatively, a certification form (ED Form 2447) also may be printed from the website, signed by the authorizing official, and mailed to the Economic Reimbursable Surveys Division of the Census Bureau at the address provided below, within five business days after submission of the NPEFS web interactive form.

SEAs may mail ED Form 2447 to: U.S. Census Bureau, ATTENTION: Economic Reimbursable Surveys Division, 4600 Silver Hill Road, Suitland, MD 20746.

If an SEA's submission is received by the Census Bureau after August 15, 2024, the SEA must show one of the following as proof that the submission was mailed on or before that date:

1. A legibly dated U.S. Postal Service postmark.

2. A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

3. A dated shipping label, invoice, or receipt from a commercial carrier.

4. Any other proof of mailing acceptable to the Secretary.

If the SEA mails ED Form 2447 through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

1. A private metered postmark.

2. A mail receipt that is not dated by the U.S. Postal Service.

*Note:* The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an SEA should check with its local post office.

**FOR FURTHER INFORMATION CONTACT:** Stephen Q. Cornman, Senior Survey Director, Financial Surveys, National Center for Education Statistics, Institute of Education Sciences, U.S. Department of Education, 550 12th Street SW, Washington, DC 20202. Telephone: (202) 245–7753. Email: *stephen.cornman@ed.gov.* You may also contact an NPEFS team member at the Census Bureau. Telephone: 1–800–437–4196 or (301) 763–1571. Email: *erd.npefs.list@census.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:** Under section 153(a)(1)(I) of the Education Sciences Reform Act of 2002, 20 U.S.C. 9543(a)(1)(I), which authorizes NCES to gather data on the financing and management of education, NCES collects data annually from SEAs through ED Form 2447. The report from SEAs includes attendance, revenue, and expenditure data from which NCES determines a State's ''average per-pupil expenditure'' (SPPE) for elementary and secondary education, as defined in section 8101(2) of the Elementary and Secondary Education Act of 1965, as amended (ESEA) (20 U.S.C. 7801(2)).

In addition to using the SPPE data as general information on the financing of elementary and secondary education, the Secretary uses these data directly in calculating allocations for certain formula grant programs, including, but not limited to, title I, part A, of the ESEA; Impact Aid; and Indian Education programs. Other programs, such as the Education for Homeless Children and Youth program under title VII of the McKinney-Vento Homeless Assistance Act, and the Student Support and Academic Enrichment Grants under title IV, part A of the ESEA, make use of SPPE data indirectly because their formulas are based, in whole or in part, on State title I, part A, allocations.

In January 2024, the Census Bureau, acting as the data collection agent for NCES, will email ED Form 2447 to SEAs, with instructions, and will request that SEAs commence submitting FY 2023 data to the Census Bureau on Wednesday, January 31, 2024. SEAs are urged to submit accurate and complete data by Friday, March 29, 2024, to facilitate timely processing.

Submissions by SEAs to the Census Bureau will be analyzed for accuracy and returned to each SEA for verification. SEAs must submit all data, including any revisions to FY 2022 and FY 2023 data, to the Census Bureau no later than Thursday, August 15, 2024. Any resubmissions of FY 2022 or FY 2023 data by SEAs in response to requests for clarification or reconciliation or other inquiries by NCES or the Census Bureau must be completed by Tuesday, September 3, 2024. Between August 15, 2024, and September 3, 2024, SEAs may also, on their own initiative, resubmit data to resolve issues not addressed in their NPEFS data submitted by August 15, 2024. All outstanding data issues must be reconciled or resolved by the SEAs, NCES, and the Census Bureau as soon as possible, but no later than September 3, 2024.

In order to facilitate timely submission of data, the Census Bureau will send reminder notices to SEAs in June and July of 2024.

Having accurate, consistent, and timely information is critical to an efficient and fair allocation process and to the NCES statistical process. The Department establishes Thursday, August 15, 2024, as the date by which SEAs must submit data using either the interactive survey form on the NPEFS data collection website at *http://surveys.nces.ed.gov/ccdnpefs* or ED Form 2447. This date is established to ensure that the best, most accurate data will be available to support timely distribution of Federal education funds.

Any resubmissions of FY 2022 or FY 2023 data by SEAs in response to requests for clarification or reconciliation or other inquiries by NCES or the Census Bureau must be completed through the interactive survey form on the NPEFS data collection website or ED Form 2447 by Tuesday, September 3, 2024. If an SEA submits revised data after the September 3, 2024, deadline that result in a lower SPPE figure, the SEA's allocations may be adjusted downward, or the Department may direct the SEA to return funds.

*Note:* The following are important dates in the data collection process for FY 2023 data and revisions to reports for previous fiscal years:

| Date | Activity |
|---|---|
| January 31, 2024 | SEAs can begin to submit accurate and complete data for FY 2023 and revisions to previously submitted data for FY 2022. |
| March 29, 2024 | Date by which SEAs are urged to submit accurate and complete data for FY 2023 and FY 2022. |
| August 15, 2024 | Mandatory final submission date for FY 2022 and FY 2023 data to be used for program funding allocation purposes. |
| September 3, 2024 | Mandatory final deadline for responses by SEAs to requests for clarification or reconciliation or other inquiries by NCES or the Census Bureau. Between August 15, 2024, and September 3, 2024, SEAs may also, on their own initiative, resubmit data to resolve issues not addressed in their final submission of NPEFS data by August 15, 2024. All data issues must be resolved. |

*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.

*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.

*Authority:* 20 U.S.C. 9543.

**Mark Schneider,**

*Director of the Institute of Education Sciences.*

[FR Doc. 2023–23972 Filed 10–30–23; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

### Energy Information Administration

### Agency Information Collection Extension

**AGENCY:** U.S. Energy Information Administration (EIA), Department of Energy (DOE).

**ACTION:** Notice and request for comments.

**SUMMARY:** EIA invites public comment on the proposed three-year extension, with changes, to the Uranium Data Program (UDP) as required under the Paperwork Reduction Act of 1995. The UDP consists of three surveys: Form EIA–851A *Domestic Uranium Production Report (Annual),* which collects annual data from the U.S. uranium industry on uranium milling and processing, uranium feed sources, uranium mining, employment, drilling, expenditures, and uranium reserves; Form EIA–851Q *Domestic Uranium Production Report (Quarterly),* which collects monthly data that is reported on a quarterly basis, on uranium production on a quarterly basis; and Form EIA–858 *Uranium Marketing Annual Survey,* which collects annual data from the U.S. uranium market on uranium contracts and deliveries, inventories, enrichment services purchased, uranium in fuel assemblies, feed deliveries to enrichers, and unfilled market requirements for the current year and the following ten years.

**DATES:** EIA must receive all comments on this proposed information collection no later than January 2, 2024. If you anticipate any difficulties in submitting your comments by the deadline, contact the person listed in **ADDRESSES** section of this notice as soon as possible.

**ADDRESSES:** Send comments to Tim Shear by email to *Uranium2024@eia.gov.*

**FOR FURTHER INFORMATION CONTACT:** Tim Shear, U.S. Energy Information Administration, telephone (202) 586–0403, email *Tim.Shear@eia.gov.* The forms and instructions are available at *https://www.eia.gov/survey.*

**SUPPLEMENTARY INFORMATION:** This information collection request contains:

(1) *OMB No.:* 1905–0160;

(2) *Information Collection Request Title:* Uranium Data Program;

(3) *Type of Request:* Three-year extension with change;

(4) *Purpose:* Uranium Data Program (UDP) collects data on domestic uranium supply and demand activities, including production, exploration and development, trade, purchases and sales available to the U.S. The users of these data include Congress, Executive Branch agencies, the nuclear and uranium industry, electric power industry, and the public. Form EIA–851A data is published in EIA's *Domestic Uranium Production Report—Annual,* at *http://www.eia.gov/uranium/production/annual/.* Form EIA–851Q data is published in EIA's *Domestic Uranium Production Report—Quarterly* at *http://www.eia.gov/uranium/production/quarterly/.* Form EIA–858 data is published in EIA's *Uranium Marketing Annual Report* at *http://www.eia.gov/uranium/marketing/* and *Domestic Uranium Production Report—Annual* at *http://www.eia.gov/uranium/production/annual/.*

**(4a) Proposed Changes to Information Collection**

There is a 6 hour increase in the total estimated burden across all three surveys. Due to the continued downturn in the uranium landholding/exploration/production sectors, EIA–851A had four fewer respondents which reduced the burden hours by 20. The addition of one trader/broker on the EIA–858 survey will result in 26 additional burden hours. The larger burden estimate of the EIA–858 survey (26 burden hours) compared to the EIA–851A survey (5 burden hours) results in 26 additional EIA–858 hours against a reduction of 20 hours on the EIA–851A survey (4 fewer respondents by 5 hours per response) for a total net burden gain of six hours across all three surveys. The number of respondents for the Form EIA–851A has decreased from 30 to 26. The number of respondents for the Form EIA–851Q has remained at 11. The number of respondents for the Form EIA–858 has increased from 61 to 62. Total annual burden hours across all uranium surveys will increase slightly from 1,769 hours to 1,775 hours;

(5) *Annual Estimated Number of Respondents:* 99;

(6) *Annual Estimated Number of Total Responses:* 132;

(7) *Annual Estimated Number of Burden* Hours: 1775;

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* EIA estimates that there are no capital and start-up costs associated with this data collection. The information is maintained during the normal course of business. The cost of the burden hours is estimated to be $155,064 (1,775 burden hours times $87.36 per hour). Other than the cost of burden hours, EIA estimates that there are no additional costs for generating, maintaining, and providing this information.

*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 has practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

*Statutory Authority:* 15 U.S.C. 772(b), 42 U.S.C. 7101 *et seq.*

Signed in Washington, DC, on October 26, 2023.

**Samson A. Adeshiyan,**

*Director, Office of Statistical Methods and Research, U.S. Energy Information Administration.*

[FR Doc. 2023–24000 Filed 10–30–23; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Energy Information Administration

### Agency Information Collection Proposed Extension

**AGENCY:** U.S. Energy Information Administration (EIA), Department of Energy (DOE).

**ACTION:** Notice and request for comments.

**SUMMARY:** EIA invites public comment on the reinstatement with changes to the Residential Energy Consumption Survey (RECS) Forms EIA 457–A, D, E, F, and G under OMB Control Number 1905–0092, as required under the Paperwork Reduction Act of 1995. RECS collects data on energy characteristics, consumption, and expenditures for the residential sector of the United States and is comprised of five forms including: Form EIA 457–A Household Survey, Form EIA 457–D Energy Supplier Survey: Household Propane Usage, Form EIA 457–E Energy Supplier Survey: Household Electricity Usage, Form EIA 457–F, Energy Supplier Survey: Household Natural Gas Usage,

Form EIA 457–G Energy Supplier Survey: Household Fuel Oil or Kerosene Usage. These forms will be used to produce household energy usage estimates for calendar year 2024.

**DATES:** EIA must receive all comments on this proposed information collection no later than January 2, 2024. If you anticipate any difficulties in submitting your comments by the deadline, contact the person listed in the **ADDRESSES** section of this notice as soon as possible.

**ADDRESSES:** Submit comments electronically to Chip Berry by email at *chip.berry@eia.gov.*

**FOR FURTHER INFORMATION CONTACT:** Chip Berry, U.S. Energy Information Administration, by telephone at (202) 586–5543, or by email at *chip.berry@eia.gov.* The proposed forms and instructions are available on EIA's website at *www.eia.gov/survey/#eia-457.*

**SUPPLEMENTARY INFORMATION:** This information collection request contains:

(1) *OMB No.:* 1905–0092;

(2) *Information Collection Request Title:* Residential Energy Consumption Survey;

(3) *Type of Request:* Reinstatement with changes;

(4) *Purpose:* The RECS is a nationwide study of energy use in housing units and includes a series of data collections from households and household energy suppliers. RECS results include official statistics about the energy characteristics, consumption, and expenditures of U.S. homes. In addition to statistics produced directly from surveys of households and energy suppliers, EIA leverages the RECS survey information to model and produce energy end-use estimates (*e.g.,* natural gas water heating consumption). EIA has conducted the RECS periodically since 1978 and the 2024 RECS will be the 16th data collection for the program.

*Form EIA 457–A: Household Survey* collects information on the presence and characteristics of a wide range of energy-consuming devices in homes, including space heating and cooling equipment, appliances, and electronics. The Household Survey also asks respondents about key structural features and demographic characteristics that impact energy usage. Forms EIA 457–D, E, F, and G: *Energy Supplier Surveys* collect monthly electricity and natural gas billing data from Household Survey-respondent energy suppliers (*e.g.,* utilities), and periodic propane and fuel oil delivery data from bulk fuel suppliers.

RECS is integral to EIA's mandate to collect and publish energy end-use consumption data. RECS estimates represent the most comprehensive national and state-level results available on energy consumption in homes. RECS is a key, benchmark data series that allows policy makers and program implementers in both public and private organizations to analyze trends in energy consumption for the residential sector. RECS fulfills planning, analyses, and decision-making needs of DOE, other Federal agencies, state governments, utilities, researchers, and energy analysts in the private sector.

In addition to annual RECS estimates produced for all prior studies, EIA intends to release sub-annual (*e.g.,* monthly) energy consumption and expenditures estimates from the 2024 RECS. These estimates would be derived from monthly energy bills collected on the Energy Supplier Survey forms and modeled energy end-use outputs.

(4a) *Proposed Changes to Information Collection:* For the 2024 RECS, EIA intends to field a series of local-area samples in select metropolitan and county areas around the country. These additional samples in approximately 8–10 local areas will support EIA's efforts to expand its demand-side energy data program to produce energy-use results for more granular geographic and demographic communities.

EIA proposes to update the Household Survey to reduce respondent burden, improve response quality, and update questions to reflect current energy trends. EIA is proposing the following questionnaire updates based on data quality analysis of the prior RECS, changes in the residential housing market, and stakeholder feedback. Proposed new questions reflect EIA's effort to collect the most relevant information necessary to estimate household energy use and to inform energy end-use estimation. Proposed question revisions should improve response quality, minimize reporting burden, and reflect changes in technology. EIA proposes deleting questions with poor response quality from the last collection or where data are now available from alternative sources.

**Household Survey (EIA 457–A)**

Question additions:

- (Your Home) Add a question asking how many months a respondent's pool is heated. Heating pools can use a significant amount of energy, so knowing the extent of heating will facilitate better pool energy consumption and expenditures estimation.
- (Space Heating) Reinstate a follow-up question for respondents using heat pumps for space heating that asks if the equipment is also used for air conditioning. This question allows EIA to better capture heat pumps used for both space heating and air conditioning.
- (Space Heating and Air Conditioning) Reinstate a question in the air-conditioning section that asks how much respondents use their cooling equipment, as well as add a similar question in the space heating section. These behavioral questions are important for EIA to gauge the use of energy-intensive equipment relative to similar homes, especially in temperate climates or climates where heating or cooling may not be used often.
- (Water Heating) Add a question about the presence of heat pump water heaters. Heat pump water heaters are an emerging technology that can significantly impact consumption and expenditures in a home.
- (Water Heating) Add a question about the backup fuel for solar thermal water heaters. EIA asks about the presence of solar thermal water heaters, but no information is currently collected about backup fuels for that equipment. This question will support more accurate estimates of household water heating consumption and expenditures.
- (Energy Bills) Add a question about the number of solar panels if a respondent indicates that they have on-site solar generation. Expanding the series of questions to better capture the size of a home's solar array will improve EIA's estimates of on-site solar generation and related consumption.
- (Electric Vehicles) Add a question asking about the number of electric vehicles owned.
- (Energy Insecurity) Add a question about a respondent's inability to pay the full amount of energy bills. While EIA gathers information about people forgoing expenses to help pay for energy bills and information about the receipt of disconnection notices, there's a gap in knowledge about people who still face difficulties with energy bills but pay enough to not receive a notice.
- (Final Questions) Reinstate a series of questions on the consumption of propane and fuel oil. This reinstated series will supplement information collected from energy suppliers, filling in gaps in the data collection and allowing for additional quality checks for bulk fuel consumption and expenditures.
- (Final Questions) Ask respondents for their solar company, also known as an inverter company or third-party operator, if they have on-site solar generation. This question may be used

to capture solar capacity and generation directly from the data source and improve EIA's estimates of consumption and expenditures for homes with solar panels.

**Revisions**

- (Appliances) Add an option to all appliance-usage questions for ''rarely used/used less than once a week.'' This additional response option will allow EIA to differentiate between low, but consistent usage (*e.g.,* ''once a week'') and near-zero or infrequent usage of clothes dryers, dishwashers, and cooking equipment.
- (Appliances) Add a response option to the range fuel question. Propane dual-fuel ranges are common enough to warrant this change and should be differentiated from natural gas dual-fuel ranges.
- (Electronics) Convert the question about external monitors to a numeric response question. In the 2020 RECS, EIA included a question about use of external monitors as part of the series of questions related to teleworking. This question will be moved from that series and added to the list of questions about computers. We will also modify the question to ask for a numeric response.
- (Space Heating) Reinstate questions that capture third sources of space heating. These questions were removed for the 2020 self-administered questionnaire to conserve space on the paper instrument. However, there were respondents in the 2020 RECS who indicated using more than two types of equipment. Space heating is the most energy-intensive end-use in homes and capturing these additional heating sources will improve EIA's estimates of heating consumption and expenditures.
- (Space Heating) Reinstate a response option for a fireplace as a main heating equipment source. For the 2020 RECS, enough respondents indicated this as a main heating source in open-ended responses to warrant adding this option to the response list.
- (Space Heating) Reinstate a more comprehensive response option list for secondary heating equipment. For 2020 RECS, enough respondents indicated additional equipment in open-ended responses to warrant adding these options to the response list. This equipment included furnaces and heat pumps as secondary space heating sources.
- (Space Heating) Allow respondents to indicate using both wood cords and wood pellets.
- (Energy Bills) Reword the question on whether respondents have an outlet that is accessible by a car. Currently, the question asks about outlets in range of where a respondent parks their car, but if the respondent doesn't have a car, then they might have difficulty answering.
- (Energy Bills) Reinstate a series of questions about miscellaneous devices that typically consume large amounts of energy if used by a household. These devices include air purifiers, water softeners, sump pumps, well pumps, power tools, large aquariums, and engine block heaters.
- (Electric Vehicles) Revise the detailed list of response options about where the respondent charges an electric vehicle. EIA intends to implement the more limited response options suggested as part of EIA's testing of EV-owning households.
- (Household Characteristics) Revise household income response options to reflect more current distributions of income ranges.

**Deletions**

- (Your Home) Remove the question asking about the total number of household members. This question is redundant, because EIA already asks questions about how many adults and how many children live in the home. We give these detailed questions primacy when there are inconsistencies in responses.
- (Your Home) Remove the question asking respondents if they had natural gas available in their neighborhood. This question is only relevant to respondents who did not already report using natural gas. Response quality issues, including high missing rates and inconsistent responses, warrant removal.
- (Appliances) Remove a question about the number of months a respondent used a secondary refrigerator. Responses were inconsistent and it is unlikely that respondents only use refrigerators for part of the year.
- (Appliances) Remove a series of questions about smaller kitchen appliances. For most households, toasters, blenders, slow cookers, and similar food-preparation devices do not constitute a significant portion of energy consumption and expenditures. EIA intends to use the space in the questionnaire occupied by these questions for ones about more energy-intensive devices.
- (Electronics) Remove a series of questions about the use of equipment for teleworking and online education. These questions were added at the beginning of the COVID–19 pandemic to only assess a potential change in household consumption due to the pandemic. We will retain the question about external monitors, with modifications.
- (Electronics) Remove the VCR question. This technology is no longer used by a significant number of households and their energy consumption accounts for very little of the total energy use in homes.
- (Electronics) Remove questions about how TVs are used. These questions were added for the 2020 RECS but were not used by EIA to estimate TV and TV peripheral energy use. The questions about the number of hours of use of each TV are sufficient for EIA's energy-use estimation.
- (Water Heating) Remove a question about whether respondents use a water-heater blanket. This question has had repeated data quality issues, included a high missing rate in the 2020 RECS.
- (Energy Bills) Remove a series of questions about non-solar renewable energy. On-site residential wind energy generation and combined heat and power systems are rare. EIA will continue to consider these questions in the future.
- (Household Characteristics) Remove the question asking about the sex of the respondent. Analysis has shown that the sex of the respondent is not predictive of differences in household energy use. Additionally, the question as currently worded is measuring an outdated binary gender construct.

**Energy Supplier Surveys (EIA 457 D–G)**

- EIA proposes to reduce the number of months of bills or fuel deliveries collected on the Energy Supplier Survey forms from 24 months to 16 months. Collecting 24 months of bills for the 2020 RECS was necessary to evaluate impacts of the COVID–19 pandemic on energy use in households. The additional eight months of bills are no longer needed, and 16 months of billing and fuel delivery data is sufficient for 2024 RECS estimation.

**Pretesting Interviews**

- EIA would like to conduct up to 100 pretesting interviews to assess the clarity of the RECS questions and instructions. This will help improve the next iteration of RECS by obtaining respondent feedback regarding their experience completing RECS.

(5) *Annual Estimated Number of Respondents:* 6,390;

(6) *Annual Estimated Number of Total Responses:* 6,390;

(7) *Annual Estimated Number of Burden Hours:* 4,443;

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* The annualized cost of the burden hours is

estimated to be $388,140 (4,443 hours times $87.36 per hour). EIA estimates that respondents will have no additional costs associated with the surveys other than the burden hours and the maintenance of the information during the normal course of business.

Comments are invited on whether or not: (a) The proposed collection of information is necessary for the proper performance of agency functions, including whether the information will have a practical utility; (b) EIA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used, is accurate; (c) EIA can improve the quality, utility, and clarity of the information it will collect; and (d) EIA can minimize the burden of the collection of information on respondents, such as automated collection techniques or other forms of information technology.

*Statutory Authority:* 15 U.S.C. 772(b) and 42 U.S.C. 7101 *et seq.* Section 13(b) of the Federal Energy Administration Act of 1974, Pub. L. 93–275, codified as 15 U.S.C. 772(b) and the DOE Organization Act of 1977, Pub. L. 95–91, codified at 42 U.S.C. 7101 *et seq.*

Signed in Washington, DC, on October 26, 2023.

**Samson A. Adeshiyan,**

*Director, Office of Statistical Methods and Research, U.S. Energy Information Administration.*

[FR Doc. 2023–23999 Filed 10–30–23; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

### Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

*Docket Numbers:* EC24–12–000.

*Applicants:* Tenaska Capital Holdings, LLC, Roundtop Energy LLC, Beaver Dam Energy LLC, Milan Energy LLC, Alpaca Energy LLC, Wolf Run Energy LLC, Oxbow Creek Energy LLC.

*Description:* Joint Application for Authorization Under Section 203 of the Federal Power Act of Tenaska Capital Holdings, LLC, et al.

*Filed Date:* 10/24/23.

*Accession Number:* 20231024–5146.

*Comment Date:* 5 p.m. ET 11/14/23.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER23–1569–002.

*Applicants:* Yellowbud Solar, LLC.

*Description:* Tariff Amendment: Response to Deficiency Letter to be effective 5/8/2023.

*Filed Date:* 10/25/23.

*Accession Number:* 20231025–5168.

*Comment Date:* 5 p.m. ET 11/15/23.

*Docket Numbers:* ER24–198–000.

*Applicants:* El Paso Electric Company.

*Description:* 205(d) Rate Filing: Service Agreement No. 355, Simultaneous Exchange with Dynasty or Alternative to be effective 12/31/2023.

*Filed Date:* 10/24/23.

*Accession Number:* 20231024–5124.

*Comment Date:* 5 p.m. ET 11/14/23.

*Docket Numbers:* ER24–199–000.

*Applicants:* PJM Interconnection, L.L.C.

*Description:* Tariff Amendment: Notice of Cancellation of ISA, SA No. 6162; Queue No. AD1–083 to be effective 9/19/2023.

*Filed Date:* 10/25/23.

*Accession Number:* 20231025–5053.

*Comment Date:* 5 p.m. ET 11/15/23.

*Docket Numbers:* ER24–200–000.

*Applicants:* PJM Interconnection, L.L.C.

*Description:* 205(d) Rate Filing: Original ISA and CSA, SA Nos. 7110 and 7111; Queue No. AE2–271 to be effective 9/25/2023.

*Filed Date:* 10/25/23.

*Accession Number:* 20231025–5071.

*Comment Date:* 5 p.m. ET 11/15/23.

*Docket Numbers:* ER24–201–000.

*Applicants:* Karbone Energy LLC.

*Description:* Baseline eTariff Filing: Karbone Energy LLC MBR Application Filing to be effective 11/1/2023.

*Filed Date:* 10/25/23.

*Accession Number:* 20231025–5075.

*Comment Date:* 5 p.m. ET 11/15/23.

*Docket Numbers:* ER24–202–000.

*Applicants:* Pacific Gas and Electric Company.

*Description:* 205(d) Rate Filing: Amendment to Interim Black Start Agreement (RS 234) 2023 to be effective 12/25/2023.

*Filed Date:* 10/25/23.

*Accession Number:* 20231025–5082.

*Comment Date:* 5 p.m. ET 11/15/23.

*Docket Numbers:* ER24–203–000.

*Applicants:* Public Service Company of Colorado.

*Description:* 205(d) Rate Filing: 2023–10–25 Bronco Plains II Amnd 2—643—0.1.0 to be effective 10/26/2023.

*Filed Date:* 10/25/23.

*Accession Number:* 20231025–5095.

*Comment Date:* 5 p.m. ET 11/15/23.

*Docket Numbers:* ER24–204–000.

*Applicants:* Pennsylvania Electric Company, PJM Interconnection, L.L.C.

*Description:* 205(d) Rate Filing: Pennsylvania Electric Company submits tariff filing per 35.13(a)(2)(iii: Penelec Amends 1 CA & 6 ESCA, SA Nos. (5775 6341 6484 6497 6498 6499 6620) to be effective 12/31/9998.

*Filed Date:* 10/25/23.

*Accession Number:* 20231025–5108.

*Comment Date:* 5 p.m. ET 11/15/23.

*Docket Numbers:* ER24–205–000.

*Applicants:* Otter Tail Power Company.

*Description:* 205(d) Rate Filing: Revisions to Operating Services Agreement with CPEC, Service Agreement No. 54 to be effective 1/1/2024.

*Filed Date:* 10/25/23.

*Accession Number:* 20231025–5109.

*Comment Date:* 5 p.m. ET 11/15/23.

*Docket Numbers:* ER24–206–000.

*Applicants:* Midcontinent Independent System Operator, Inc., Ameren Illinois Company.

*Description:* 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 2023–10–25_SA 4179 Ameren Illinois-WVPA TIA to be effective 10/15/2023.

*Filed Date:* 10/25/23.

*Accession Number:* 20231025–5111.

*Comment Date:* 5 p.m. ET 11/15/23.

Take notice that the Commission received the following qualifying facility filings:.

*Docket Numbers:* QF24–73–000.

*Applicants:* ERY Retail Podium LLC.

*Description:* Form 556 of ERY Retail Podium LLC.

*Filed Date:* 10/25/23.

*Accession Number:* 20231025–5162.

*Comment Date:* 5 p.m. ET 11/15/23.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in

Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: October 25, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–23979 Filed 10–30–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. ER24–172–000]**

## FirstEnergy Pennsylvania Electric Company; Supplemental Notice That Initial Market-Based Rate Filing Includes Request For Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of FirstEnergy Pennsylvania Electric Company's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is November 14, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202)502–6595 or *OPP@ferc.gov*.

Dated: October 25, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–23980 Filed 10–30–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

## Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas and Oil Pipeline Rate and Refund Report filings:

**Filings Instituting Proceedings**

*Docket Numbers:* RP24–54–000.
*Applicants:* Panhandle Eastern Pipe Line Company, LP.
*Description:* 4(d) Rate Filing: Negotiated Rate Filing on 10–24–23 to be effective 3/1/2020.
*Filed Date:* 10/24/23.
*Accession Number:* 20231024–5072.
*Comment Date:* 5 p.m. ET 11/6/23.

*Docket Numbers:* RP24–55–000.
*Applicants:* Iroquois Gas Transmission System, L.P.
*Description:* 4(d) Rate Filing: 10.25.23 Negotiated Rates—Castleton Merchant Trading L.P. R–4010–06 to be effective 11/1/2023..
*Filed Date:* 10/25/23.
*Accession Number:* 20231025–5014.
*Comment Date:* 5 p.m. ET 11/6/23.

*Docket Numbers:* RP24–56–000.
*Applicants:* Midcontinent Express Pipeline LLC.
*Description:* 4(d) Rate Filing: Fuel Tracker Filing 10/25/23 to be effective 12/1/2023.
*Filed Date:* 10/25/23.
*Accession Number:* 20231025–5070.
*Comment Date:* 5 p.m. ET 11/6/23.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

**Filings in Existing Proceedings**

*Docket Numbers:* PR23–67–001.
*Applicants:* TPL SouthTex Transmission Company LP.
*Description:* 284.123(g) Rate Filing: SOC updates 2023—revised to be effective 8/31/2023.
*Filed Date:* 10/25/23.
*Accession Number:* 20231025–5105.
*Comment Date:* 5 p.m. ET 11/15/23.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For

other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202)502–6595 or *OPP@ferc.gov*.

Dated: October 25, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–23976 Filed 10–30–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Western Area Power Administration

### 2025 Resource Pool—Provo River Project, Proposed Power Allocation

**AGENCY:** Western Area Power Administration, DOE.

**ACTION:** Notice of Provo River Project 2025 Resource Pool proposed power allocation and request for comment.

**SUMMARY:** Western Area Power Administration (WAPA), a Federal Power Marketing Administration of the Department of Energy (DOE), announces its Provo River Project (PRP) 2025 Resource Pool proposed power allocation. WAPA developed the proposed power allocations under its Final 2025 Provo River Project Marketing Plan and Call for 2025 Resource Pool Applications (Marketing Plan), published in the **Federal Register** March 17, 2023. WAPA proposes not to allocate any power under the 2025 Resource Pool.

**DATES:** The comment period on this Notice of proposed power allocation begins today and ends at 4 p.m. MST, on January 2, 2024. WAPA will accept comments by email or delivered by common carrier such as U.S. mail. WAPA reserves the right to not consider comments received after the prescribed date and time.

A single public information and comment forum about the proposed 2025 Resource Pool power allocation will be held virtually on Wednesday, December 6, 2023, beginning at 2 p.m. MST and concluding when comments are complete, or no later than 5 p.m. MST. Information on the virtual meeting may be found on the Colorado River Storage Project (CRSP) website at: *www.wapa.gov/regions/CRSP/PowerMarketing/Pages/power-marketing.aspx.* WAPA will post virtual meeting access and dial in information at this link 14 days before the scheduled meeting. The public information and comment forum can be accessed 15 minutes in advance of the start time.

**ADDRESSES:** Submit written comments about the 2025 Resource Pool proposed power allocation to: Mr. Rodney Bailey, Senior Vice President and CRSP Manager, CRSP Management Center (MC), Western Area Power Administration, 1800 South Rio Grande Avenue, Montrose, CO 81401. Comments also may be emailed to *Provo-Marketing@wapa.gov* or faxed to 970–240–6282. All documentation developed or retained by WAPA for the purpose of developing the proposed power allocation is available for inspection and copying at the CRSP MC. Comments must be received by WAPA within the time required in the **DATES** section. Information about the Marketing Plan, which describes the resource pool allocation procedures, is available on CRSP's website at: *www.wapa.gov/regions/CRSP/PowerMarketing/Pages/power-marketing.aspx.*

**FOR FURTHER INFORMATION CONTACT:** Mr. Randolph Manion, CRSP Contracts and Energy Services Manager, *Manion@wapa.gov,* 720–201–3285, or fax at 970–240–6282.

**SUPPLEMENTARY INFORMATION:** The Marketing Plan provides the basis for marketing the PRP long-term hydroelectric resource beginning October 1, 2024, through September 30, 2054. The Marketing Plan established the opportunity for one resource pool of up to 3 percent of the net marketable resource under contract at the time of reallocation to be available for eligible new preference entities and existing contractors.

WAPA notified the public of the 2025 Resource Pool allocation procedures, including the Eligibility Criteria, and called for applications in the **Federal Register** on March 17, 2023 (88 FR 16433). WAPA accepted applications at WAPA's CRSP MC until 4:00 p.m. MDT, June 15, 2023.

WAPA seeks comments on its proposal not to allocate any power under the 2025 Resource Pool. After considering public comments received, WAPA will publish the final decision in the **Federal Register**.

#### I. 2025 Pool Resources

To ensure consistency with WAPA's wide-spread use policy when a project is remarketed, it was WAPA's intent to reallocate up to 3 percent of the net marketable PRP energy resource for eligible new preference entities. Furthermore, PRP contractors also were eligible to apply for a portion of the resource pool. Based on the most recent 5-year net marketable power average of 17,243,527 kilowatt-hour (kWh) annually, the estimated amount of PRP energy available for the 2025 Resource Pool as of October 1, 2024, through September 30, 2054, is estimated at 517,306 kWh annually. The 2025 Resource Pool would be created by reducing existing PRP contractors' allocation by up to 3 percent.

#### II. No Proposed 2025 Resource Pool Power Allocation

WAPA received one application for the 2025 Resource Pool. The single application came- from the Utah Associated Municipal Power Systems (UAMPS), a joint action agency, on behalf of three of its members: Payson, Utah, Springville City, Utah, and South Utah Valley Electric Service District, Utah. All are existing PRP contractors (sub-allottees). WAPA received no other applications, including any applications from eligible new applicants.

As discussed in the Marketing Plan, WAPA would make allocations for the 2025 Resource Pool at WAPA's discretion (88 FR 16438). One of the purposes of the 2025 Resource Pool is ''to ensure consistency with the wide-spread use policy to allow new applicants an opportunity to receive an allocation'' (88 FR 16435). In allocating the 2025 Resource Pool WAPA would ''take into consideration all existing federal hydropower allocations an applicant is currently receiving when determining each new 2025 Resource Pool application'' (88 FR 16437). After analyzing the application from UAMPS on behalf of the three sub-allottees and taking into consideration all existing federal hydropower allocations to all PRP contractors, WAPA determined no significant benefit of additional wide-spread use by continuing forward with the 2025 Resource Pool proposed power allocations. Therefore, WAPA proposes not to allocate any power under the 2025 Resource Pool. As part of the proposal, WAPA will not reduce PRP contractor allocations by 3 percent, and all current PRP allocations remaining unchanged from October 1, 2024, through September 30, 2054, as indicated in the table below.

| Joint action agency | Eligible entity | Percentage entitlement |
|---|---|---|
| | Heber City | 6.0 |
| UAMPS Total | | 24.0 |
| | Lehi | 2.7 |
| | Springville | 12.9 |
| | Payson | 4.8 |
| | South Utah Valley ESD | 3.6 |
| UMPA Total | | 70 |
| | Provo | 60.9 |
| | Salem | 1.4 |
| | Spanish Fork | 7.7 |

## III. Regulatory Procedure Requirements

*A. Review Under the National Environmental Policy Act (NEPA)*

WAPA has determined that this proposed action fits within the categorical exclusion listed in appendix B to subpart D of 10 CFR part 1021 (B4.1 contracts, policies, and marketing and allocation plans for electric power). Categorically excluded projects and activities do not require preparation of either an environmental impact statement or an environmental assessment. A copy of the categorical exclusion determination is available on the CRSP website at: *www.wapa.gov/regions/CRSP/environment/Pages/environment.aspx.*

*B. Determination Under Executive Order 12866*

WAPA has an exemption from centralized regulatory review under Executive Order 12866. Accordingly, no clearance of this notice by the Office of Management and Budget is required.

Signing Authority

This document of the Department of Energy was signed on October 13, 2023, by Tracey A. LeBeau, Administrator, Western Area Power Administration, pursuant to delegated authority from the Secretary of Energy. That delegation authority 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 this 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 October 26, 2023.

**Treena V. Garrett,**

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

[FR Doc. 2023–24002 Filed 10–30–23; 8:45 am]

**BILLING CODE 6450–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OAR–2016–0027; FRL—OMS–2024–10]**

## Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; On-Highway Motorcycle Certification and Compliance Program

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), ''On-Highway Motorcycle Certification and Compliance Program'' to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through October 31, 2023. Public comments were previously requested via the **Federal Register** on July 31, 2023, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

**DATES:** Comments may be submitted on or before November 30, 2023.

**ADDRESSES:** Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2016–0027, to EPA online using *www.regulations.gov* (our preferred method), by email to *a-and-r-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection 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:** Julian Davis, Environmental Protection Agency, 2000 Traverwood, Ann Arbor MI 48105; telephone number: (734) 214–4029; fax number: (734) 214–4869; email address: *davis.julian@epa.gov.*

**SUPPLEMENTARY INFORMATION:** This is a proposed extension of the ICR (EPA ICR Number 2535.03, OMB Control Number 2060–0710), which is currently approved through October 31, 2023. 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.

Public comments were previously requested via the **Federal Register** on July 31, 2023 during a 60-day comment period (88 FR 49460). This notice allows for an additional 30 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

*Abstract:* Under the Clean Air Act (42 U.S.C. 7521 *et seq.*) manufacturers and importers of on-highway motorcycles must have a certificate of conformity

issued by EPA covering any vehicle they intend to offer for sale in the United States. A certificate of conformity represents that the respective vehicle conforms to all applicable emissions requirements. In issuing a certificate of conformity, EPA reviews vehicle information and emissions test data to determine if the required testing has been performed and the required emissions levels have been demonstrated. After a certificate of conformity has been issued, the Agency may request additional information to verify that the product continues to meet its certified emissions standards throughout its useful life.

*Form Numbers:* Highway Motorcycle HC+$NO_x$ Average Exhaust Emissions Model Year Report (5900–339); Manufacturer Production Report for Engine/Equipment Manufacturers—Heavy—Duty, Nonroad, and Highway Motorcycles (5900–90); List of Emissions-Related Components (5900–653); Catalyst Information (5900–464); AECD Reporting Template (5900–654)

*Respondents/affected entities:* Entities potentially affected by this action are on-highway motorcycle manufacturers and importers.

*Respondent's obligation to respond:* Mandatory (40 CFR part 86).

*Estimated number of respondents:* 95 (total).

*Frequency of response:* Annual, unless otherwise specified under 40 CFR part 86, subpart E.

*Total estimated burden:* 5832 hours (per year). Burden is defined at 5 CFR 1320.03(b).

*Total estimated cost:* $1,124,869 (per year), which includes $31,998 annualized capital and $342,565 operation & maintenance costs.

*Changes in Estimates:* There is an increase of 379 hours in the total estimated respondent burden but a decrease of $63,760 in the total estimated respondent cost compared with the ICR currently approved by OMB. This increase in hours but decrease in total estimated cost is primarily due to the inclusion of electric motorcycle manufacturers who must certify their engine families but are not subject to exhaust or evaporative emissions testing requirements.

**Courtney Kerwin,**

*Director, Regulatory Support Division.*

[FR Doc. 2023–24107 Filed 10–30–23; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

**[OMB 3060–0967, OMB 3060–1053; FR ID 182049]**

### Information Collections Being Submitted for Review and Approval to Office of Management and Budget

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

**DATES:** Written comments and recommendations for the proposed information collection should be submitted on or before November 30, 2023.

**ADDRESSES:** Comments should be sent to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Your comment must be submitted into *www.reginfo.gov* per the above instructions for it to be considered. In addition to submitting in *www.reginfo.gov* also send a copy of your comment on the proposed information collection to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.* Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

**FOR FURTHER INFORMATION CONTACT:** For additional information or copies of the information collection, contact Cathy Williams at (202) 418–2918. To view a copy of this information collection request (ICR) submitted to OMB: (1) go to the web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

**SUPPLEMENTARY INFORMATION:** The Commission may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

*OMB Control No.:* 3060–0967.

*Title:* Section 79.2, Accessibility of Programming Providing Emergency Information, and Emergency Information; Section 79.105, Audio Description and Emergency Information Accessibility Requirements for All Apparatus; Section 79.106, Audio Description and Emergency Information Accessibility Requirements for Recording Devices.

*Form No.:* N/A.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Individuals or households; Business or other for-profit; Not-for-profit institutions; and State, Local, or Tribal Government.

*Number of Respondents and Responses:* 158 respondents; 261 responses.

*Estimated Time per Response:* 0.5 to 5 hours.

*Frequency of Response:* Annual and on occasion reporting requirements; Recordkeeping requirement; Third party disclosure requirement.

*Obligation to Respond:* Voluntary. The statutory authority for the collection is contained in the Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–260, 124 Stat. 2751, and sections 4(i), 4(j), 303, 330(b), 713, and 716 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303, 330(b), 613, and 617.

*Total Annual Burden:* 275 hours.

*Annual Cost Burden:* $15,300.

*Needs and Uses:* In 2000, the Commission adopted rules to require video programming distributors (VPDs) to make emergency information provided in the audio portion of the programming accessible to viewers who have hearing disabilities. Second Report and Order, MM Docket No. 95–176, FCC 00–136. Later that year, to ensure that televised emergency information is accessible to viewers who are blind or visually impaired, the Commission modified its rules to require VPDs to make emergency information audible when provided in the video portion of a regularly scheduled newscast or a newscast that interrupts regular programming, and to provide an aural tone when emergency information is provided visually during regular programming (*e.g.,* through screen crawls or scrolls). Report and Order, MM Docket No. 99–339, FCC 00–258.

In 2013, the Commission adopted rules related to accessible emergency information and apparatus requirements for emergency information and video description. Report and Order and Further Notice of Proposed Rulemaking, MB Docket Nos. 12–107 and 11–43, FCC 13–45. Specifically, the Commission's rules require that VPDs and video programming providers (VPPs) (including program owners) make emergency information accessible to individuals who are blind or visually impaired by using a secondary audio stream to convey televised emergency information aurally, when such information is conveyed visually during programming other than newscasts. The Commission's rules also require certain apparatus that receive, play back, or record video programming to make available audio description services and accessible emergency information.

In 2015, the Commission adopted rules to require the following: (1) apparatus manufacturers must provide a mechanism that is simple and easy to use for activating the secondary audio stream to access audible emergency information; and (2) starting no later than July 10, 2017, multichannel video programming distributors (MVPDs) must pass through the secondary audio stream containing audible emergency information when it is provided on linear programming accessed on second screen devices (*e.g.,* tablets, smartphones, laptops and similar devices) over their networks as part of their MVPD services. Second Report and Order and Second Further Notice of Proposed Rulemaking, MB Docket No. 12–107, FCC 15–56.

Finally, in 2020, the Commission adopted rules that included modernizing the term ''video description'' in the subject rules to the more widely understood ''audio description.'' Report and Order, MB Docket No. 11–43, FCC 20–155. These rules are codified at 47 CFR 79.2, 79.105, and 79.106.

**Information Collection Requirements**

(a) Complaints alleging violations of the emergency information rules.

Section 79.2(c) of the Commission's rules provides that a complaint alleging a violation of § 79.2 of its rules, may be transmitted to the Consumer and Governmental Affairs Bureau by any reasonable means, such as the Commission's online informal complaint filing system, letter, facsimile transmission, telephone (voice/TRS/TTY), internet email, audio-cassette recording, Braille, or some other method that would best accommodate the complainant's disability. After the Commission receives the informal complaint, the Commission notifies the VPD or VPP of the complaint, and the VPD or VPP has 30 days to reply.

(b) Complaints alleging violations of the apparatus emergency information and audio description requirements.

Complaints alleging violations of the rules containing apparatus emergency information and audio description requirements, 47 CFR 79.105–79.106, may be transmitted to the Consumer and Governmental Affairs Bureau by any reasonable means, such as the Commission's online informal complaint filing system, letter in writing or Braille, facsimile transmission, telephone (voice/TRS/TTY), email, or some other method that would best accommodate the complainant's disability. Given that the population intended to benefit from the rules adopted will be blind or visually impaired, if a complainant calls the Commission for assistance in preparing a complaint, Commission staff will document the complaint in writing for the consumer. The Commission will forward such complaints, as appropriate, to the named manufacturer or provider for its response, as well as to any other entity that Commission staff determines may be involved, and may request additional information from any relevant parties when, in the estimation of Commission staff, such information is needed to investigate the complaint or adjudicate potential violations of Commission rules.

(c) Requests for Commission determination of technical feasibility of emergency information and audio description apparatus requirements.

The requirements pertaining to apparatus designed to receive or play back video programming apply only to the extent they are ''technically feasible.'' Parties may raise technical infeasibility as a defense when faced with a complaint alleging a violation of the apparatus requirements or they may file a request for a ruling under section 1.41 of the Commission's rules as to technical infeasibility before manufacturing or importing the product.

(d) Requests for Commission determination of achievability of emergency information and audio description apparatus requirements.

The requirements pertaining to certain apparatus designed to receive, play back, or record video programming apply only to the extent they are achievable. Manufacturers of apparatus that use a picture screen of less than 13 inches in size and of recording devices may petition the Commission, pursuant to 47 CFR 1.41, for a full or partial exemption from the audio description and emergency information requirements before manufacturing or importing the apparatus. Alternatively, manufacturers may assert that a particular apparatus is fully or partially exempt as a response to a complaint, which the Commission may dismiss upon a finding that the requirements of this section are not achievable. A petition for exemption or a response to a complaint must be supported with sufficient evidence to demonstrate that compliance with the requirements is not achievable (meaning with reasonable effort or expense), and the Commission will consider four specific factors when making such a determination.

(e) Petitions for purpose-based waivers of emergency information and audio description apparatus requirements.

The Commission may waive emergency information and audio description apparatus requirements for any apparatus or class of apparatus that is (a) primarily designed for activities other than receiving or playing back video programming transmitted

simultaneously with sound, or (b) designed for multiple purposes, capable of receiving or playing video programming transmitted simultaneously with sound but whose essential utility is derived from other purposes. The Commission will address any requests for a purpose-based waiver on a case-by-case basis, and waivers will be available prospectively for manufacturers seeking certainty prior to the sale of a device.

(f) Submission and review of consumer eligibility to receive an accessible set-top box.

The Commission granted DIRECTV a waiver with respect to the set-top box models on which it is not able to implement audio functionality for emergency information, but conditioned such relief by requiring DIRECTV to provide, upon request and at no additional cost to customers who are blind or visually impaired, a set-top box model that is capable of providing aural emergency information. DIRECTV may require customers who are blind or visually impaired to submit reasonable documentation of disability to DIRECTV as a condition to providing the box at no additional cost.

*OMB Control Number:* 3060–1053.

*Title:* Misuse of Internet Protocol Captioned Telephone Service (IP CTS); Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket Nos. 13–24 and 03–123.

*Form Number:* N/A.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Business or other for-profit; Individuals or households.

*Number of Respondents and Responses:* 187,173 respondents; 673,980 responses.

*Estimated Time per Response:* 0.1 hours (6 minutes) to 40 hours.

*Frequency of Response:* Annual, every five years, monthly, and ongoing reporting requirements; Recordkeeping requirements; Third party disclosure requirements.

*Obligation to Respond:* Required to obtain or retain benefits. The statutory authority for the information collection requirements is found at Sec. 225 [47 U.S.C. 225] Telecommunications Services for Hearing-Impaired Individuals; The Americans with Disabilities Act of 1990, (ADA), Public Law 101–336, 104 Stat. 327, 366–69, enacted on July 26, 1990.

*Total Annual Burden:* 342,103 hours.

*Total Annual Cost:* $72,000.

*Needs and Uses:* On August 1, 2003, the Commission released Telecommunication Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CC Docket No. 98–67, Declaratory Ruling, 68 FR 55898, September 28, 2003, clarifying that one-line captioned telephone voice carry over (VCO) service is a type of telecommunications relay service (TRS) and that eligible providers of such services are eligible to recover their costs from the Interstate TRS Fund (Fund) in accordance with section 225 of the Communications Act.

On July 19, 2005, the Commission released Telecommunication Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CC Docket No. 98–67 and CG Docket No. 03–123, Order, 70 FR 54294, September 14, 2005, clarifying that two-line captioned telephone VCO service, like one-line captioned telephone VCO service, is a type of TRS eligible for compensation from the Fund.

On January 11, 2007, the Commission released Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket No. 03–123, Declaratory Ruling, 72 FR 6960, February 14, 2007, granting a request for clarification that Internet Protocol (IP) captioned telephone relay service (IP CTS) is a type of TRS eligible for compensation from the Fund.

On August 26, 2013, the Commission issued Misuse of Internet Protocol Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket Nos. 13–24 and 03–123, Report and Order, 78 FR 53684, August 30, 2013, to regulate practices relating to the marketing of IP CTS, impose certain requirements for the provision of this service, and mandate registration and certification of IP CTS users.

On June 8, 2018, the Commission issued Misuse of Internet Protocol Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket Nos. 13–24 and 03–123, Report and Order and Declaratory Ruling, 83 FR 30082, June 27, 2018 (2018 IP CTS Modernization Order), to facilitate the Commission's efforts to reduce waste, fraud, and abuse and improve its ability to efficiently manage the IP CTS program through regulating practices related to the marketing of IP CTS, generally prohibiting the provision of IP CTS to consumers who do not genuinely need the service, permitting the provision of IP CTS in emergency shelters, and approving the use of automatic speech recognition to generate captions without the assistance of a communications assistant.

On February 15, 2019, the Commission issued Misuse of Internet Protocol Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket Nos. 13–24 and 03–123, Report and Order, and Order, 84 FR 8457, March 8, 2019 (2019 IP CTS Program Management Order), requiring the submission of IP CTS user registration information to the telecommunications relay service (TRS) User Registration Database (Database) so that the Database administrator can verify IP CTS users to reduce the risk of waste, fraud, and abuse in the IP CTS program.

On June 30, 2022, the Commission issued Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Structure and Practices of the Video Relay Service Program; Misuse of Internet Protocol Captioned Telephone Service, CG Docket Nos. 03–123, 10–51, and 13–24, Report and Order, published at 87 FR 57645, September 21, 2022 (Registration Grace Period Order), allowing IP CTS and Video Relay Service (VRS) providers to provide compensable service to a new user for up to two weeks after submitting the user's information to the Database if the user's identity is verified within that period, in order to offer more efficient service to IP CTS and VRS users without risk of waste, fraud, and abuse to the Fund.

On September 30, 2022, the Commission released the Accessible Carceral Communications Order, Rates for Interstate Inmate Calling Services, WC Docket No.12–375, Fourth Report and Order, published at 87 FR 75496, December, 9, 2022, (Accessible Carceral Communications Order), requiring inmate calling services providers to provide incarcerated TRS-eligible users the ability to access any relay service eligible for TRS Fund support. To facilitate the registration of IP CTS users in carceral facilities, the Commission amended the registration and verification requirements for individual users. The programmatic changes in information collection burdens that apply to VRS and IP Relay due to the Accessible Carceral Communications Order are addressed separately in modifications to information collection No. 3060–1089.

This notice and request for comments pertains to the programmatic changes in

information collection burdens that apply to IP CTS due to the Accessible Carceral Communications Order.

Federal Communications Commission.

**Katura Jackson,**

*Federal Register Liaison.*

[FR Doc. 2023–23935 Filed 10–30–23; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL TRADE COMMISSION

### Senior Executive Service Performance Review Board

**AGENCY:** Federal Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given of the appointment of members to the FTC Performance Review Board.

**FOR FURTHER INFORMATION CONTACT:** Diane Campbell, Chief Human Capital Officer, 600 Pennsylvania Avenue NW, Washington, DC 20580, (202) 436–0152.

**SUPPLEMENTARY INFORMATION:** Publication of the Performance Review Board (PRB) membership is required by 5 U.S.C. 4314 (c) (4). The PRB reviews and evaluates the initial appraisal of a senior executive's performance by the supervisor, and makes recommendations regarding performance ratings, performance awards, and pay-for-performance pay adjustments to the Chair.

The following individuals have been designated to serve on the Commission's Performance Review Board:

Dianne Campbell, Chief Human Capital Officer

Anisha Dasgupta, General Counsel

Monique Fortenberry, Director, Office of Workplace Inclusivity & Opportunity

Tara Koslov, Deputy Director, Bureau of Competition

Alison Oldale, Deputy Director, Bureau of Economics

David Robbins, Executive Director, PRB Chair

Monica Vaca, Deputy Director, Bureau of Consumer Protection

By direction of the Commission.

**April J. Tabor,**

*Secretary.*

[FR Doc. 2023–23993 Filed 10–30–23; 8:45 am]

**BILLING CODE 6750–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[Docket No. CDC–2023–0027, NIOSH–350]**

### World Trade Center Health Program; Youth Research Cohort; Request for Information

**AGENCY:** Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

**ACTION:** Request for information; reopening of comment period.

**SUMMARY:** CDC's National Institute for Occupational Safety and Health (NIOSH) is extending the public comment period for a request for information (RFI) that was initially published April 26, 2023 and extended on August 18, 2023, regarding a World Trade Center (WTC) Health Program research cohort for future studies on health, social, and educational impacts among persons exposed to the September 11, 2001, terrorist attacks who were aged 21 years or younger at the time of their exposures. With this notice, the comment period is extended an additional 90 days to allow interested parties additional time to respond.

**DATES:** Comments must be received by January 29, 2024.

**ADDRESSES:** Comments may be submitted through either of the following two methods:

- *Federal eRulemaking Portal: http://www.regulations.gov* (follow the instructions for submitting comments), or
- *By Mail:* NIOSH Docket Office, Robert A. Taft Laboratories, MS C–34, 1090 Tusculum Avenue, Cincinnati, Ohio 45226–1998.

*Instructions:* All written submissions received in response to this notice must include the agency name (Centers for Disease Control and Prevention, HHS) and docket number (CDC–2023–0027, NIOSH–350) for this action. All relevant comments, including any personal information provided, will be posted without change to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Rachel Weiss, Program Analyst, 1090 Tusculum Ave., MS C–46, Cincinnati, OH 45226; Telephone (404) 498–2500 (this is not a toll-free number); Email *NIOSHregs@cdc.gov.*

**SUPPLEMENTARY INFORMATION:** The WTC Health Program was established by title I of the James Zadroga 9/11 Health and Compensation Act of 2010, Public Law 111–347, as amended by Public Law 114–113, Public Law 116–59, and Public Law 117–328, adding title XXXIII to the Public Health Service (PHS) Act (codified at 42 U.S.C. 300mm–300mm–62). All references to the Administrator in this document mean the Director of the NIOSH within CDC, or his or her designee.

The WTC Health Program conducts research among its members receiving monitoring or treatment in the Program and in sampled populations outside the New York City disaster area (NYCDA), as defined in section 3306(7) of the PHS Act, in Manhattan as far north as 14th Street and in Brooklyn.[1]

In December 2022, the Consolidated Appropriations Act, 2023 [2] amended section 3341 of the PHS Act to direct the Administrator, in consultation with the Secretary of Education, to establish a new research cohort. The cohort must be of sufficient size to conduct future research studies on the health and educational impacts of ''exposure to airborne toxins, or any other hazard or adverse condition, resulting from the September 11, 2001, terrorist attacks, including on the population of individuals who were 21 years of age or younger at the time of exposure, including such individuals who are screening-eligible WTC survivors or certified-eligible WTC survivors.'' [3] The new WTC Health Program youth research cohort is referred to as ''WTC Youth.'' In accordance with section 3341, the cohort of WTC Youth must:

- Be of sufficient size to conduct future research studies on the health and educational impacts of 9/11 exposures;
- Include in this group sufficient representation of individuals who were 21 years of age or younger at the time of exposure; and
- Include in this group individuals who are screening-eligible WTC survivors or certified-eligible WTC survivors.

The cohort may also include individuals who were 21 years of age or younger on September 11, 2001, who were located outside the NYCDA and in Manhattan not further north than 14th Street; or anywhere within the borough of Brooklyn. Additionally, the cohort may include age-appropriate control populations as needed for research purposes.

[1] 42 U.S.C. 300mm–51.

[2] Public Law 117–328 (Dec. 29, 2022).

[3] WTC survivors include individuals who lived, worked, went to school, or attended child or adult day care in the NYCDA on September 11, 2001, or in the following days, weeks, or months and those otherwise meeting the eligibility criteria in 42 CFR 88.7 or 88.8.

In response to these new requirements, the Administrator, following consultation with the Secretary of Education, will engage the public for input on a multi-phased approach for establishing the youth cohort. At this time, the Administrator seeks initial comments on the following approach:

1. *Phase I:* Community Engagement: Gather sufficient information from educators, scientists, and community members on options for establishing a youth cohort that will efficiently support future research.

2. *Phase II:* Options Development: Use the information gathered in Phase I to develop a set of options for moving forward with establishing the youth cohort.

3. *Phase III:* Options Ranking: Engage community in ranking the options developed in Phase II.

4. *Phase IV:* Option Selection and Implementation: Use the information from Phase III to select the preferred option(s) for establishing the youth cohort.

**Request for Information**

NIOSH previously published this request for information in the **Federal Register** (88 FR 25406) on April 26, 2023 and again on August 18, 2023 (88 FR 56630). With this request for information, NIOSH is further extending the public comment period and is again soliciting information from any interested party, including educators, researchers, clinicians, community members, WTC Health Program members, treatment providers, and government agencies at all levels (Federal, State, Territorial, local, and Tribal), regarding the proposed approach to establishing the WTC Health Program youth cohort.

In particular, NIOSH seeks comments on the following items regarding the general approach to assembling the cohort, as described above:

1. Whether the four-phased approach for establishing the youth cohort is comprehensive and adequately incorporates community involvement in selecting a preferred approach for establishing the youth cohort.

2. Any potential partnerships for future actions for establishing the cohort of WTC Youth.

NIOSH also seeks information on the following scientific parameters, best practices, and approaches for assembling a research cohort that is best suited for future research of WTC Youth:

3. Ideas regarding outreach, recruitment, retention, community involvement, and project oversight. NIOSH is interested in descriptions of any anticipated barriers to the project and propose potential risk mitigation strategies.

4. Health conditions and potential social and educational impacts (*i.e.,* adverse effects of interest) that may be priorities for future research on WTC Youth. In light of these adverse effects to be researched, NIOSH is interested in descriptions of the cohort characteristics believed necessary to support future research, including recommendations on data collection requirements, such as describing methods for and frequency of contact with prospective cohort members.

5. The recruitment and retention of appropriate control group(s) for future observational studies of WTC Youth. For example, recruitment methods may differ between exposed and control groups given expected differences in participation rates. These differences may lead to a selection bias. A selection bias may also arise given the long period of time between exposure and recruitment (*i.e.,* a survivorship bias). NIOSH is interested in comments regarding selection of controls using methods that reduce the potential for bias in future research.

Commenters are encouraged to offer information and insights into the specific topics described above, or any other aspect of this activity.

CDC is extending the comment period for this RFI again to allow more time for the public to comment. Accordingly, the comment period is reopened through January 29, 2024.

**Disclaimer**

This notice is intended for planning purposes; it does not constitute a formal announcement for comprehensive applications. In accordance with Federal Acquisition Regulation 48 CFR 15.201(e), responses to this notice are not offers and cannot be accepted by the Government to form a binding award. NIOSH will not provide reimbursement for costs incurred in commenting on this notice.

NIOSH will not respond to individual public comments or publish publicly a compendium of responses. An informational submission in response to this notice does not create any commitment by or on behalf of CDC or HHS to develop or pursue any program or ideas discussed.

**John J. Howard,**

*Administrator, World Trade Center Health Program and Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, Department of Health and Human Services.*

[FR Doc. 2023–23954 Filed 10–30–23; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifier: CMS–10652]**

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**DATES:** Comments must be received by January 2, 2024.

**ADDRESSES:** When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options''

to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number: ____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

**FOR FURTHER INFORMATION CONTACT:** William N. Parham at (410) 786–4669.

**SUPPLEMENTARY INFORMATION:**

**Contents**

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10652 Virtual Groups for Merit-Based Incentive Payment System (MIPS)

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

**Information Collection**

1. *Type of Information Collection Request:* Extension of currently approved Information Collection; *Title of Information Collection:* Virtual Groups for Merit-Based Incentive Payment System (MIPS); *Use:* Section 1848(q)(5)(I)(ii) of the 2018 Quality Payment Program final rule establishes that a process must be in place to allow an individual MIPS eligible clinician or group consisting of not more than 10 MIPS eligible clinicians to elect, with respect to a performance period for a year, to be in a virtual group with at least one other such individual MIPS eligible clinician or group. Section 1848(q)(5)(I)(iii) of the Act establishes the following requirements that pertain to an election process: (1) individual eligible clinicians and groups forming virtual groups are required to make the election prior to the start of the applicable performance period under MIPS and cannot change their election during the performance period; (2) an individual eligible clinician or group may elect to be in no more than one virtual group for a performance period and in the case of the group electing to be in a virtual group for the performance period, the election applies to all eligible clinicians in the group; (3) a virtual group is a combination of TINs; (4) formal written agreements are required among the eligible clinicians (includes individual eligible clinicians and eligible clinicians within the groups) electing to be a virtual group; and (5) the Secretary has the authority to include other requirements determined appropriate.

Section 1848(q)(5)(I)(i) of the Act also provides that MIPS eligible clinicians electing to be a virtual group must: (1) have their performance assessed for the quality and cost performance categories in a manner that applies the combined performance of all the MIPS eligible clinicians in the virtual group to each MIPS eligible clinician in the virtual group for the applicable performance period; and (2) be scored for the quality and cost performance categories based on such assessment. *Form Number:* CMS–10652 (OMB control number: 0938–1343); Frequency: Yearly; *Affected Public:* Individuals and Households, Private Sector, Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 16; *Total Annual Responses:* 16; *Total Annual Hours:* 160 (For policy questions regarding this collection contact Renee O'Neill at 410–786–8821.)

Dated: October 26, 2023.

**William N. Parham, III,**

*Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.*

[FR Doc. 2023–24012 Filed 10–30–23; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Indian Health Service

### Privacy Act of 1974; System of Records

**AGENCY:** Indian Health Service, Department of Health and Human Services.

**ACTION:** Notice of a new system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974, as amended, the Department of Health and Human Services (HHS) is establishing a new system of records maintained by the Indian Health Service (IHS) Office of Clinical and Preventive Services (OCPS), System Number 09–17–0006, ''Community Health Aide Program (CHAP) Records.'' The records in the new system of records are about individual healthcare providers who have applied for Federal certification under the Community Health Aide Program (CHAP) created under the Indian Health Care Improvement Act, as amended; and individuals serving as CHAP Certification Board members who review and evaluate the certification/recertification applications for completeness and verify that the candidates meet the minimum standards for certification. The CHAP Certification Board will provide the respective Area Director with its recommendation to either certify, recertify, or deny certification after reviewing the certification applications.

**DATES:** In accordance with 5 U.S.C. 552a(e)(4) and (11), this notice is applicable October 31, 2023, subject to a 30-day comment period on the routine uses described below. Please submit any comments by November 30, 2023.

**ADDRESSES:** Written comments may be submitted by mail or email to: Dr. Lori Christensen, Chief Medical Officer, IHS, 5600 Fishers Lane—Mail Stop: 08E37A, Rockville, MD 20857, or *IHSCHAP@ihs.gov.* Comments are reviewable at same location. To review comments in person, please contact the Office of the Chief Medical Officer at 240–701–3890.

**FOR FURTHER INFORMATION CONTACT:** General questions about this system of records may be submitted to Heather McClane, IHS Privacy Act Officer, ATTN: National Community Health Aide Program, 5600 Fishers Lane—Mail Stop: 09E70, Rockville, MD 20857, or by email at *Heather.McClane@ihs.gov,* or by phone at 240–479–8521. General questions may also be submitted to the Community Health Aide Program, Office of Clinical and Preventive

Services, at *IHSCHAP@ihs.gov.* Additional information is available at *www.ihs.gov/chap.*

**SUPPLEMENTARY INFORMATION:** Consistent with 25 U.S.C. 1616*l,* the records system will be referred to as the Community Health Aide Program (CHAP) Records. The purpose of the new system of records is to preserve and process records related to Federal certification of health providers under the CHAP. CHAP providers include the disciplines and provider types approved by the National CHAP Certification Board.

The records include: (1) applications for CHAP certification submitted by individual providers (those seeking certification at any level—*e.g.,* levels I, II, III, IV, Practitioner, and Therapist, those seeking recertification, those previously certified seeking an additional or different certification, those denied Federal certification, and those with revoked Federal certification); and (2) the qualifications and recommendations of CHAP certification board members who review certification applications and provide recommendations to Area Directors for the certification, recertification, or denial of certification. The Area Certification Board may also provide review requests for decertifications and make recommendations to Area Directors to decertify individual providers.

A Tribe or Tribal Organization supporting a CHAP Certification Board under an Indian Self-Determination and Education Assistance Act (ISDEAA) agreement may maintain a copy of a record, but the Tribe's copy would be a Tribal record, not a Federal agency record that is subject to the Privacy Act, Federal Records Act, or the Freedom of Information Act, nor would it constitute the official Federal record.

**Roselyn Tso,**

*Director, Indian Health Service.*

**SYSTEM NAME AND NUMBER:**

Community Health Aide Program (CHAP) Records, 09–17–0006.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

The addresses of the agency components responsible for the system of records are found in the Appendix.

**SYSTEM MANAGER(S):**

The official listed in the Appendix for the Area Office that processed the particular certification application involving the subject individual as an applicant, or with respect to a board member from that Area's Certification Board, is the relevant System Manager who the subject individual must contact to make a Privacy Act request.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

The Indian Health Care Improvement Act, as amended (25 U.S.C. 1601 *et seq.*), and specifically 25 U.S.C. 1616*l.*

**PURPOSE(S) OF THE SYSTEM:**

The records in this system of records will be used to implement the CHAP under 25 U.S.C. 1616*l,* including for these principal purposes:

1. Purposes for which records about individual providers will be used:

- To process applications for certification that are submitted by prospective, current, and former CHAP providers seeking initial or renewal Federal certification to provide community health care, behavioral health, oral health services, or other services authorized by the IHS National CHAP Certification Board to be provided in a Federal or Tribal facility operating a CHAP.
- To document the dates and certification status of CHAP providers, including changes/modifications in categories and levels of certification. An example of a category modification would be a Dental Health Aide Therapist adding a level I Behavioral Health Aide certification. An example of a change in level would be a level IV Community Health Aide becoming a Community Health Aide Practitioner.
- To secure reciprocity for CHAP providers across jurisdictions and IHS-defined geographical areas (often referred to as ''Areas'') by enabling the National Certification Board, in its oversight role, to ensure each Area's education/training requirements, standards and procedures meet or exceed the National standards.
- To ensure that Federal and Tribal healthcare facilities seeking to hire current, prospective, and former Federally certified CHAP providers have access to the certification status of providers certified under 25 U.S.C. 1616*l.*
- To ensure that CHAP providers are qualified, competent, and capable of delivering quality healthcare consistent with the National CHAP Program Standards and Policies at large, and that the CHAP providers' scopes of practice are in line with their competency, their training, and the ability of the facility to provide adequate support, equipment, services, and staff.
- To inform the staff of health care facilities seeking to employee CHAP providers for the purpose of assessing the providers' professional competence, character, and fitness.
- To inform State health professional boards that have oversight of CHAP providers of information they need to carry out their legally assigned functions.

2. Purposes for which records about CHAP Certification Board members will be used:

- For board staffing and other administrative purposes and to ensure program integrity (*i.e.,* to recruit and select individuals who are qualified to render certification decisions that maintain appropriate CHAP levels of care).
- To document each member's membership effective dates and separations, qualifications, and decisions related to Area Certification Board recommendations to Area Directors.

IHS may also use the records for secondary purposes, such as program planning and evaluation, individual evaluation, continuous quality improvement, compiling of numbers and types of providers certified each cycle, and other purposes consistent with the authorities in 25 U.S.C. 1616*l.*

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

The records will be about these categories of individuals:

- Prospective, current, and former CHAP providers working or seeking to work in Tribal and Federal healthcare facilities and those denied certification, described in more detail as follows:
  - *Prospective*—Those who have sought Federal certification and are awaiting a decision.
  - *Current*—Those who have sought Federal certification and have been recommended and issued Federal certification for any level of provider approved by the National CHAP Certification Board. This includes those who may have advanced, regressed, or changed their provider type category.
  - *Former*—Those who sought Federal certification and were recommended and issued Federal certification for any level of recognized CHAP providers but whose certification is not current.
  - *Individuals Denied Certification or Certification Revoked*—Those who applied for certification but whose application for certification was denied or had certifications revoked.
- Individuals serving as CHAP Certification Board Members who review applications for certification/recertification and requests for decertifications to make recommendations to the respective Area Director.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

The categories of records will include:

1. Application for CHAP certification, which contains:

a. the legal name, other names/alias, and date of birth of the provider/applicant;

b. provider/applicant contact information such as mailing and email addresses, phone number, and communication preferences;

c. the names and dates of training and education programs attended, skills verification with address and contact phone number, including such programs attended as required for renewal or continuation of certification;

d. applicable employment information such as employer, employer address, work phone, work email, fax, and states where services are provided or intend to be provided; and

e. application status (*e.g.* complete, incomplete, provisional, approved, denied).

2. Additional records may include:

a. transcripts and training logs from educational/training programs;

b. documentation of previous certifications held, revoked, or denied;

c. information regarding liability insurance coverage;

d. professional performance and achievement records, such as, continuing education certificates, performance awards, adverse or disciplinary actions, and evaluations and approvals completed by employers and supervisors; and employer-validated complaints against providers;

e. records relating to the processing of and decision on applications for Federal certification and recertification or decertification; and for other relevant Federal certification and recertification or decertification actions; and

f. records related to the qualifications of Certification Board Members, including letters of nomination, letters from supervisors indicating support of or opposition to nominations, Curriculum Vitae, professional contact information, and dates of membership.

**RECORD SOURCE CATEGORIES:**

Information in the records may be provided by these sources:

- subject individual;
- CHAP Certification Boards;
- educational institutions attended;
- continuing education entities;
- internship, preceptorship, and practicum sites;
- human resource departments;
- professional associations;
- State and Tribal licensing boards;
- financial institutions from which these applicants have obtained educational loans;
- HHS contractors/subcontractors;
- PHS Commissioned Personnel Operations Division and U.S. Office of Personnel Operations Division and U.S. Office of Personnel Management personnel records;
- any HHS OPDIV or other Federal agencies maintaining records relevant to the applicant's qualifications, such as an agency where the individual worked as an employee or contractor, or the Department of the Treasury which maintains records of individuals disqualified to receive Federal payments;
- State or local governments;
- professional boards such as the Federation of State Medical Boards or similar non-government entities; and
- third parties providing reviews concerning the subject individual.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:**

In addition to the disclosures authorized directly in the Privacy Act at 5 U.S.C. 552a(b)(1), (b)(2), and (b)(4) through (b)(11), these routine uses specify circumstances under which the agency may disclose information from this system of records to a non-HHS officer or employee without the consent of the subject individual. IHS will prohibit redisclosures, or may permit only certain redisclosures, as required or authorized by law. Each proposed disclosure permitted directly in the Privacy Act or under these routine uses will also be evaluated to ensure that the disclosure is legally permissible under any other applicable laws.

1. *Disclosures for Evaluation of Healthcare Delivery Services.* Records about applicants and certified providers may be disclosed to organizations authorized to conduct evaluation studies concerning the delivery of health care services by the IHS and HHS (*e.g.,* Joint Commission on the Accreditation of Healthcare Organizations).

2. *Disclosures to CHAP Certification Boards and Contractors to perform duties.* Certification records about CHAP providers may be disclosed to CHAP Certification Boards authorized by IHS, consistent with 25 U.S.C 1616*l.* This includes disclosures to the non-Federal members of a CHAP Certification Board and to employees of a Tribe or Tribal organization who have a need to have access to the information in performance of their duties or activities for such boards and organizations operating under an Indian Self-Determination and Education Assistance Act (ISDEAA) agreement.

3. *Disclosures for certification software vendors/contractors.* Records may be disclosed to a certification software vendor performing or working on a contract for IHS and who has a need to have access to the information in the performance of its duties or activities for IHS in accordance with law and with the contract.

4. *Disclosures for Evaluation or Verification of Application Data.* IHS may disclose biographic data and information supplied by an applicant to (a) contacts listed on the applications and associated forms for the purpose of evaluating the applicant's professional qualifications, personal characteristics, experience, and suitability, (b) a Federal, state, or local government health profession licensing or certification board, or (c) a health care oversight or professional monitoring organization or program (*e.g.,* accreditation surveyors, or the National Practitioner Data Bank) for the purpose of verifying that a clinician's claimed background and employment data are valid and all claimed credentials are current and in good standing.

5. *Disclosures for Reimbursement of Care Purposes.* Records about a provider's certification status may be disclosed to Federal, state, private and third-party payers that need to know the provider's certification status to issue reimbursements for care rendered by the provider.

6. *Disclosures to OPM.* Records about providers may be disclosed to the Office of Personnel Management (OPM) if the records are relevant to the individual's application for or maintenance of Civil Service appointments.

7. *Disclosures for human resource matters.* Records pertaining to IHS certification decisions may be disclosed to Federal, state, local, or Tribal entities when necessary for them to address human resources matters arising from IHS certification decisions.

8. *Disclosures for Compliance Monitoring.* Records about a current provider or board member may be disclosed to relevant governmental agencies for the purpose of monitoring the individual's compliance with applicable laws and standards, on an ongoing basis, to ensure that the individual remains qualified for Federal certification or to serve as a CHAP Certification Board member.

9. *Disclosure to Department of Justice or in Proceedings.* HHS may disclose information from this system of records to the Department of Justice (DOJ), or to a court or other tribunal, when any of the following is a party to litigation or similar proceedings or has an interest in such proceedings, and HHS determines that the proceedings are likely to affect HHS or any of its components: (a) HHS, or any component thereof; (b) any HHS employee in their official capacity; (c)

any HHS employee in their individual capacity where the DOJ (or HHS, where it is authorized to do so) has agreed to represent the employee; or (d) the United States or any agency thereof. In order to disclose information in these circumstances, HHS must determine that the use of such records by the DOJ, the court or other tribunal is relevant and necessary to the proceedings and would help in the effective representation of the governmental party or interest.

10. *Disclosures to Congressional Office.* Records may be disclosed to a congressional office from the record of an individual in response to a verified inquiry from the congressional office made at the written request of that individual.

11. *Reporting Violations or Potential Violations of Law.* In the event that a record in this system of records on its face, or in conjunction with other records, indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule, or order issued pursuant thereto, the relevant records in this system of records may be referred to the appropriate agency, whether Federal, state, local, or Tribal, charged with enforcing or implementing the statute or rule, regulation, or order issued pursuant thereto.

12. *Disclosure in the Event of a Security Breach Experienced by HHS.* Records may be disclosed to appropriate agencies, entities, and persons when: (1) HHS suspects or has confirmed that there has been a breach of the system of records; (2) HHS has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, HHS (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 HHS efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

13. *Disclosure to Assist another Agency Experiencing a Security Breach.* Records may be disclosed to another Federal agency or Federal entity, when HHS 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.

14. *Medical Quality Assurance Disclosures.* Records about providers and board members may be disclosed for any purpose authorized by 25 U.S.C. 1675(d) or (e)(2). To the extent the records are protected by 25 U.S.C. 1675, the records may only be disclosed in accordance with the exceptions in 25 U.S.C. 1675(d) and (e)(2).

15. *Disclosures of Certification Status.* Records about current or former CHAP providers, individuals denied certification, or individuals seeking certification may be disclosed to Federal, state, local and Tribal governmental entities with authority to maintain records concerning the issuance, retention, or revocation of Federal certifications necessary to practice a health professional occupation or specialty.

16. *Disclosures to the public.* Information about a provider's certification status may be made public for awareness of which providers are currently in good standing as CHAP providers, or to share how many providers are certified to help determine the need for more providers or training facilities based on clinical need, and would be limited to information that would be required to be disclosed to the public under the Freedom of Information Act.

**POLICIES AND PRACTICES FOR STORAGE OF RECORDS:**

The records will be stored in file folders and computer-based electronic files on the secure IHS network indexed by name and record number in accordance with current IHS policy.

**POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:**

The records will be retrieved by the subject individual's name or certification number (for current and former CHAP providers) and any other identifying numbers necessary to ensure that the records retrieved are about the intended individual.

**POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:**

Upon approval of a disposition schedule by the National Archives and Records Administration (NARA), the records will be disposed of when eligible for destruction under the schedule, if the records are no longer needed for administrative, audit, legal, or operational purposes. While the records are unscheduled, they must be retained indefinitely. Note that CHAP is an expansion of the use of CHAP providers throughout the IHS health system, and only the Alaska CHAP maintains historical and archived records.

**ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:**

The records will be protected from unauthorized access by the following safeguards. All safeguards will conform to applicable laws, rules, and policies, including the HHS Information Security and Privacy Program, *https://www.hhs.gov/ocio/securityprivacy/,* the E-Government Act of 2002, as amended (44 U.S.C. ch. 35), pertinent National Institutes of Standards and Technology (NIST) publications, and OMB Circular A–130, Managing Information as a Strategic Resource.

*Authorized Users:* Access will be limited to authorized users who (1) have a need for such records in the performance of their official duties and (2) are advised of the confidentiality of the records and the civil and criminal penalties for misuse. Particularly as the IHS transitions to an electronic records system, authorized users may include individuals and entities outside of HHS who are given certain access for purposes of facilitating specific disclosures authorized under the Privacy Act, including the routine uses described above. For example, authorized users may include: National Certification Board members, Area Certification Board members, IHS Area Offices, Office of Clinical and Preventive Services CHAP staff, clinical supervision staff and additional IHS or Tribal staff with oversight responsibilities related to CHAP providers within an Indian Health Program, as defined in 25 U.S.C. 1603(12).

At each location where records in this system will be maintained, a list of users or categories of users having an official need-to-know has been developed and is maintained.

*Physical Safeguards:* Paper records will be kept in locked metal filing cabinets or in locked desk drawers in secured rooms at all times when not actually in use during working hours and at all times during non-working hours. Record storage areas, including file cabinets and desks, are not left unattended or unlocked during office hours, including lunch hours.

*Administrative Safeguards:* Only persons who have an official need-to-know will be entrusted with records from this system of records, and they will be instructed to safeguard the confidentiality of the records and to destroy all copies or to return such records when the need to know has ended. Instructions will include the

statutory penalties for noncompliance. Proper charge-out procedures will be followed for the removal of records from the area in which they are maintained. Authorized users will receive privacy and security training before record access is granted and annually thereafter. When copying records for authorized purposes, employees are instructed to ensure that any imperfect pages are not left in the reproduction room where they can be read but are destroyed or obliterated. Area Privacy Coordinators have routine access for monitoring compliance with privacy regulations.

*Technical Safeguards:* Records in the electronic system will be secured by encryption and intrusion detection systems. Access to electronic records will be controlled by user name and password.

**RECORD ACCESS PROCEDURES:**

To request access to records about you in this system of records, submit a written access request addressed to the relevant System Manager (see the Appendix and the ''System Manager(s)'' section of this SORN). The request must:

- Reasonably describe the records sought.
- Include (as applicable) the name of the IHS Service Unit relevant to your certification application, or the name of the Area Certification Board on which you served, and pertinent dates.
- Include (for contact purposes and identity verification purposes) your full name, current address, telephone number and/or email address, date and place of birth, signature, evidence of other names used (if seeking records retrieved by a name other than your current name), and, if needed by the agency, sufficient particulars contained in the records (such as, record number or other identifying numbers) to enable the agency to locate the records and distinguish between records on subject individuals with the same name.

In addition, to verify your identity, your signature on the request must be notarized or the request must include, above your signature, your written certification that you are the individual who you claim to be and that you understand that the knowing and willful request for or acquisition of a record pertaining to an individual under false pretenses is a criminal offense subject to a fine of up to $5,000.

In your written request, you may request that copies of the records be sent to you or include your signed, written consent directing that the records be sent to a third party, or you may request an appointment to review the records in person (including with a person of your choosing, if you provide written authorization for agency personnel to discuss the records in that person's presence). If you make an appointment to review the records in person, you must bring at least one piece of tangible identification, such as a driver's license or passport, to the appointment. You may also request an accounting of disclosures that have been made of records about you, if any. Requests by telephone will not be accepted.

To the extent the records are Medical Quality Assurance records protected by 25 U.S.C. 1675, the records may be disclosed only in accordance with the exceptions in 25 U.S.C. 1675(d) and (e)(2), because the Privacy Act right of access provisions are superseded by the confidentiality provisions protecting Medical Quality Assurance Records. Accordingly, Medical Quality Assurance Records will only be released pursuant to the Privacy Act when the Agency has decided to release the records in accordance with 25 U.S.C. 1675(d) or (e)(2).

**CONTESTING RECORD PROCEDURES:**

To request correction of a record about you in this system of records, submit a written request to the relevant System Manager (see the Appendix and the ''System Manager(s)'' section of this SORN). The request must contain the same information required for an access request and include verification of your identity in the same manner required for an access request. In addition, the request must reasonably identify the record, specify the information contested, and state the corrective action sought and the reasons for requesting the correction. The request should include supporting information to show how the record is factually inaccurate, incomplete, untimely, or irrelevant. The right to contest records is limited to information that is factually inaccurate, incomplete, untimely (obsolete), or irrelevant.

**NOTIFICATION PROCEDURES:**

To find out if the system of records contains a record about you, submit a written notification request to the relevant System Manager (see the Appendix and the ''System Manager(s)''section of this SORN). The request must identify this system of records, contain the same information required for an access request, and include verification of identity in the same manner required for an access request.

**EXEMPTIONS PROMULGATED FOR THE SYSTEM:**

None.

**HISTORY:**

None.

**Appendix:**

Chief Medical Officer, Office of the Director, HQ, 5600 Fishers Lane, MS 08E37A, Rockville, MD 20857, Phone: 204–701–3890, Fax No: 301–594–6213

Director—Alaska Area Office, 4141 Ambassador Dr., Suite 300, Anchorage AK 99508, Phone: 907–729–3683

Director—Albuquerque Area Office, 4101 Indian School Rd. NE, Suite 225, Albuquerque, NM 87110–3988, Phone: 505–256–6800, Fax No. 505–256–6847

Director—Bemidji Area Office, Indian Health Service, U.S. Department of Health and Human Services, Bemidji Technology Park, 2225 Cooperative Ct. NW, Bemidji, MN 56601, Phone: (218) 444–0452

Director—Billings Area Office, 2900 4th Avenue North, Billings, MT 59101

Director—California Area Office, 650 Capitol Mall, Suite 7–100, Sacramento, CA 95814, Phone: 916–930–3927, Fax No: 916–930–3952

Director—Great Plains Area Office, 115 4th Avenue SE, Room 309, Aberdeen, SD 57401, Phone: 605–226–7581, Fax No: 605–226–7541

Director—Nashville Area Office, 711 Stewarts Ferry Pike, Nashville, TN 37214, Phone: 915–467–1500

Director—Navajo Area Office, P.O. Box 9020, Window Rock, AZ 86515, Phone: 928–871–5801, Fax No: 928–871–5872

Director—Oklahoma City Area Office, 701 Market Drive, Oklahoma City, OK 73114, Phone: 405–951–3820, Fax: 405–951–3780

Director—Phoenix Area Office, Two Renaissance Square, 40 N Central Avenue, Suite 504, Phoenix, AZ 85004, Phone: 602–364–5039

Director—Portland Area Indian Health Service, 1414 NW Northrup Street, Suite 800, Portland, OR 97209, Phone: 503–414–5555 Fax: 503–414–5554

Director—Tucson Area Office, 7900 South J Stock Road, Tucson, AZ 85746, Phone: 520–547–8140

[FR Doc. 2023–23964 Filed 10–30–23; 8:45 am]

BILLING CODE 4166–14–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Indian Health Service

### Request for Public Comment: 30-Day Information Collection: Application for Participation in the IHS Scholarship Program

**AGENCY:** Indian Health Service, HHS.

**ACTION:** Notice and request for comments. Request for revision to a collection.

**SUMMARY:** In compliance the Paperwork Reduction Act of 1995, the Indian Health Service (IHS) invites the general public to comment on the information collection titled, ''Application for

Participation in the IHS Scholarship Program,'' Office of Management and Budget (OMB) Control No. 0917–0006. IHS is requesting OMB to approve an extension for this collection, which expires on October 31, 2023.

**DATES:** *Comment Due Date:* November 30, 2023. Your comments regarding this information collection are best assured of having full effect if received within 30 days of the date of this publication.

**ADDRESSES:** Send your comments and suggestions regarding the proposed information collection contained in this notice, especially regarding the estimated public burden and associated response time to: Office of Management and Budget, Office of Regulatory Affairs, New Executive Office Building, Room 10235, Washington, DC 20503, Attention: Desk Officer for IHS.

**FOR FURTHER INFORMATION CONTACT:** To request additional information, please contact Evonne Bennett, Information Collection Clearance Officer by email at: *Evonne.Bennett@ihs.gov* or telephone at 240–472–1996.

**SUPPLEMENTARY INFORMATION:** This previously approved information collection project was last published in the **Federal Register** (88 FR 59929), on August 30, 2023 and allowed 60 days for public comment. The purpose of this notice is to allow 30 days for public comment. A copy of the supporting statement is available at *www.regulations.gov* (see Docket ID IHS–2023–0001).

*Information Collection: Title:* ''Application for Participation in the IHS Scholarship Program,'' OMB Control No. 0917–0006. *Type of Information Collection Request:* Extension of the currently approved information collection ''Application for Participation in the IHS Scholarship Program,'' OMB Control No. 0917–0006. *Form Number(s):* IHS–856–07 through 856–16, IHS–856–21 through 856–22, IHS–817, and IHS–818 are retained for use by the IHS Scholarship Program (IHSSP) as part of this current Information Collection Request. Reporting forms are found on the IHS website at *www.ihs.gov/scholarship. Need and Use of Information Collection:* The IHS Scholarship Branch needs this information for program administration and uses the information to: solicit, process, and award IHS Pre-graduate, Preparatory, and/or Health Professions Scholarship recipients; monitor the academic performance of recipients; and to place recipients at payback sites. The IHSSP application is electronically available on the internet at the IHS website at: *http://www.ihs.gov/scholarship/applynow/. Affected Public:* Individuals, not-for-profit institutions and State, local or Tribal Governments. *Type of Respondents:* Students pursuing health care professions.

*The table below provides:* Types of data collection instruments, Estimated number of respondents, Number of responses per respondent, Annual number of responses, Average burden hour per response, and Total annual burden hours.

| Forms | Data collection instrument(s) | Number of respondents | Responses per respondent | Total annual response | Burden hour per response * | Annual burden hours |
|---|---|---|---|---|---|---|
| | Scholarship Online Application | 850 | 1 | 850 | 1.00 (60 min) | 850 |
| 1 | Verification of Acceptance or Decline of Award (IHS–856–7). | 300 | 1 | 300 | 0.13 ( 8 min) | 40 |
| 2 | Scholarship Program Agreement (IHS–817) | 60 | 1 | 60 | 0.16 (10 min) | 10 |
| 3 | Health Professions Contract (IHS–818) | 225 | 1 | 225 | 0.16 (10min) | 38 |
| 4 | Recipient's Initial Program Progress Report (IHS–856–8) | 800 | 1 | 800 | 0.13 (8 min) | 107 |
| 5 | Notification of Academic Problem (IHS–856–9) | 20 | 1 | 20 | 0.13 (8 min) | 3 |
| 6 | Change of Status (IHS–856–10) | 50 | 1 | 50 | .045 (25 min) | 21 |
| 7 | Notification of Deferment Intent (IHS–856–11) | 60 | 1 | 60 | 0.13 (8 min) | 8 |
| 8 | Preferred Placement (IHS–856–12) | 150 | 1 | 150 | 0.50 (30 min) | 75 |
| 9 | Notification of Impending Graduation (IHS–856–13) | 170 | 1 | 170 | 0.17 (10 min) | 28 |
| 10 | Deferment Approval Request (IHS–856–14) | 60 | 1 | 60 | 0.13 (8 min) | 8 |
| 11 | Placement Update (IHS–856–15) | 170 | 1 | 170 | 0.18 (11 min) | 31 |
| 12 | Annual Status Report (IHS–856–16) | 200 | 1 | 200 | 0.25 (15 min) | 50 |
| 13 | Summer School Request (IHS–856–21) | 100 | 1 | 100 | 0.10 (6 min) | 10 |
| 14 | Change of Name or Address (IHS–856–22) | 20 | 1 | 20 | 0.13 (8 min) | 3 |
| Total | | | | 3,235 | 225 | 1,281 |

* For ease of understanding, burden hours per response are also provided in minutes.

There are no direct costs to respondents other than their time to voluntarily complete the forms and submit them for consideration. The estimated cost for the federal government is $145,223.00 (contractor) to work on the program with IHS program staff.

There are no capital costs, operating costs and/or maintenance costs to respondents.

*Requests for Comments:* Your written comments and/or suggestions are invited on one or more of the following points:

(a) whether the information collection activity is necessary to carry out an agency function;

(b) whether the agency processes the information collected in a useful and timely fashion;

(c) the accuracy of the public burden estimate (the estimated amount of time needed for individual respondents to provide the requested information);

(d) whether the methodology and assumptions used to determine the estimates are logical;

(e) ways to enhance the quality, utility, and clarity of the information being collected; and

(f) ways to minimize the public burden through the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

**Roselyn Tso,**

*Director, Indian Health Service.*

[FR Doc. 2023–23996 Filed 10–30–23; 8:45 am]

**BILLING CODE 4166–14–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Topics in Neurobehavioral Processes, Sleep, and Aging.

*Date:* December 6, 2023.

*Time:* 10:00 a.m. to 7:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Kristen Prentice, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3112, MSC 7808, Bethesda, MD 20892, (301) 496–0726, *prenticekj@mail.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Topics on HIV Molecular Virology, Therapies and Comorbidities Study Section.

*Date:* December 6, 2023.

*Time:* 11:00 a.m. to 7:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Raul Rojas, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6185, Bethesda, MD 20892, (301) 451–6319, *rojasr@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: October 26, 2023.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023–24005 Filed 10–30–23; 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 Cutting-Edge Basic Research Awards (CEBRA).

*Date:* November 20, 2023.

*Time:* 10:00 a.m. to 5:30 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:* Sheila Pirooznia, Ph.D., Scientific Review Officer, Division of Extramural Review, Scientific Review Branch, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 496–9350, *sheila.pirooznia@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: October 25, 2023.

**David W. Freeman,**

*Supervisory Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023–23942 Filed 10–30–23; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Human Genome Research Institute; 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 Council for Human Genome Research.

This is a hybrid meeting held in-person and virtually and is open to the public as indicated below. Individuals who plan to attend in-person or view the virtual meeting and need special assistance 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 *https://www.genome.gov/about-nhgri/Institute-Advisors/National-Advisory-Council-for-Human-Genome-Research.*

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 Council for Human Genome Research.

*Date:* February 12–13, 2024.

*Closed:* February 12, 2024, 9:00 a.m. to 10:30 a.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Human Genome Research Institute, National Institutes of Health, 6700B Rockledge Drive, Suite 1100, Bethesda, MD 20892.

*Open:* February 12, 2024, 10:30 a.m. to 6:30 p.m.

*Agenda:* Report of Institute Director and Institute Staff.

*Place:* National Human Genome Research Institute, National Institutes of Health, 6700B Rockledge Drive, Suite 1100, Bethesda, MD 20892.

*Closed:* February 13, 2024, 10:30 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Human Genome Research Institute, National Institutes of Health, 6700B Rockledge Drive, Suite 1100, Bethesda, MD 20892.

*Contact Person:* Rudy O. Pozzatti, Ph.D., Scientific Review Officer, Scientific Review Branch, National Human Genome Research Institute, 6700 B Rockledge Drive, Suite 3100, Rockville, MD 20892, (301) 402–0838, *pozzattr@mail.nih.gov*.

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.

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: *http://www.genome.gov/council,* where an agenda

and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: October 26, 2023.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023–24006 Filed 10–30–23; 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 Defining Mechanisms of HIV Induced Inflammation and Immune Activation During Suppressive Antiretroviral Therapy (ART) (R01 Clinical Trial Not Allowed).

*Date:* December 11, 2023.

*Time:* 10:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G11A, Rockville, MD 20892 (Virtual Meeting).

*Contact Person:* J. Bruce Sundstrom, 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 3G11A, Rockville, MD 20852, 240–669–5045, *sundstromj@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: October 25, 2023.

**David W. Freeman,**

*Supervisory Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023–23943 Filed 10–30–23; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### Agency Information Collection Activities: Regulation on Agency Protests; OMB No. 1600–0004

**AGENCY:** Department of Homeland Security (DHS).

**ACTION:** 30-Day notice and request for comments OMB No. 1600–0004.

**SUMMARY:** The Department of Homeland Security will submit the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. DHS previously published this information collection request (ICR) in the **Federal Register** on August 22, 2023, for a 60-day public comment period. No comments were received by DHS. The purpose of this notice is to allow additional 30-days for public comments.

**DATES:** Comments are encouraged and will be accepted until November 30, 2023. This process is conducted in accordance with 5 CFR 1320.1

**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.

The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

**SUPPLEMENTARY INFORMATION:** In accordance with Federal regulations and statutes, when protests are filed, the contracting officer will require information/documentation such as detailed statements of legal and factual grounds for the protests, copies of relevant documents, solicitation or contract number, and requests for a ruling by the agency. The Federal Acquisition Regulation (FAR) and 48 CFR chapter 1 provide general procedures on handling protests submitted by contractors to Federal agencies. FAR part 33, Protests, Disputes and Appeals, prescribes policies and procedures for filing protests and for processing contract disputes and appeals. While the FAR prescribes the procedures to be followed for protests to the agency, it allows agencies to determine the method of receipt. DHS will utilize electronic mediums (email or facsimile) for collection of information and will not prescribe a format or require more information than what is already required in the FAR. If DHS determines there is a need to collect additional information outside of what is required in the FAR, DHS will submit a request to the Office of Management and Budget (OMB) for approval. The prior information collection request for OMB No. 1600–0004 was approved through November 30, 2024, by OMB in a Notice of OMB Action. This justification supports a request for an extension of the approval.

The information being collected will be obtained from contractors as part of their submissions whenever they file a bid protest with DHS. The information will be used by DHS officials in deciding how the protest should be resolved. Failure to collect this information would result in delayed resolution of protests. Agency protest information is contained in each individual solicitation document, and provides the specified contracting officer's name, email, and mailing address that the contractors would use to submit its response. The FAR does not specify the format in which the contractor should submit protest information. However, most contractors use computers to prepare protest materials and submit time sensitive responses electronically (email or facsimile) to the specified Government point of contact. Since the responses must meet specific timeframes, a

centralized mailbox or website would not be a practical method of submission. Submission of protest information through contracting officers' email or through facsimile are the best methods to use to document receipt of protest information, and are the methods most commonly used in the Government protest process. This information collection may involve small business contractors, depending on the particular transaction. The burden applied to small businesses is minimal and consistent with the goals of achieving timely resolution of agency protests. This information is collected only when contractors choose to file a protest to the agency. The information is requested from contractors so that the Government will be able to evaluate protests effectively and provide prompt resolution of issues in dispute when contractors file such claims.

DHS/ALL/PIA–006 General Contact Lists covers the basic contact information that must be collected for DHS to address these protests. The other information collected will typically pertain to the contract itself, and not individuals. However, all information for this information collection is submitted voluntarily. Technically, because this information is not retrieved by personal identifier, no SORN is required. However, DHS/ALL–021 DHS Contractors and Consultants provides coverage for the collection of records on DHS contractors and consultants, to include resume and qualifying employment information. There is no assurance of confidentiality provided to the respondents.

The burden estimates provided in response to Item 12 above are based upon the Department's findings in its FY 2022 Procurement Line of Business, Operational Status Report. No program changes have occurred or changes to the information being collected, however, the burden was adjusted to reflect an agency adjustment increase of 33 respondents within DHS for Fiscal Year 2022, as well as an increase in the average hourly wage rate.

**Analysis:**

*Agency:* Department of Homeland Security (DHS).

*Title:* Regulation on Agency Protests.

*OMB Number:* 1600–0004.

*Frequency:* Annually.

*Affected Public:* Business or other for-profit/Individuals or Households.

*Number of Respondents:* 126.

*Estimated Time per Respondent:* 2 hrs.

*Total Burden Hours:* 252.

**Robert Porter Dorr,**

*Executive Director, Business Management Directorate.*

[FR Doc. 2023–23939 Filed 10–30–23; 8:45 am]

**BILLING CODE 9112–FL–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–7070–N–77]**

## 30-Day Notice of Proposed Information Collection: Rental Housing Finance Survey (RHFS); OMB Control No.: 2528–0276

**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 30, 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: Anna Guido, 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:** Anna P. Guido, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410; email: *PaperworkReductionActOffice@hud.gov.* telephone (202) 402–5535. 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. Guido.

**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 July 14, 2023 at 88 FR 45233.

**A. Overview of Information Collection**

*Title of Information Collection:* 2024 Rental Housing Finance Survey.

*OMB Approval Number:* 2528–0276.

*Type of Request:* Revision of a currently approved collection.

*Form Number:* N/A.

*Description of the need for the information and proposed use:* The Rental Housing Finance Survey (RHFS) provides a measure of financial, mortgage, and property characteristics of rental housing properties in the United States. RHFS focuses on mortgage financing of rental housing properties, with emphasis on new originations for purchase-money mortgages and refinancing, and the characteristics of these new originations.

The RHFS will collect data on property values of residential structures, characteristics of residential structures, rental status and rental value of units within the residential structures, commercial use of space within residential structures, property management status, ownership status, a detailed assessment of mortgage financing, and benefits received from Federal, state, local, and non-governmental programs.

Many of the questions are the same or similar to those found on the 1995 Property Owners and Managers Survey, the rental housing portion of the 2001 Residential Finance Survey, and previous collections of the Rental Housing Finance Survey. This survey does not duplicate work done in other existent HUD surveys or studies that deal with rental units' financing.

Policy analysts, program managers, budget analysts, and Congressional staff can use the survey's results to advise executive and legislative branches about the mortgage finance characteristics of the rental housing stock in the United States and the suitability of public

policy initiatives. Academic researchers and private organizations also will utilize the data to facilitate their research and projects.

The Department of Housing and Urban Development (HUD) needs the RHFS data for the following two reasons:

1. This is the only source of information on the rental housing finance characteristics of rental properties.

2. HUD needs this information to gain a better understanding of the mortgage finance characteristics of the rental housing stock in the United States to evaluate, monitor, and design HUD programs.

*Respondents:* Owners and managers of rental properties.

| Information collection | Number of respondents | Frequency of response | Responses per annum | Burden hour per response | Annual burden hours | Hourly cost per response | Annual cost |
|---|---|---|---|---|---|---|---|
| RHFS | 10,000 | 1 | 10,000 | 1 | 10,000 | $40.51 | $405,100 |

**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 comments in response to these questions.

**C. Authority**

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

**Anna P. Guido,**

*Department Reports Management Office, Office of Policy Development and Research, Chief Data Officer.*

[FR Doc. 2023–23985 Filed 10–30–23; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–7070–N–74]**

## 30-Day Notice of Proposed Information Collection: Study of Post-Disaster Outcomes of Renter Households and Rental Housing Community Development Block Grant-Disaster Recovery (CDBG–DR); OMB Control No.: 2528–NEW

**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 30, 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: Anna Guido, 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:** Anna P. Guido, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410; email: *PaperworkReductionActOffice@hud.gov* or telephone (202) 402–5535. 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. Guido.

**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 July 11, 2023 at 88 FR 44144.

**A. Overview of Information Collection**

*Title of Information Collection:* Study of Post-Disaster Outcomes of Renter Households and Rental Housing. Community Development Block Grant-Disaster Recovery (CDBG–DR).

*OMB Approval Number:* 2528–New.

*Type of Request:* New collection.

*Form Number:* N/A.

*Description of the need for the information and proposed use:* The Office of Policy Development and Research (PD&R), at the U.S. Department of Housing and Urban Development (HUD), is proposing the collection of information for the HUD CDBG Disaster Recovery Outcomes of Renter Households Cooperative Agreement.

The goal of this research is to improve disaster recovery effectiveness for renter households by examining the disaster recovery outcomes of renter households and rental housing stock in places that received Community Development

Block Grant-Disaster Recovery grants (CDBG–DR). This research is expected to help the Federal government, states, and communities throughout the United States improve disaster recovery effectiveness for renter households by providing information about how disaster recovery programs funded through CDBG–DR have different impacts on renters and homeowners, and how disasters impact affordable rental housing stock over time. This research will be used to assess renter outcomes, barriers to accessing recovery resources, and mechanisms of Federal and local implementation of CDBG–DR grants. Results from this study will support HUD in identifying opportunities for changes to legislation, policy and program implementation in disaster recovery to improve outcomes for renters.

This **Federal Register** Notice provides an opportunity to comment on the information collection for this study titled HUD CDBG Disaster Recovery Outcomes of Renter Households. The information collection is designed to support the study of disaster outcomes on renters, including to better understand CDBG–DR allocations across housing tenure, specifically for renters, identify successful processes with corresponding outcomes for rental housing recovery aid programs and translate this research into actionable programmatic recommendations with appropriate timelines, policy making and implementation changes to improve these outcomes. The study includes a survey, interviews and focus groups in communities that have received CDBG–DR funding.

*Respondents:* CDBG–DR grantee representatives and administrators; elected and appointed government officials in CDBG–DR grantee jurisdictions and municipalities; landlords and developers in CDBG–DR grantee jurisdictions; representatives from housing and tenant advocacy organizations; and renters living in CDBG–DR grantee jurisdictions.

| Information collection | Number of respondents | Frequency of response | Responses per annum | Burden hour per response | Annual burden hours | Hourly cost per response | Cost |
|---|---|---|---|---|---|---|---|
| Interviews—Federal, state, and local government | 25 | 1 | 25 | 1 | 25 | $30.85 | $771.25 |
| Interviews—Professionals and business services | 20 | 1 | 20 | 1 | 20 | 39.64 | 792.80 |
| Interviews—Private sector employees | 25 | 1 | 25 | 1 | 25 | 33.03 | 825.75 |
| Focus groups—Private sector employees | 120 | 1 | 120 | 1.5 | 180 | 33.03 | 5,945.40 |
| Total | 190 | | | | 250 | | 8,335.20 |

**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 comments in response to these questions.

**C. Authority**

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Anna P. Guido,

*Department Reports Management Office, Office of Policy Development and Research, Chief Data Officer.*

[FR Doc. 2023–23988 Filed 10–30–23; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–7071–N–27]**

## 60-Day Notice of Proposed Information Collection: Home Equity Conversion Mortgage (HECM) Insurance Application for the Origination of Reverse Mortgages and Related Documents; OMB Control No.: 2502–0524

**AGENCY:** Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

**ACTION:** Notice.

**SUMMARY:** HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

**DATES:** *Comments Due Date:* January 2, 2024.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection can be submitted within 60 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 60-day Review—Open for Public Comments'' or by using the search function. Interested persons are also invited to submit comments regarding this proposal by name and/or OMB Control Number and can be sent to: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000 or email at *PaperworkReductionActOffice@hud.gov.*

**FOR FURTHER INFORMATION CONTACT:** Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email; *Colette.Pollard@hud.gov* or telephone

202–402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

**A. Overview of Information Collection**

*Title of Information Collection:* Home Equity Conversion Mortgage (HECM) Insurance Application for the Origination of Reverse Mortgages and Related Documents.

*OMB Approval Number:* 2502–0524.

*Type of Request:* Revision of currently approved collection.

*Form Number:* HUD–92901, HUD–92902, HUD–92051, HUD–92561, HUD–92564–CN, HUD–92800.5b, HUD–92900–A, HUD 92900–C, HUD–1, HUD–1a, HUD–9991, HUD–9992, FNMA–1025, FNMA–1003, FNMA–1007, FNMA–1009, FNMA–1004, FNMA–1004D, FNMA–1004C, FNMA–1073, FNMA–1103, HUD–92541, HUD–92544, NPMA–99A, NPMA–99B.

*Description of the need for the information and proposed use:* The Home Equity Conversion Mortgage (HECM) program is the Federal Housing Administration's (FHA) reverse mortgage program that enables seniors who have equity in their homes to withdraw a portion of the accumulated equity. The intent of the HECM Program is to ease the financial burden on elderly homeowners facing increased health, housing, and subsistence costs at a time of reduced income. The currently approved information collection is necessary to screen mortgage insurance applications in order to protect the FHA insurance fund and the interests of consumers and potential borrowers. This collection was revised to align with current program requirements and recent amendments to the regulations.

*Respondents:* Mortgagees and Counselors.

*Estimated Number of Respondents:* 512.

*Estimated Number of Responses:* 572,680.

*Frequency of Response:* Varies.

*Average Hours per Response:* 0.05 to 2.00.

*Total Estimated Burdens:* $28,462,906.21.

**B. Solicitation of Public Comment**

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

**C. Authority**

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

**Jeffrey D. Little,**

*General Deputy Assistant Secretary for Housing.*

[FR Doc. 2023–24003 Filed 10–30–23; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[BLM_NV_FRN_MO4500169077]**

### Notice of Availability of the Final Environmental Impact Statement for Nevada Gold Mines LLC's Goldrush Mine Project, Lander and Eureka Counties, NV

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** In accordance with the National Environmental Policy Act (NEPA) of 1969, as amended, and the Federal Land Policy and Management Act of 1976, as amended (FLPMA), the Bureau of Land Management (BLM) announces the availability of the Final Environmental Impact Statement (EIS) for the Nevada Gold Mines LLC (NGM) Goldrush Mine Project.

**DATES:** The BLM will not issue a decision on the proposal for a minimum of 30 days after the date that the Environmental Protection Agency (EPA) publishes its Notice of Availability (NOA) in the **Federal Register**.

**ADDRESSES:** The Final EIS and documents pertinent to this proposal are available for review on the BLM National NEPA Register website at *https://eplanning.blm.gov/eplanning-ui/project/2012544/510.*

**FOR FURTHER INFORMATION CONTACT:** Scott Distel, Project Manager, telephone: (775) 635–4093; email: *sdistel@blm.gov;* address: 50 Bastian Road, Battle Mountain, NV 89820. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 7–1–1 (TTY, TDD, or TeleBraille) to access telecommunication relay services for contacting Mr. Distel. 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:**

**Purpose and Need for the Proposed Action**

The BLM's purpose for the action is to respond to NGM's proposal, as described in its proposed plan of operations, and to analyze the potential environmental effects associated with the Proposed Action, which is the operator's proposed plan of operations, and alternatives to the Proposed Action. NEPA mandates that the BLM evaluate the potential effects of the Proposed Action and develop alternatives. The BLM's need for the action is established by the BLM's responsibilities under Section 302 of FLPMA and the BLM Surface Management Regulations at 43 CFR subpart 3809 to respond to a proposed plan of operations and ensure that operations prevent unnecessary or undue degradation of the public lands.

**Proposed Action and Alternatives**

Under the proposed plan of operations, NGM would construct and operate an underground mine project in the Cortez Mining Area of Lander and Eureka Counties, Nevada. The proposed Goldrush Mine Plan boundary encompasses 19,853 acres, of which 772 acres are private land controlled by NGM and 19,081 acres are public lands administered by the BLM Battle Mountain District, Mount Lewis Field Office (MLFO) and BLM Elko District, Tuscarora Field Office (TFO). Most of this area is within existing exploration and mine plans previously authorized by the BLM and includes facilities and surface disturbance associated with the

authorized plans. To create the new Plan boundary, NGM proposes boundary modifications and/or reclassification of acres within the following existing NGM-owned exploration and mine Plan boundaries: Horse Canyon Mine Plan (N–66896) administered by MLFO; Horse Canyon/Cortez Unified Exploration Project (HC/CUEP) Plan (N–66621) administered by MLFO; West Pine Valley Exploration Project Plan (N–77213) administered by TFO; and use of existing infrastructure at the Cortez Mine (N–67575) administered by MLFO.

The proposed plan of operations would result in 1,694 acres of new surface disturbance on public lands administered by the BLM, including approximately 210 acres of exploration disturbance that could occur anywhere within the proposed Goldrush Mine Plan boundary. In addition, approximately 1,064 acres of existing authorized disturbance would be within the proposed footprint, and approximately 12 acres of existing authorized disturbance would be reclassified. The proposal includes a materials handling system for transporting ore and waste rock from the underground workings to the surface and transporting aggregate and supplies to the underground workings and surface backfill plant; a dewatering system; ventilation raises; a backfill aggregate paste plant and crusher; a shotcrete/cemented rock fill (CRF) plant; two new power lines with two switching stations; new ancillary surface facilities; and continued surface and underground exploration operations.

The Revised Proposed Action for Reduced Wildlife Impacts Alternative is the BLM's Preferred Alternative. The proposed Plan boundary under this alternative would consist of 19,871 acres, of which 772 acres would be on private land controlled by NGM and 19,099 of public lands administered by the BLM. The same reclassification of acres from existing authorizations would occur as described under the proposed plan of operations, except a total of 888 acres would be transferred from the West Pine Valley Exploration Plan (N–77213) to the Goldrush Mine Plan boundary. This alternative would create an additional 1,626 acres of new surface disturbance on public lands administered by the BLM, including approximately 210 acres of exploration disturbance. In addition, approximately 1,027 acres of existing authorized disturbance would be within the footprint of this alternative, and approximately five acres of existing authorized disturbance would be reclassified.

The proposed underground mining and surface support operations for the Goldrush Mine under the Revised Proposed Action for Reduced Wildlife Impacts Alternative would include the same features as described for proposed plan of operations, except the following would occur: the water treatment plant and multi-use shop would be eliminated; the surface paste plant in Horse Canyon, paste plant access road to Horse Canyon, and associated aggregate haulage would be eliminated; a secondary CRF plant would be constructed on the proposed portal pad expansion; the laydown yard would be relocated to be constructed adjacent to the West Pine Valley rapid infiltration basin; and the alignment of the 13.8-kV power line would be changed to relocate the poles below the crest of the canyon wall in Horse Canyon. The only changes to the underground mining operations would be increasing the diameter of the ventilation raises to 21 feet in diameter and eliminating the use of the aggregate paste fill as backfill.

Under the No Action Alternative, the development of the Goldrush Mine would not be authorized and NGM would not construct, operate, and close a new underground mine (*i.e.,* the Goldrush Mine). Modifications or reclassification of acres would not occur, and the dual use of facilities between the Cortez Mine and Goldrush Mine would not occur. NGM would continue current authorized mining and exploration operations under the previously authorized plans.

Based on the analyses contained in the EIS for the proposed Goldrush Mine Project, and after carefully considering input received from the public and cooperating agencies, the BLM has selected the Revised Proposed Action for Reduced Wildlife Impacts Alternative as the BLM's preferred alternative.

Public comments on the Draft EIS received, and internal BLM review, were considered and incorporated as appropriate into the Final EIS. Public comments resulted in the addition of clarifying text but did not significantly change the impact analyses.

(Authority: 40 CFR 1506.6, 40 CFR 1506.10)

**Douglas W. Furtado,**

*District Manager Battle Mountain District.*

[FR Doc. 2023–24011 Filed 10–30–23; 8:45 am]

**BILLING CODE 4331–21–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[BLM_NV_FRN_MO4500173317]**

### Notice of Segregation of Public Land for the Pantheon Solar Project, White Pine County, NV

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of segregation.

**SUMMARY:** Through this notice the Bureau of Land Management (BLM) is segregating public lands included in the right-of-way application for the Pantheon Solar project (N–099861) from appropriation under the public land laws, including the Mining Law, but not the Mineral Leasing or Material Sales Acts, for a period of 2 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 total 4,210.06 acres.

**DATES:** This segregation for the lands identified in this notice takes effect on October 31, 2023.

**FOR FURTHER INFORMATION CONTACT:** For further information and/or to have your name added to the mailing list, send requests to: Jared Bybee, Field Manager, at telephone (775) 289–1847; address 702 N Industrial Way, Ely, NV 89301 or email *jbybee@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 43 CFR 2804.25(f) allow the BLM to temporarily segregate public lands within a right-of-way application area for solar 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. Licenses, permits, cooperative agreements, or discretionary

land use authorizations of a temporary nature that 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**

T. 16 N., R. 60 E.,
Sec. 1, lots 2 thru 7, SW¼NE¼, S½NW¼, SW¼, and W½SE¼;
Sec. 2, lots 1, 7, and 8, S½NE¼, SE¼NW¼, and S½;
Sec. 11, N½NE¼, SE¼NE¼, and SE¼;
Sec. 12, W½NE¼, W½, and W½SE¼;
Sec. 13, NW¼NE¼ and W½;
Sec. 14, NE¼, E½SW¼, and SE¼;
Sec. 22, SE¼NE¼ and E½SE¼;
Sec. 23, NE¼, NE¼NW¼, S½NW¼, and S½;
Sec. 24, W½;
Sec. 25, NW¼;
Sec. 26, N½NE¼, SE¼NE¼, and N½NW¼.
T. 17 N., R. 60 E.,
Sec. 35, SE¼SE¼;
Sec. 36, SE¼NW¼ and SW¼.

The area described contains 4,210.06 acres, according to the official protraction diagrams and 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 2 years from the date of publication unless extended for an additional 2 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)

**Jared Bybee,**

*Field Manager—Bristlecone Field Office.*

[FR Doc. 2023–23998 Filed 10–30–23; 8:45 am]

**BILLING CODE 4331–21–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

**[NPS–WASO–NAGPRA–NPS0036836; PPWOCRADN0–PCU00RP14.R50000]**

### Notice of Inventory Completion: University of California, Berkeley, Berkeley, CA

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the University of California, Berkeley has completed an inventory of human remains and associated funerary objects and has determined that there is no cultural affiliation between the human remains and associated funerary objects and any Indian Tribe. The human remains and associated funerary objects were removed from Alameda, Contra Costa, San Francisco, San Mateo, Santa Clara, and Santa Cruz Counties, CA.

**DATES:** Disposition of the human remains and associated funerary objects in this notice may occur on or after November 30, 2023.

**ADDRESSES:** Alexandra Lucas, Repatriation Coordinator, Government and Community Relations (Chancellor's Office), University of California, Berkeley, 200 California Hall, Berkeley, CA 94720, telephone (510) 570–0964, email *nagpra-ucb@berkeley.edu.*

**SUPPLEMENTARY INFORMATION:** This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the University of California, Berkeley. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the University of California, Berkeley.

**Description**

Human remains representing, at minimum, 2,148 individuals were removed from Alameda County, CA, between 1876 and 2001, and donated or appropriated into the University of California, Berkeley campus anthropology museum (Phoebe A. Hearst Museum of Anthropology) by numerous individuals. The human remains were removed from sites CA-Ala–12, CA-Ala–13,CA-Ala–17, CA-Ala–20, CA-Ala–23, CA-Ala–28 CA-Ala–307, CA-Ala–308, CA-Ala–309, CA-Ala–316, CA-Ala–317, CA-Ala–324, CA-Ala–328, CA-Ala–329, CA-Ala–330, CA-Ala–42, CA-Ala–47, CA-Ala–48, CA-Ala–50, CA-Ala–52, CA-Ala–53, CA-Ala–55, and unknown sites. The 12,086 lots of associated funerary objects include awls, baked clay and baked clay objects, baskets, beads, bifaces, blades, bone tools, bone tubes, botanical samples, charcoal samples, charmstones, choppers, clubs, cooking stones, core tools, cores, drills, faunal remains, fishhooks, flakers, flakes, fleshers, ground stone, gun barrel, hammerstones, harpoons, historic refuse, knives, labrets (jewelry worn on the head), manos, mats (floor coverings), metates, mineral and rock samples, mortars, needles, net weights, ornaments, painting supplies, pendants, pestles, pins (fasteners), pipes, projectile points, saws, scrapers, shell samples, sinkers, soil samples, spearheads), stone tools, strigils (sweat scrapers), string, wedges, whistles, worked bone, worked shell, and worked stone.

Human remains representing, at minimum, 1,880 individuals were removed from Contra Costa County, CA, between 1904 and 2001, and donated or appropriated into the University of California, Berkeley campus anthropology museum (Phoebe A. Hearst Museum of Anthropology) by numerous individuals. The human remains were removed from sites CA-CCo–1, CA-CCo–124, CA-CCo–126, CA-CCo–13, CA-CCo–133, CA-CCo–135, CA-CCo–137, CA-CCo–138, CA-CCo–139, CA-CCo–14, CA-CCo–141, CA-CCo–142, CA-CCo–146, CA-CCo–148, CA-CCo–15, CA-CCo–150, CA-CCo–151, CA-CCo–18, CA-CCo–20, CA-CCo–224, CA-CCo–225, CA-CCo–227, CA-CCo–229, CA-CCo–241, CA-CCo–242, CA-CCo–25, CA-CCo–250, CA-CCo–256, CA-CCo–259, CA-CCo–261, CA-CCo–267, CA-CCo–271, CA-CCo–272, CA-CCo–274, CA-CA-CCo–290, CA-CCo–295, CA-CCo–298, CA-CCo–300, CA-CCo–301, CA-CCo–306, CA-CCo–307, CA-CCo–4, CA–CCo–5, and unknown sites. The 11,154 lots of associated funerary objects include abraders, acorn anvils, awls, baked clay and baked clay objects, bangles, basketry, beads, blades, bone tools, bone tubes, botanical samples, charcoal samples, charmstones, choppers, cooking stones, cores, drills, ear spools, faunal remains, fishhooks, flakers, flakes, gorge hooks, ground stone, hammerstones, harpoons, historic refuse, knives, labrets, level bags, manos, mineral and rock samples, mortars, needles, net weights, ornaments, painting supplies, pendants, pestles, pins, pipes, projectile points, saws, scrapers, shell samples, sinkers,

soil samples, spearheads, spoons, stone tools, strigils (sweat scrapers), string, wedges, whistles, worked bone, worked shell, and worked stone.

Human remains representing, at minimum, 53 individuals were removed from San Francisco County, CA, between 1872 and 1985, and donated or appropriated into the University of California, Berkeley campus anthropology museum (Phoebe A. Hearst Museum of Anthropology) by numerous individuals. The human remains were removed from sites CA-SFr–17, CA-SFr–7, and unknown sites. The 131 lots of associated funerary objects include awls, beads, bone tools, bone tubes, charmstones, crucifix, faunal remains, flakes, hammerstones, mortars, ornaments, pendants, pestles, pipes, projectile points, shell samples, sinkers, whistles, worked bone, and worked stone.

Human remains representing, at minimum, 119 individuals were removed from San Mateo County, CA, between 1872 and 1975, and donated or appropriated into the University of California, Berkeley campus anthropology museum (Phoebe A. Hearst Museum of Anthropology) by numerous individuals. The human remains were removed from sites CA-SMa–151, CA-SMa–22, CA-SMa–23, CA-SMa–3, CA-SMa–4, CA-SMa–434, CA-SMa–88, CA-SMa–90, and unknown sites. The 1,157 lots of associated funerary objects include acorn anvils, awls, baked clay and baked clay objects, beads, blades, bone tools, botanical samples, charcoal samples, charmstones, cores, faunal remains, flakers, flakes, ground stone, hammerstones, harpoons, historic refuse, manos, metates, mineral and rock samples, mortars, painting supplies, pendants, pestles, projectile points, scrapers, shell samples, sinkers, soil samples, stone tools, whistles, worked bone, and worked stone.

Human remains representing, at minimum, 225 individuals were removed from Santa Clara County, CA, prior to 1881 and through to 1958, and donated or appropriated into the University of California, Berkeley campus anthropology museum (Phoebe A. Hearst Museum of Anthropology) by numerous individuals. The human remains were removed from sites CA-SCl–1, CA-SCl–20, CA-SCl–38, CA-SCl–49, and unknown sites. The 422 lots of associated funerary objects are acorn anvils, awls, beads, blades, charmstones, cores, faunal remains, fishhooks, flakes, hammerstones, handles, historic refuse, mineral and rock samples, mortars, needles, ornaments, painting supplies, pendants, pestles, pins, projectile points, saws, scrapers, shell samples, soil samples, spoons, strigils, wedges, whistles, worked bone, and worked stone.

Human remains representing, at minimum, 15 individuals were removed from Santa Cruz County, CA, between 1880 and 1956, and donated or appropriated into the University of California, Berkeley campus anthropology museum (Phoebe A. Hearst Museum of Anthropology) by numerous individuals. The human remains were removed sites CA-SCr–1, CA-SCr–25, CA-SCr–41, CA-SCr–52, and unknown sites. The 43 lots of associated funerary objects are beads, botanical samples, cores, faunal remains, flakes, gorge hooks, ground stone, knives, mortars, ornaments, pebbles, pestles, scrapers, shell samples, soil samples, whistles, and worked bone.

**Aboriginal Land**

The human remains and associated funerary objects in this notice were removed from known geographic locations. These locations are the aboriginal lands of one or more Indian Tribes. These locations are also the aboriginal lands of the Ohlone/Costanoan State recognized tribes. The following information was used to identify the aboriginal land: California Native American Heritage Commission Native American Contact List for implementing AB275 (dated: 07/20/2023), Unratified Treaty E ''Treaty at Dent's and Valentine's Crossing (May 28, 1851)'', and Unratified Treaty M ''Treaty of Camp Frémont (Mar. 19, 1851).''

**Determinations**

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes, the University of California, Berkeley has determined that:

- The human remains described in this notice represent the physical remains of 4,440 individuals of Native American ancestry.
- The 24,993 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- No relationship of shared group identity can be reasonably traced between the human remains and associated funerary objects and any Indian Tribe.
- The human remains and associated funerary objects described in this notice were removed from the aboriginal land of the Buena Vista Rancheria of Me-Wuk Indians of California; California Valley Miwok Tribe, California; Chicken Ranch Rancheria of Me-Wuk Indians of California; Guidiville Rancheria of California; Ione Band of Miwok Indians of California; Jackson Band of Miwuk Indians; Middletown Rancheria of Pomo Indians of California; Picayune Rancheria of Chukchansi Indians of California; Santa Rosa Indian Community of the Santa Rosa Rancheria, California; Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California; Table Mountain Rancheria; Tule River Indian Tribe of the Tule River Reservation, California; Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California; and the Wilton Rancheria, California.

**Requests for Disposition**

Written requests for disposition of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for disposition may be submitted by:

1. Any one or more of the Indian Tribes identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization, or who shows that the requestor is an aboriginal land Indian Tribe.

Disposition of the human remains and associated funerary objects described in this notice to a requestor may occur on or after November 30, 2023. If competing requests for disposition are received, the University of California, Berkeley must determine the most appropriate requestor prior to disposition. Requests for joint disposition of the human remains and associated funerary objects are considered a single request and not competing requests. The University of California, Berkeley is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

*Authority:* Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9 and 10.11.

Dated: October 20, 2023.

**Melanie O'Brien,**

*Manager, National NAGPRA Program.*

[FR Doc. 2023–23975 Filed 10–30–23; 8:45 am]

**BILLING CODE 4312–52–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

**[NPS–IMR–PECO–34549; PS.SIMLA0051.00.1]**

### Minor Boundary Revision at Pecos National Historical Park

**AGENCY:** National Park Service, Interior.

**ACTION:** Notification of boundary revision.

**SUMMARY:** The boundary of Pecos National Historical Park is modified to include nine tracts of unimproved land totaling approximately 192.37 acres located in San Miguel County, New Mexico, immediately adjoining the boundaries of Pecos National Historical Park (Park).

**DATES:** The effective date of this boundary revision is October 31, 2023.

**ADDRESSES:** The boundary revision is depicted on Map No. 430/179,642 dated April 2023. The map is available for inspection at the following locations: National Park Service, Land Resources Program Center, 12795 West Alameda Parkway, Suite 161, Lakewood, Colorado 80228; and National Park Service, Department of the Interior, 1849 C Street NW, Washington, DC 20240.

**FOR FURTHER INFORMATION CONTACT:** Chief Realty Officer, William Morgan, National Park Service, Interior Regions 6, 7 & 8, Land Resources Program Center, 12795 West Alameda Parkway, Suite 161, Lakewood, Colorado, telephone (303) 969–2610.

**SUPPLEMENTARY INFORMATION:** Section 202(b) of the Act of June 27, 1990, 16 U.S.C. 410rr–1, (Pub. L. 101–313), authorizes the Secretary of the Interior to make minor revisions to the boundary of Pecos National Historical Park, in accordance with section 7(c) of the Land and Water Conservation Fund Act of 1965, codified as amended at 54 U.S.C. 100506(c). After notifying the House Committee on Natural Resources and the Senate Committee on Energy and Natural Resources, the Secretary of the Interior may make minor revisions to the boundaries of an area of the National Park System upon publication of Notice in the **Federal Register**. The Committees have been notified of this boundary revision. This boundary revision will support the Park's mission through the preservation and protection of significant resources, enhancing the interpretation and management of the Park in addition to providing expanded recreational opportunities to park visitors.

**Katharine Hammond,**

*Regional Director, NPS Regions 6, 7, & 8.*

[FR Doc. 2023–23977 Filed 10–30–23; 8:45 am]

**BILLING CODE 4312–52–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–1325]**

### Certain Soft Projectile Launching Devices, Components Thereof, Ammunition, and Products Containing Same; Notice of Request for Submission on the Public Interest

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that on October 25, 2023, the presiding administrative law judge (''ALJ'') issued an Initial Determination on Violation of Section 337. The ALJ also issued a Recommended Determination on remedy and bonding should a violation be found in the above-captioned investigation. The Commission is soliciting submissions on public interest issues raised by the recommended relief should the Commission find a violation. This notice is soliciting comments from the public and interested government agencies only.

**FOR FURTHER INFORMATION CONTACT:** Robert J. Needham, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708–5468. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** Section 337 of the Tariff Act of 1930 provides that, if the Commission finds a violation, it shall exclude the articles concerned from the United States unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. (19 U.S.C. 1337(d)(1)). A similar provision applies to cease and desist orders. (19 U.S.C. 1337(f)(1)).

The Commission is soliciting submissions on public interest issues raised by the recommended relief should the Commission find a violation, specifically: a limited exclusion order directed to certain soft projectile launching devices, components thereof, ammunition, and products containing same imported, sold for importation, and/or sold after importation by respondents Prime Time Toys LLC, Prime Time Toys Ltd., and Easebon Services, Ltd. and cease and desist orders directed to Prime Time Toys LLC, Prime Time Toys Ltd., and Easebon Services, Ltd. Parties are to file public interest submissions pursuant to 19 CFR 210.50(a)(4).

The Commission is interested in further development of the record on the public interest in this investigation. Accordingly, members of the public and interested government agencies are invited to file submissions of no more than five (5) pages, inclusive of attachments, concerning the public interest in light of the ALJ's Recommended Determination on Remedy and Bonding issued in this investigation on October 25, 2023. Comments should address whether issuance of the recommended remedial orders in this investigation, should the Commission find a violation, would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) explain how the articles potentially subject to the recommended remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the recommended orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third-party suppliers have the capacity to replace the volume of articles potentially subject to the recommended orders within a commercially reasonable time; and

(v) explain how the recommended orders would impact consumers in the United States.

Written submissions must be filed no later than by close of business on November 27, 2023.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (Mar. 19, 2020). Submissions should refer to the investigation number (''Inv. No. 337–TA–1325'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *https://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf*). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment by marking each document with a header indicating that the document contains confidential information. This marking will be deemed to satisfy the request procedure set forth in Rules 201.6(b) and 210.5(e)(2) (19 CFR 201.6(b) & 210.5(e)(2)). Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. Any non-party wishing to submit comments containing confidential information must serve those comments on the parties to the investigation pursuant to the applicable Administrative Protective Order. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing and must be served in accordance with Commission Rule 210.4(f)(7)(ii)(A) (19 CFR 210.4(f)(7)(ii)(A)). All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection on EDIS.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: October 26, 2023.

**Katherine Hiner,**

*Supervisory Attorney.*

[FR Doc. 2023–24015 Filed 10–30–23; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation Nos. 701–TA–699–702 and 731–TA–1659–1660 (Preliminary)]**

## Frozen Warmwater Shrimp From Ecuador, India, Indonesia, and Vietnam; Institution of Antidumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations

**AGENCY:** United States International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission hereby gives notice of the institution of investigations and commencement of preliminary phase antidumping and countervailing duty investigation Nos. 701–TA–699–702 and 731–TA–1659–1660 (Preliminary) pursuant to the Tariff Act of 1930 (''the Act'') to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of frozen warmwater shrimp from Ecuador and Indonesia provided for in statistical reporting numbers 0306.17.0004, 0306.17.0005, 0306.17.0007, 0306.17.0008, 0306.17.0010, 0306.17.0011, 0306.17.0013, 0306.17.0014, 0306.17.0016, 0306.17.0017, 0306.17.0019, 0306.17.0020, 0306.17.0022, 0306.17.0023, 0306.17.0025, 0306.17.0026, 0306.17.0028, 0306.17.0029, 0306.17.0041, 0306.17.0042, 1605.21.1030, and 1605.29.1010 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value and alleged to be subsidized by the Governments of Ecuador, India, Indonesia, and Vietnam. Unless the Department of Commerce (''Commerce'') extends the time for initiation, the Commission must reach a preliminary determination in antidumping and countervailing duty investigations in 45 days, or in this case by December 11, 2023. The Commission's views must be transmitted to Commerce within five business days thereafter, or by December 18, 2023.

**DATES:** October 25, 2023.

**FOR FURTHER INFORMATION CONTACT:** Calvin Chang (202) 205–3062), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

**SUPPLEMENTARY INFORMATION:**

*Background.*—These investigations are being instituted, pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)), in response to petitions filed on October 25, 2023, by the American Shrimp Processors Association, Port Arthur, Texas.

For further information concerning the conduct of these investigations and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

*Participation in the investigations and public service list.*—Persons (other than petitioners) wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in §§ 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. Industrial users and (if the merchandise under investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission antidumping duty and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance.

*Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.*—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these investigations available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigations under the APO issued in the investigations, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

*Conference.*—The Office of Investigations will hold a staff conference in connection with the preliminary phase of these investigations beginning at 9:30 a.m. on Wednesday, November 15, 2023. Requests to appear at the conference should be emailed to *preliminaryconferences@usitc.gov* (DO NOT FILE ON EDIS) on or before November 13, 2023. Please provide an email address for each conference participant in the email. Information on conference procedures, format, and participation will be available on the Commission's Public Calendar. A nonparty who has testimony that may aid the Commission's deliberations may request permission to participate by submitting a short statement.

Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

*Written submissions.*—As provided in §§ 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before 5:15 p.m. on November 20, 2023, a written brief containing information and arguments pertinent to the subject matter of the investigations. Parties shall file written testimony and supplementary material in connection with their presentation at the conference no later than noon on November 14, 2023. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

*Certification.*—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with these investigations must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that any information that it submits to the Commission during these investigations may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of these or related investigations or reviews, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

*Authority:* These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.12 of the Commission's rules.

By order of the Commission.

Issued: October 25, 2023.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2023–23947 Filed 10–30–23; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[USITC SE–23–052]**

### Sunshine Act Meetings

**AGENCY HOLDING THE MEETING:** United States International Trade Commission.

**TIME AND DATE:** November 3, 2023 at 11:00 a.m.

**PLACE:** Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205–2000.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:**

1. *Agendas for future meetings:* none.
2. Minutes.
3. Ratification List.
4. Commission vote on Inv. No. 731–TA–472 (Fifth Review) (Silicon Metal from China). The Commission currently is scheduled to complete and file its determinations and views of the Commission on November 14, 2023.
5. *Outstanding action jackets:* none.

**CONTACT PERSON FOR MORE INFORMATION:** Sharon Bellamy, Supervisory Hearings and Information Officer, 202–205–2000.

The Commission is holding the meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b). In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: October 27, 2023.

**Sharon Bellamy,**

*Supervisory Hearings and Information Officer.*

[FR Doc. 2023–24073 Filed 10–27–23; 11:15 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

**[Docket No. DEA–1051A]**

### Proposed Adjustments to the 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

**AGENCY:** Drug Enforcement Administration, Department of Justice.

**ACTION:** Notice with request for comments.

**SUMMARY:** The Drug Enforcement Administration (DEA) proposes to adjust the 2023 aggregate production quotas for several controlled substances in schedules I and II of the Controlled Substances Act (CSA) and the assessment of annual needs for the list I chemical phenylpropanolamine.

**DATES:** Interested persons may file written comments on this notice in accordance with 21 CFR 1303.13(c) and 1315.13(d). Electronic comments must be submitted, and written comments must be postmarked, on or before November 30, 2023. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after 11:59 p.m. Eastern Time on the last day of the comment period.

Based on comments received in response to this notice, the Administrator may hold a public hearing on one or more issues raised. In the event the Administrator decides in her sole discretion to hold such a hearing, the Administrator will publish a notice of any such hearing in the **Federal Register**. After consideration of any comments or objections, or after a hearing, if one is held, the Administrator will publish in the **Federal Register** a final order establishing the 2023 adjusted aggregate production quotas for schedule I and II controlled substances, and an adjusted assessment of annual needs for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine, as relevant.

**ADDRESSES:** To ensure proper handling of comments, please reference ''Docket No. DEA–1051A'' on all correspondence, including any attachments. DEA encourages that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *http://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon completion of your submission, you will receive a Comment Tracking Number for your comment. Please be aware that submitted comments are not instantaneously available for public view on *Regulations.gov*. If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. Paper comments that duplicate electronic submissions are not necessary and are discouraged. Should you wish to mail a paper comment *in lieu of* an electronic comment, it should be sent via regular or express mail to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DRW, 8701 Morrissette Drive, Springfield, Virginia 22152.

**FOR FURTHER INFORMATION CONTACT:** Scott A. Brinks, Regulatory Drafting and Policy Support Section, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152, Telephone: 571–776–3882.

**SUPPLEMENTARY INFORMATION:**

## Posting of Public Comments

Please note that all comments received in response to this docket are considered part of the public record. The Drug Enforcement Administration (DEA) will make comments available for public inspection online at *http://www.regulations.gov*. Such information includes personal or business identifiers (such as name, address, state or Federal identifiers, etc.) voluntarily submitted by the commenter. Generally, all information voluntarily submitted by the commenter, unless clearly marked as Confidential Information in the method described below, will be publicly posted. Comments may be submitted anonymously. The Freedom of Information Act applies to all comments received.

Commenters submitting comments which include personal identifying information (PII), confidential, or proprietary business information that the commenter does not want made publicly available should submit two copies of the comment. One copy must be marked ''CONTAINS CONFIDENTIAL INFORMATION'' and should clearly identify all PII or business information the commenter does not want to be made publicly available, including any supplemental materials. DEA will review this copy, including the claimed PII and confidential business information, in its consideration of comments. The second copy should be marked ''TO BE PUBLICLY POSTED'' and must have all claimed confidential PII and business information already redacted. DEA will post only the redacted comment on *http://www.regulations.gov for public inspection.*

For easy reference, an electronic copy of this document is available at *http://www.regulations.gov.*

## Legal Authority and Background

Section 306 of the 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 schedules I and II and for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine. The Attorney General has delegated this function to the Administrator of DEA.[1]

DEA established the 2023 APQ for substances in schedules I and II and the assessment of annual needs (AAN) for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine on December 2, 2022.[2] That order stipulated that, in accordance with 21 CFR 1303.13 and 1315.13, all APQ and AAN are subject to adjustment.

## Analysis for Proposed Adjusted 2023 Aggregate Production Quotas and Assessment of Annual Needs

DEA proposes to adjust the established 2023 APQ for certain schedule I and II controlled substances and the AAN for certain list I chemicals to be manufactured in the United States (U.S.) in 2023 to provide for the estimated medical, scientific, research, and industrial needs of the U.S., 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.

### *Factors for Determining the Proposed Adjustments*

In determining the proposed adjustments, the Administrator has taken into account the factors in 21 CFR 1303.13 (adjustment of APQ for controlled substances) and 21 CFR 1315.13 (adjustment of the AAN for ephedrine, pseudoephedrine, and phenylpropanolamine). The Administrator is authorized to increase or reduce the APQ and the AAN at any time.[3]

DEA determined whether to propose an adjustment of the APQ for 2023 by considering the factors found at 21 CFR 1303.13(b):[4]

(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 Sec. 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

[1] 28 CFR 0.100(b).

[2] 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).

[3] 21 CFR 1303.13(a) and 1315.13(a).

[4] DEA recently adopted revisions to its regulations for setting quotas, but that rule has not yet taken effect and does not affect this notice proposing some adjustments to the 2023 APQs. Management of Quotas for Controlled Substances and List I Chemicals, 88 FR 60117 (Aug. 31, 2023) (effective Nov. 29, 2023).

exporters), notwithstanding the possibility that individual manufacturing quotas may be suspended pursuant to Sec. 1303.24(b) or abandoned pursuant to Sec. 1303.27;

(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.

DEA also considered updated information obtained from 2022 year-end inventories, 2022 disposition data submitted by quota applicants, changes in estimates of the medical needs of the U.S., export requirements, and other information made available to DEA after the initial APQ and AAN had been established. Additional factors the Administrator considered in calculating the APQ, but not the AAN, include product development requirements of both bulk and finished dosage form manufacturers.

After considering the changes in the extent of diversion of all controlled substances, as required by 21 CFR 1303.13(b)(1), DEA has determined that any changes from the initial calculations are slight and not statistically significant from the estimates of diversion that DEA applied to the initial APQ valuations.

DEA determined whether to propose an adjustment of the AAN for 2023 by considering the factors found at 21 CFR 1315.13(b) and summarized below:

(1) Changes in the demand for that chemical, changes in the national rate of net disposal of the chemical, and changes in the rate of net disposal of the chemical by registrants holding individual manufacturing or import quotas for that chemical;

(2) Whether any increased demand for that chemical, the national and/or changes in individual rates of net disposal of that chemical are temporary, short term, or long term;

(3) Whether any increased demand for that chemical can be met through existing inventories, increased individual manufacturing quotas, or increased importation, without increasing the assessment of annual needs, taking into account production delays and the probability that other individual manufacturing quotas may be suspended pursuant to Sec. 1315.24(b);

(4) Whether any decreased demand for that chemical will result in excessive inventory accumulation by all persons registered to handle that chemical (including manufacturers, distributors, importers, and exporters), notwithstanding the possibility that individual manufacturing quotas may be suspended pursuant to Sec. 1315.24(b) or abandoned pursuant to Sec. 1315.27;

(5) Other factors affecting medical, scientific, research, industrial, and importation needs in the United States, lawful export requirements, and reserve stocks, as the Administrator finds relevant, including changes in the currently accepted medical use in treatment with the chemical or the substances that 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.

In evaluating whether there is a need for adjustment of the 2023 AAN for list I chemicals, DEA used the calculation methodology previously described in the 2010 and 2011 assessment of annual needs.[5] DEA considered the total net disposals of the list I chemicals for the current and preceding two years, actual and estimated inventories, projected demand, industrial use, and export requirements from data provided by DEA registered manufacturers and importers on the relevant quota application forms.[6]

*Additional Considerations Applicable to Covered Controlled Substances*

When setting APQ, the Administrator must estimate the amount of diversion of any substance that is considered a ''covered controlled substance.'' [7] The covered controlled substances are fentanyl, oxycodone, hydrocodone, oxymorphone, and hydromorphone.[8] DEA is required to ''make appropriate quota reductions, as determined by the [Administrator], from the quota the [Administrator] would have otherwise established had such diversion not been considered.'' [9] When estimating diversion, the Administrator ''shall consider information,'' in consultation with the Secretary of Health and Human Services, the Administrator ''determines reliable on rates of overdose deaths and abuse and overall public health impact related to the covered controlled substance in the United States;'' and ''may take into consideration'' whatever other sources of information they determine reliable.[10]

DEA sent letters to the Centers for Disease Control and Prevention (CDC), and the states in February, April, and May 2023 requesting overdose death and overprescribing data that could be considered in estimating diversion. DEA received information from the CDC in April 2023 and received Prescription Data Monitoring Program (PDMP) data from the states in May and June 2023. DEA considered this information in developing the estimates of diversion for the five covered controlled substances for this proposed adjustment.

To determine the estimates of diversion, DEA also aggregated data for each covered controlled substance from the Drug Theft and Loss Reports. DEA gathered data involving employee theft, break-ins, armed robberies, and material lost in transit. DEA calculated the metric weight in grams of each active pharmaceutical ingredient (API) of the controlled substances being diverted as identified in these reports. In calculating the estimates of diversion, DEA utilized the same methodology as published in the Proposed APQ for Schedule I and II Controlled Substances and AAN for the List I Chemicals Ephedrine, Pseudoephedrine, and Phenylpropanolamine for 2023.[11] Below, DEA provides an updated chart showing estimations of diversion for each of the covered controlled substances.

DIVERSION ESTIMATES FOR 2023 (g)

| Fentanyl | 59 |
|---|---|
| Hydrocodone | 133,004 |
| Hydromorphone | 595 |
| Oxycodone | 174,797 |
| Oxymorphone | 109 |

**Proposed Adjustments for the 2023 Aggregate Production Quotas and Assessment of Annual Needs**

DEA is proposing increases to the APQ for the following schedule I substances: all other tetrahydrocannabinol, delta-9-tetrahydrocannabinol, ibogaine, psilocybin, and psilocyn. These proposed increases are to support research and clinical trials by DEA-registered schedule I researchers. These proposed increases demonstrate DEA's support for research with schedule I controlled substances.

DEA established the 2023 APQs for substances in schedules I and II on December 2, 2022.[12] Subsequent to that publication, DEA published in the **Federal Register** final rules to permanently schedule four synthetic

[5] 74 FR 60294 (Nov. 20, 2009) and 75 FR 79407 (Dec. 20, 2010).

[6] *Id.*

[7] 21 U.S.C. 826(i)(1)(A).

[8] 21 U.S.C. 826(i)(1)(A).

[9] All functions vested in the Attorney General by the CSA have been delegated to the Administrator of DEA. 28 CFR 0.100(b); 21 U.S.C. 826(i)(1)(C).

[10] 21 U.S.C. 826(i)(1)(B).

[11] 87 FR 63091 (October 18, 2022).

[12] 87 FR 74168.

drugs under the CSA.[13] The specific synthetic substances are eutylone, mesocarb, methiopropamine, and zipeprol. As a result, these substances will continue to be subject to the CSA schedule I controls and DEA is proposing to assign individual APQ for each substance pursuant to 21 U.S.C. 826 and 21 CFR part 1303.

DEA previously adjusted the established 2023 aggregate production quota 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 in accordance with 21 U.S.C. 826(h).[14] This adjustment was 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.

The Administrator, therefore, proposes to adjust the 2023 APQ for the schedule I controlled substances of all other tetrahydrocannabinol, delta-9-tetrahydrocannabinol, eutylone, ibogaine, mesocarb, methiopropamine, psilocybin, psilocyn, and zipeprol. The proposed adjusted APQ and AAN, as expressed in grams of anhydrous acid or base, are as follows:

| Basic class | Established 2023 quotas (g) | Proposed revised 2023 quotas (g) |
|---|---|---|
| **Schedule I** | | |
| 1-[1-(2-Thienyl)cyclohexyl]pyrrolidine | 20 | no change. |
| 1-(1-Phenylcyclohexyl)pyrrolidine | 30 | no change. |
| 1-(2-Phenylethyl)-4-phenyl-4-acetoxypiperidine | 10 | no change. |
| 1-(5-Fluoropentyl)-3-(1-naphthoyl)indole (AM2201) | 30 | no change. |
| 1-(5-Fluoropentyl)-3-(2-iodobenzoyl)indole (AM694) | 30 | no change. |
| 1-[1-(2-Thienyl)cyclohexyl]piperidine | 15 | no change. |
| 2′-fluoro 2-fluorofentanyl | 30 | no change. |
| 1-Benzylpiperazine | 25 | no change. |
| 1-Methyl-4-phenyl-4-propionoxypiperidine | 10 | no change. |
| 2-(2,5-Dimethoxy-4-ethylphenyl)ethanamine (2C–E) | 30 | no change. |
| 2-(2,5-Dimethoxy-4-methylphenyl)ethanamine (2C–D) | 30 | no change. |
| 2-(2,5-Dimethoxy-4-nitro-phenyl)ethanamine (2C–N) | 30 | no change. |
| 2-(2,5-Dimethoxy-4-n-propylphenyl)ethanamine (2C–P) | 30 | no change. |
| 2-(2,5-Dimethoxyphenyl)ethanamine (2C–H) | 100 | no change. |
| 2-(4-Bromo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25B–NBOMe; 2C–B–NBOMe; 25B; Cimbi-36) | 30 | no change. |
| 2-(4-Chloro-2,5-dimethoxyphenyl)ethanamine (2C–C) | 30 | no change. |
| 2-(4-Chloro-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25C–NBOMe; 2C–C–NBOMe; 25C; Cimbi-82) | 25 | no change. |
| 2-(4-Iodo-2,5-dimethoxyphenyl)ethanamine (2C–I) | 30 | no change. |
| 2-(4-Iodo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25I–NBOMe; 2C–I–NBOMe; 25I; Cimbi-5) | 30 | no change. |
| 2,5-Dimethoxy-4-ethylamphetamine (DOET) | 25 | no change. |
| 2,5-Dimethoxy-4-n-propylthiophenethylamine | 25 | no change. |
| 2,5-Dimethoxyamphetamine | 25 | no change. |
| 2-[4-(Ethylthio)-2,5-dimethoxyphenyl]ethanamine (2C–T–2) | 30 | no change. |
| 2-[4-(Isopropylthio)-2,5-dimethoxyphenyl]ethanamine (2C–T–4) | 30 | no change. |
| 3,4,5-Trimethoxyamphetamine | 30 | no change. |
| 3,4-Methylenedioxyamphetamine (MDA) | 12,000 | no change. |
| 3,4-Methylenedioxymethamphetamine (MDMA) | 12,000 | no change. |
| 3,4-Methylenedioxy-N-ethylamphetamine (MDEA) | 40 | no change. |
| 3,4-Methylenedioxy-N-methylcathinone (methylone) | 5,200 | no change. |
| 3,4-Methylenedioxypyrovalerone (MDPV) | 35 | no change. |
| 3–FMC; 3-Fluoro-N-methylcathinone | 25 | no change. |
| 3-Methylfentanyl | 30 | no change. |
| 3-Methylthiofentanyl | 30 | no change. |
| 4-Bromo-2,5-dimethoxyamphetamine (DOB) | 5,100 | no change. |
| 4-Bromo-2,5-dimethoxyphenethylamine (2–CB) | 25 | no change. |
| 4-Chloro-*alpha*-pyrrolidinovalerophenone (4-chloro-*alpha*-PVP) | 25 | no change. |
| 4–CN-Cumyl-Butinaca | 25 | no change. |
| 4,4′-Dimethylaminorex | 30 | no change. |
| 4-Fluoroisobutyryl fentanyl | 30 | no change. |
| 4F–MDMB–BINACA | 30 | no change. |
| 4–FMC; Flephedrone | 25 | no change. |
| 4–MEC; 4-Methyl-N-ethylcathinone | 25 | no change. |
| 4-Methoxyamphetamine | 150 | no change. |
| 4-Methyl-2,5-dimethoxyamphetamine (DOM) | 25 | no change. |
| 4-Methylaminorex | 25 | no change. |
| 4-Methyl-N-methylcathinone (mephedrone) | 45 | no change. |
| 4-Methyl-*alpha*-ethylaminopentiophenone (4–MEAP) | 25 | no change. |
| 4-Methyl-*alpha*-pyrrolidinohexiophenone (MPHP) | 25 | no change. |
| 4′-Methyl acetyl fentanyl | 30 | no change. |

[13] 87 FR 70717 (November 21, 2022), 87 FR 71247 (November 22, 2022), 87 FR 20318 (April, 7 2022), and 87 FR 32996 (June 1, 2022).

[14] Adjustment to the Aggregate Production Quota for Methylphenidate (for Sale) for 2023, 88 FR 68147 (October 3, 2023).

| Basic class | Established 2023 quotas (g) | Proposed revised 2023 quotas (g) |
|---|---|---|
| 4-Methyl-α-pyrrolidinopropiophenone (4-MePPP) | 25 | no change. |
| 5-(1,1-Dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol | 50 | no change. |
| 5-(1,1-Dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol or CP–47,497 C8-homolog) | 40 | no change. |
| 5F–AB–PINACA; (1-Amino-3-methyl-1-oxobutan-2-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide | 25 | no change. |
| 5F–ADB; 5F–MDMB–PINACA (methyl 2-(1-(5-fluoropentyl)-1H-indazole-3-carboxamido)-3,3-dimethylbutanoate) | 25 | no change. |
| 5F–CUMYL–P7AICA; 1-(5-Fluoropentyl)-N-(2-phenylpropan-2-yl)-1H-pyrrolo[2,3-b]pyridine-3carboximide | 25 | no change. |
| 5F–CUMYL–PINACA | 25 | no change. |
| 5F–EDMB–PINACA | 25 | no change. |
| 5F–MDMB–PICA | 25 | no change. |
| 5F–AMB (methyl 2-(1-(5-fluoropentyl)-1H-indazole-3-carboxamido)-3-methylbutanoate) | 25 | no change. |
| 5F–APINACA; 5F–AKB48 (N-(adamantan-1-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide) | 25 | no change. |
| 5-Fluoro-PB–22; 5F–PB–22 | 25 | no change. |
| 5-Fluoro-UR144, XLR11 ([1-(5-fluoro-pentyl)-1Hindol-3-yl](2,2,3,3-tetramethylcyclopropyl)methanone | 25 | no change. |
| 5-Methoxy-3,4-methylenedioxyamphetamine | 25 | no change. |
| 5-Methoxy-N,N-diisopropyltryptamine | 25 | no change. |
| 5-Methoxy-N,N-dimethyltryptamine | 11,000 | no change. |
| AB–CHMINACA | 30 | no change. |
| AB–FUBINACA | 50 | no change. |
| AB–PINACA | 30 | no change. |
| ADB–FUBINACA (N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-(4-fluorobenzyl)-1H-indazole-3-carboxamide) | 30 | no change. |
| Acetorphine | 25 | no change. |
| Acetyl Fentanyl | 100 | no change. |
| Acetyl-*alpha*-methylfentanyl | 30 | no change. |
| Acetyldihydrocodeine | 30 | no change. |
| Acetylmethadol | 25 | no change. |
| Acryl Fentanyl | 25 | no change. |
| ADB–PINACA (N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-pentyl-1H-indazole-3-carboxamide) | 50 | no change. |
| AH–7921 | 30 | no change. |
| All other tetrahydrocannabinol | 15,000 | 350,000. |
| Allylprodine | 25 | no change. |
| Alphacetylmethadol | 25 | no change. |
| *alpha*-Ethyltryptamine | 25 | no change. |
| Alphameprodine | 25 | no change. |
| Alphamethadol | 25 | no change. |
| *alpha*-Methylfentanyl | 30 | no change. |
| *alpha*-Methylthiofentanyl | 30 | no change. |
| *alpha*-Methyltryptamine (AMT) | 25 | no change. |
| *alpha*-Pyrrolidinobutiophenone (α-PBP) | 25 | no change. |
| *alpha*-pyrrolidinoheptaphenone (PV8) | 25 | no change. |
| *alpha*-pyrrolidinohexabophenone (α -PHP) | 25 | no change. |
| *alpha*-Pyrrolidinopentiophenone (α-PVP) | 25 | no change. |
| Amineptine | 30 | no change. |
| Aminorex | 25 | no change. |
| Anileridine | 20 | no change. |
| APINCA, AKB48 (N-(1-adamantyl)-1-pentyl-1H-indazole-3-carboxamide) | 25 | no change. |
| Benzethidine | 25 | no change. |
| Benzylmorphine | 30 | no change. |
| Betacetylmethadol | 25 | no change. |
| *beta*-Hydroxy-3-methylfentanyl | 30 | no change. |
| *beta*-Hydroxyfentanyl | 30 | no change. |
| *beta*-Hydroxythiofentanyl | 30 | no change. |
| *beta*-Methyl fentanyl | 30 | no change. |
| *beta*-Phenyl fentanyl | 30 | no change. |
| Betameprodine | 25 | no change. |
| Betamethadol | 4 | no change. |
| Betaprodine | 25 | no change. |
| Brorphine | 30 | no change. |
| Bufotenine | 15 | no change. |
| Butonitazene | 30 | no change. |
| Butylone | 25 | no change. |
| Butyryl fentanyl | 30 | no change. |
| Cathinone | 40 | no change. |
| Clonitazene | 25 | no change. |
| Codeine methylbromide | 30 | no change. |
| Codeine-N-oxide | 192 | no change. |
| Crotonyl Fentanyl | 25 | no change. |
| Cyclopentyl Fentanyl | 30 | no change. |
| Cyclopropyl Fentanyl | 20 | no change. |

| Basic class | Established 2023 quotas (g) | Proposed revised 2023 quotas (g) |
|---|---|---|
| Cyprenorphine | 25 | no change. |
| d-9–THC | 384,460 | 628,460. |
| Desomorphine | 25 | no change. |
| Dextromoramide | 25 | no change. |
| Diapromide | 20 | no change. |
| Diethylthiambutene | 20 | no change. |
| Diethyltryptamine | 25 | no change. |
| Difenoxin | 9,300 | no change. |
| Dihydromorphine | 653,548 | no change. |
| Dimenoxadol | 25 | no change. |
| Dimepheptanol | 25 | no change. |
| Dimethylthiambutene | 20 | no change. |
| Dimethyltryptamine | 3,000 | no change. |
| Dioxyaphetyl butyrate | 25 | no change. |
| Dipipanone | 25 | no change. |
| Drotebanol | 25 | no change. |
| Ethylmethylthiambutene | 25 | no change. |
| Ethylone | 25 | no change. |
| Etonitazene | 25 | no change. |
| Etodesnitazene | 30 | no change. |
| Etorphine | 30 | no change. |
| Etoxeridine | 25 | no change. |
| Eutylone | N/A | 30. |
| Fenethylline | 30 | no change. |
| Fentanyl carbamate | 30 | no change. |
| Fentanyl related substances | 600 | no change. |
| FUB–144 | 25 | no change. |
| Flunitazene | 30 | no change. |
| FUB–AKB48 | 25 | no change. |
| Fub-AMB, MMB-Fubinaca, AMB-Fubinaca | 25 | no change. |
| Furanyl fentanyl | 30 | no change. |
| Furethidine | 25 | no change. |
| *gamma*-Hydroxybutyric acid | 29,417,000 | no change. |
| Heroin | 150 | no change. |
| Hydromorphinol | 40 | no change. |
| Hydroxypethidine | 25 | no change. |
| Ibogaine | 30 | 150. |
| Isobutyryl Fentanyl | 25 | no change. |
| Isotonitazine | 25 | no change. |
| JWH–018 and AM678 (1-Pentyl-3-(1-naphthoyl)indole) | 35 | no change. |
| JWH–019 (1-Hexyl-3-(1-naphthoyl)indole) | 45 | no change. |
| JWH–073 (1-Butyl-3-(1-naphthoyl)indole) | 45 | no change. |
| JWH–081 (1-Pentyl-3-[1-(4-methoxynaphthoyl)]indole) | 30 | no change. |
| JWH–122 (1-Pentyl-3-(4-methyl-1-naphthoyl)indole) | 30 | no change. |
| JWH–200 (1-[2-(4-Morpholinyl)ethyl]-3-(1-naphthoyl)indole) | 35 | no change. |
| JWH–203 (1-Pentyl-3-(2-chlorophenylacetyl)indole) | 30 | no change. |
| JWH–250 (1-Pentyl-3-(2-methoxyphenylacetyl)indole) | 30 | no change. |
| JWH–398 (1-Pentyl-3-(4-chloro-1-naphthoyl)indole) | 30 | no change. |
| Ketobemidone | 30 | no change. |
| Levomoramide | 25 | no change. |
| Levophenyacylmorphan | 25 | no change. |
| Lysergic acid diethylamide (LSD) | 1,200 | no change. |
| MAB–CHMINACA; ADB–CHMINACA (N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-(cyclohexylmethyl)-1H-indazole-3-carboxamide) | 30 | no change. |
| MDMB–CHMICA; MMB–CHMINACA(methyl 2-(1-(cyclohexylmethyl)-1H-indole-3-carboxamido)-3,3-dimethylbutanoate) | 30 | no change. |
| MDMB–FUBINACA (methyl 2-(1-(4-fluorobenzyl)-1H-indazole-3-carboxamido)-3,3-dimethylbutanoate) | 30 | no change. |
| MMB–CHMICA-(AMB–CHIMCA); Methyl-2-(1-(cyclohexylmethyl)-1H-indole-3-carboxamido)-3-methylbutanoate | 25 | no change. |
| Marijuana | 6,675,000 | no change. |
| Marijuana extract | 1,000,000 | no change. |
| Mecloqualone | 30 | no change. |
| Mescaline | 1,200 | no change. |
| Mesocarb | N/A | 30. |
| Methaqualone | 60 | no change. |
| Methcathinone | 25 | no change. |
| Methiopropamine | N/A | 30. |
| Methoxetamine | 30 | no change. |
| Methoxyacetyl fentanyl | 30 | no change. |
| Methyldesorphine | 5 | no change. |
| Methyldihydromorphine | 25 | no change. |
| Metodesnitazene | 30 | no change. |

| Basic class | Established 2023 quotas (g) | Proposed revised 2023 quotas (g) |
|---|---|---|
| Metonitazene | 30 | no change. |
| Morpheridine | 25 | no change. |
| Morphine methylbromide | 5 | no change. |
| Morphine methylsulfonate | 5 | no change. |
| Morphine-N-oxide | 150 | no change. |
| MT–45 | 30 | no change. |
| Myrophine | 25 | no change. |
| NM2201: Naphthalen-1-yl 1-(5-fluorpentyl)-1H-indole-3-carboxylate | 25 | no change. |
| N,N-Dimethylamphetamine | 25 | no change. |
| Naphyrone | 25 | no change. |
| N-Ethyl-1-phenylcyclohexylamine | 25 | no change. |
| N-Ethyl-3-piperidyl benzilate | 10 | no change. |
| N-Ethylamphetamine | 24 | no change. |
| N-Ethylhexedrone | 25 | no change. |
| N-Ethylpentylone, ephylone | 30 | no change. |
| N-Hydroxy-3,4-methylenedioxyamphetamine | 24 | no change. |
| Nicocodeine | 25 | no change. |
| Nicomorphine | 25 | no change. |
| N-methyl-3-piperidyl benzilate | 30 | no change. |
| Noracymethadol | 25 | no change. |
| N-Pyrrolidino Etonitazene | 30 | no change. |
| Norlevorphanol | 2,550 | no change. |
| Normethadone | 25 | no change. |
| Normorphine | 40 | no change. |
| Norpipanone | 25 | no change. |
| Ocfentanil | 25 | no change. |
| *ortho*-Fluoroacryl fentanyl | 30 | no change. |
| *ortho*-Fluorobutyryl fentanyl | 30 | no change. |
| *ortho*-Fluorofentanyl,2-Fluorofentanyl | 30 | no change. |
| *ortho*-Fluoroisobutyryl fentanyl | 30 | no change. |
| *ortho*-Methyl acetylfentanyl | 30 | no change. |
| *ortho*-Methyl methoxyacetyl fentanyl | 30 | no change. |
| *Para*-Chlorisobutyrl fentanyl | 30 | no change. |
| *Para*-flourobutyryl fentanyl | 25 | no change. |
| *Para*-fluorofentanyl | 25 | no change. |
| *Para*-Fluoro furanyl fentanyl | 30 | no change. |
| *Para*-Methoxybutyrl fentanyl | 30 | no change. |
| *Para*-methoxymethamphetamine | 30 | no change. |
| *Para*-Methylfentanyl | 30 | no change. |
| Parahexyl | 5 | no change. |
| PB–22; QUPIC | 20 | no change. |
| Pentedrone | 25 | no change. |
| Pentylone | 25 | no change. |
| Phenadoxone | 25 | no change. |
| Phenampromide | 25 | no change. |
| Phenomorphan | 25 | no change. |
| Phenoperidine | 25 | no change. |
| Phenyl fentanyl | 30 | no change. |
| Pholcodine | 5 | no change. |
| Piritramide | 25 | no change. |
| Proheptazine | 25 | no change. |
| Properidine | 25 | no change. |
| Propiram | 25 | no change. |
| Protonitazene | 30 | no change. |
| Psilocybin | 8,000 | 15,000. |
| Psilocyn | 12,000 | 24,000. |
| Racemoramide | 25 | no change. |
| SR–18 and RCS–8 (1-Cyclohexylethyl-3-(2-methoxyphenylacetyl)indole) | 45 | no change. |
| SR–19 and RCS–4 (1-Pentyl-3-[(4-methoxy)-benzoyl]indole) | 30 | no change. |
| Tetrahydrofuranyl fentanyl | 15 | no change. |
| Thebacon | 25 | no change. |
| Thiafentanil | 25 | no change. |
| Thiofentanyl | 25 | no change. |
| Thiofuranyl fentanyl | 30 | no change. |
| THJ–2201 ([1-(5-fluoropentyl)-1H-indazol-3-yl](naphthalen-1-yl)methanone) | 30 | no change. |
| Tilidine | 25 | no change. |
| Trimeperidine | 25 | no change. |
| UR–144 (1-pentyl-1H-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl)methanone | 25 | no change. |
| U–47700 | 30 | no change. |
| Valeryl fentanyl | 25 | no change. |
| Zipeprol | N/A | 30. |

| Basic class | Established 2023 quotas (g) | Proposed revised 2023 quotas (g) |
|---|---|---|
| **Schedule II** | | |
| 1-Phenylcyclohexylamine | 15 | no change. |
| 1-Piperidinocyclohexanecarbonitrile | 25 | no change. |
| 4-Anilino-N-phenethyl-4-piperidine (ANPP) | 937,874 | no change. |
| Alfentanil | 5,000 | no change. |
| Alphaprodine | 25 | no change. |
| Amobarbital | 20,100 | no change. |
| Amphetamine (for sale)(split) | N/A | no change. |
| Bezitramide | 25 | no change. |
| Carfentanil | 20 | no change. |
| Cocaine | 60,492 | no change. |
| Codeine (for conversion) | 1,085,024 | no change. |
| Codeine (for sale) | 21,003,397 | no change. |
| D-amphetamine (for sale) | 21,200,000 | no change. |
| D,l-amphetamine | 21,200,000 | no change. |
| D-amphetamine (for conversion) | 20,000,000 | no change. |
| Dexmethylphenidate (for sale) | 6,200,000 | no change. |
| Dexmethylphenidate (for conversion) | 4,200,000 | no change. |
| Dextropropoxyphene | 35 | no change. |
| Dihydrocodeine | 132,658 | no change. |
| Dihydroetorphine | 25 | no change. |
| Diphenoxylate (for conversion) | 14,100 | no change. |
| Diphenoxylate (for sale) | 770,800 | no change. |
| Ecgonine | 60,492 | no change. |
| Ethylmorphine | 30 | no change. |
| Etorphine hydrochloride | 32 | no change. |
| Fentanyl | 731,452 | no change. |
| Glutethimide | 25 | no change. |
| Hydrocodone (for conversion) | 1,250 | no change. |
| Hydrocodone (for sale) | 27,239,822 | no change. |
| Hydromorphone | 1,994,125 | no change. |
| Isomethadone | 30 | no change. |
| L-amphetamine | 30 | no change. |
| Levo-alphacetylmethadol (LAAM) | 25 | no change. |
| Levomethorphan | 30 | no change. |
| Levorphanol | 23,010 | no change. |
| Lisdexamfetamine | 26,500,000 | no change. |
| Meperidine | 681,289 | no change. |
| Meperidine Intermediate-A | 30 | no change. |
| Meperidine Intermediate-B | 30 | no change. |
| Meperidine Intermediate-C | 30 | no change. |
| Metazocine | 15 | no change. |
| Methadone (for sale) | 25,619,700 | no change. |
| Methadone Intermediate | 27,673,600 | no change. |
| Methamphetamine | 150 | no change. |
| d-methamphetamine (for conversion) | 485,020 | no change. |
| d-methamphetamine (for sale) | 47,000 | no change. |
| l-methamphetamine | 587,229 | no change. |
| Methylphenidate (for sale) | 53,283,000 | no change. |
| Methylphenidate (for conversion) | 15,300,000 | no change. |
| Metopon | 25 | no change. |
| Moramide-intermediate | 25 | no change. |
| Morphine (for conversion) | 2,458,460 | no change. |
| Morphine (for sale) | 21,747,625 | no change. |
| Nabilone | 62,000 | no change. |
| Norfentanyl | 25 | no change. |
| Noroxymorphone (for conversion) | 22,044,741 | no change. |
| Noroxymorphone (for sale) | 1,000 | no change. |
| Oliceridine | 25,100 | no change. |
| Opium (powder) | 250,000 | no change. |
| Opium (tincture) | 530,837 | no change. |
| Oripavine | 33,010,750 | no change. |
| Oxycodone (for conversion) | 437,827 | no change. |
| Oxycodone (for sale) | 53,840,608 | no change. |
| Oxymorphone (for conversion) | 28,204,371 | no change. |
| Oxymorphone (for sale) | 516,351 | no change. |
| Pentobarbital | 33,843,337 | no change. |
| Phenazocine | 25 | no change. |
| Phencyclidine | 35 | no change. |
| Phenmetrazine | 25 | no change. |
| Phenylacetone | 100 | no change. |

| Basic class | Established 2023 quotas (g) | Proposed revised 2023 quotas (g) |
|---|---|---|
| Piminodine | 25 | no change. |
| Racemethorphan | 5 | no change. |
| Racemorphan | 5 | no change. |
| Remifentanil | 3,000 | no change. |
| Secobarbital | 172,100 | no change. |
| Sufentanil | 4,000 | no change. |
| Tapentadol | 11,941,416 | no change. |
| Thebaine | 57,137,944 | no change. |
| **List I Chemicals** | | |
| Ephedrine (for conversion) | 41,100 | no change. |
| Ephedrine (for sale) | 4,136,000 | no change. |
| Phenylpropanolamine (for conversion) | 14,878,320 | no change. |
| Phenylpropanolamine (for sale) | 7,990,000 | no change. |
| Pseudoephedrine (for conversion) | 1,000 | no change. |
| Pseudoephedrine (for sale) | 174,246,000 | no change. |

The Administrator further proposes that APQ for all other schedule I and II controlled substances included in 21 CFR 1308.11 and 1308.12 remain at zero. In accordance with 21 CFR 1303.13 and 21 CFR 1315.13, upon consideration of the relevant factors, the Administrator may adjust the 2023 APQ and AAN as needed.

*Conclusion*

After consideration of any comments or objections, or after a hearing, if one is held, the Administrator will issue and publish in the **Federal Register** a final order establishing any adjustment of the 2023 APQ for each basic class of controlled substances in schedules I and II and AAN for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine.[15]

*Signing Authority*

This document of the Drug Enforcement Administration was signed on October 25, 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**.

**Scott Brinks,**

*Federal Register Liaison Officer, Drug Enforcement Administration.*

[FR Doc. 2023–23931 Filed 10–30–23; 8:45 am]

**BILLING CODE P**

[15] 21 CFR 1303.13(c) and 1315.13(c).

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Dmitry Anatolevich Shelchkov, M.D.; Decision and Order

On July 21, 2021, the Drug Enforcement Administration (hereinafter, DEA or Government) issued an Order to Show Cause (hereinafter, OSC) to Dmitry Anatolevich Shelchkov, M.D. (hereinafter, Registrant). Request for Final Agency Action (hereinafter, RFAA), Appendix (hereinafter, RFAAX) H, at 1, 4. The OSC proposed the revocation of Registrant's Certificate of Registration No. BS8311502 at the registered address of 1396 Myrtle Avenue, Brooklyn, New York 11237. *Id.* at 1. The OSC alleged that Registrant's registration should be revoked because Registrant is ''without authority to handle controlled substances in New York, the state in which [he is] registered with DEA.'' *Id.* at 2 (citing 21 U.S.C. 824(a)(3)).

The Agency makes the following findings of fact based on the uncontroverted evidence submitted by the Government in its RFAA,[1] which was fully received on July 12, 2023.[2]

[1] The Government's RFAA is dated June 30, 2022. RFAA, at 6.

[2] Based on the Declaration from a DEA Diversion Investigator, the Agency finds that the Government's service of the OSC on Registrant was adequate. RFAAX F, at 1; *see also* RFAAX A (Form DEA–12 signed by Registrant). Further, based on the Government's assertions in its RFAA, the Agency finds that more than thirty days have passed since Registrant was served with the OSC and Registrant has neither requested a hearing nor submitted a corrective action plan and therefore has waived any such rights. RFAA, at 2; *see also* 21 CFR 1301.43 and 21 U.S.C. 824(c)(2).

#### Findings of Fact

On March 2, 2021, the New York State Commissioner of Health ordered that ''effective immediately, [Registrant] shall not practice medicine in the State of New York.'' RFAAX B, at 1, 3. On October 29, 2021, the New York State Board for Professional Medical Conduct issued a Determination and Order revoking Registrant's New York medical license. RFAAX C, at 3–4, 27. According to New York's online records, of which the Agency takes official notice, Registrant's New York medical license is revoked.[3] New York State Department of Health Office of Professional Medical Conduct Physician Search, *https://apps.health.ny.gov/pubdoh/professionals/doctors/conduct/factions/Home.action* (last visited date of signature of this Order).[4] Accordingly,

[3] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Registrant may dispute the Agency's finding by filing a properly supported motion for reconsideration of findings of fact within fifteen calendar days of the date of this Order. Any such motion and response shall be filed and served by email to the other party and to Office of the Administrator, Drug Enforcement Administration at *dea.addo.attorneys@dea.gov.*

[4] The New York State Education Department Office of the Professions lists the status of Registrant's New York medical license as ''summary suspension'', but notes that because the office does not discipline physicians, the status listed might be impacted by New York State Department of Health action and accordingly provides a link to the New York State Department of Health Office of Professional Medical Conduct Physician Search. New York State Education Department Office of the Professions, Verification Search, *https://www.op.nysed.gov/verification-search.*

the Agency finds that Registrant is not licensed to engage in the practice of medicine in New York, the state in which he is registered with DEA.

**Discussion**

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the Controlled Substances Act (hereinafter, CSA) ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27616, 27617 (1978).[5]

According to the New York Controlled Substances Act (hereinafter, the Act), ''[i]t shall be unlawful for any person to manufacture, sell, prescribe, distribute, dispense, administer, possess, have under his control, abandon, or transport a controlled substance except as expressly allowed by this article.'' N.Y. Pub. Health Law section 3304 (McKinney 2023). Further, the Act defines a ''practitioner'' as ''[a] physician . . . or other person licensed, or otherwise permitted to dispense, administer or conduct research with respect to a controlled substance in the course of a licensed professional practice. . . .'' *Id.* at section 3302(27). Finally, New York regulations state that ''[a] prescription for a controlled substance may be issued only by a practitioner who is . . . authorized to prescribe controlled substances pursuant to his licensed professional practice. . . .'' N.Y. Comp. Codes R. & Regs. tit. 10, section 80.64(a)(1) (2023).

Here, the undisputed evidence in the record is that Registrant lacks authority to practice medicine in New York. As discussed above, a physician must be a licensed practitioner to dispense a controlled substance in New York. Thus, because Registrant lacks authority to practice medicine in New York and, therefore, is not authorized to handle controlled substances in New York, Registrant is not eligible to maintain a DEA registration. Accordingly, the Agency will order that Registrant's DEA registration be revoked.

**Order**

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. BS8311502 issued to Dmitry Anatolevich Shelchkov, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(g)(1), I hereby deny any pending applications of Dmitry Anatolevich Shelchkov, M.D., to renew or modify this registration, as well as any other pending application of Dmitry Anatolevich Shelchkov, M.D., for additional registration in New York. This Order is effective November 30, 2023.

**Signing Authority**

This document of the Drug Enforcement Administration was signed on October 20, 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. 2023–23950 Filed 10–30–23; 8:45 am]

**BILLING CODE 4410–09–P**

[5] This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(g)(1) (this section, formerly section 823(f), was redesignated as part of the Medical Marijuana and Cannabidiol Research Expansion Act, Public Law 117–215, 136 Stat. 2257 (2022)). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR at 71371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39130, 39131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51104, 51105 (1993); *Bobby Watts, M.D.,* 53 FR 11919, 11920 (1988); *Frederick Marsh Blanton,* 43 FR at 27,617.

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Siamak Arassi, M.D.; Decision and Order

On May 24, 2023, the Drug Enforcement Administration (DEA or Government) issued an Order to Show Cause (OSC) to Siamak Arassi, M.D. (Registrant). Request for Final Agency Action (RFAA), Exhibit (RFAAX) 1 at 1, 3. The OSC proposed the revocation of Registrant's Certificate of Registration No. BA8851809 at the registered address of 19115 W Capitol Dr., Suite 117, Brookfield, Wisconsin 53045. *Id.* at 1. The OSC alleged that Registrant's registration should be revoked because Registrant is ''currently without authority to handle controlled substances in the State of Wisconsin,'' the state in which he is registered with DEA. *Id.* at 2 (citing 21 U.S.C. 824(a)(3)).

The OSC notified Registrant of his right to file with DEA a written request for hearing, and that if he failed to file such a request, he would be deemed to be in default. OSC, at 2 (citing 21 CFR 1301.43). Here, Registrant did not request a hearing. RFAA, at 2.[1] ''A default, unless excused, shall be deemed to constitute a waiver of the registrant's/applicant's right to a hearing and an admission of the factual allegations of the [OSC].'' 21 CFR 1301.43(e).

Further, ''[i]n the event that a registrant . . . is deemed to be in default . . . DEA may then file a request for final agency action with the Administrator, along with a record to support its request. In such circumstances, the Administrator may enter a default final order pursuant to [21 CFR] § 1316.67.'' *Id.* § 1301.43(f)(1). Here, the Government has requested final agency action based on Registrant's default pursuant to 21 CFR 1301.43(c), (f). *See also id.* § 1316.67.

**Findings of Fact**

The Agency finds that, in light of Registrant's default, the factual allegations in the OSC are admitted. According to the OSC, on February 15, 2023, the State of Wisconsin Medical

[1] On June 1, 2023, a DEA Diversion Investigator (DI) emailed Registrant at his personal email address, attaching a copy of the OSC with a delivery and read receipt request. RFAAX 2, at 2. DI received notification that the email was delivered successfully. *Id.* Registrant responded on the same day by email but did not request a hearing. RFAAX 2, Attachment E. Based on the information in the record, the Agency finds that the Government's service of the OSC on Registrant was adequate. RFAA, at 2 (citing *Emilio Luna, M.D.,* 77 FR 4829, 4830 (2012) (finding service via email can satisfy due process)).

Examining Board issued a Final Decision and Order indefinitely suspending Registrant's license to practice medicine and surgery. RFAAX 1, at 2; RFAAX 2, Attachment C, at 15.

According to Wisconsin's online records, of which the Agency takes official notice, Registrant's Wisconsin medical license remains suspended.[2] Wisconsin Department of Safety and Professional Services, Wisconsin Credential/License Search, *https://licensesearch.wi.gov/* (last visited date of signature of this Order). Therefore, the Agency finds that Registrant is not authorized to practice medicine nor to handle controlled substances in Wisconsin, the state in which he is registered with DEA.

**Discussion**

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under 21 U.S.C. 823 ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, D.O.,* 76 FR 71371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, D.O.,* 43 FR 27616, 27617 (1978).[3]

According to Wisconsin statute, ''dispense'' means ''to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling or compounding necessary to prepare the substance for that delivery.'' Wis. Stat. section 961.01(7) (2023). Further, a ''practitioner'' means a ''physician . . . or other person licensed, registered, certified or otherwise permitted to distribute, dispense, conduct research with respect to, administer or use in teaching or chemical analysis a controlled substance in the course of professional practice or research in [Wisconsin].'' *Id.* section 961.01(19)(a).

Here, the undisputed evidence in the record is that Registrant currently lacks authority to practice medicine in Wisconsin. As already discussed, a practitioner must be a licensed practitioner to dispense controlled substances in Wisconsin. Thus, because Registrant lacks a license to practice medicine in Wisconsin and, therefore, is not authorized to handle controlled substances in Wisconsin, Registrant is not eligible to maintain a DEA registration. Accordingly, the Agency will order that Registrant's DEA registration be revoked.

**Order**

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. BA8851809 issued to Siamak Arassi, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(g)(1), I hereby deny any pending applications of Siamak Arassi, M.D., to renew or modify this registration, as well as any other pending application of Siamak Arassi, M.D., for additional registration in Wisconsin. This Order is effective November 30, 2023.

**Signing Authority**

This document of the Drug Enforcement Administration was signed on October 20, 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. 2023–23958 Filed 10–30–23; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Demille W. Madoux, M.D.; Decision and Order

On January 11, 2023, the Drug Enforcement Administration (DEA or Government) issued an Order to Show Cause (OSC) to Demille W. Madoux, M.D. (Registrant). Request for Final Agency Action (RFAA), Exhibit (RFAAX) 2, at 1, 4. The OSC proposed the revocation of Registrant's Certificate of Registration No. BM0663523 at the registered address of 13921 N Meridian Ave., Suite 100, Oklahoma City, Oklahoma 73134. *Id.* at 1. The OSC alleged that Registrant's registration should be revoked because Registrant is ''currently without authority to handle controlled substances in the State of Oklahoma, the state in which [he is] registered with DEA.'' *Id.* at 2 (citing, *inter alia,* 21 U.S.C. 824(a)(3)).

The OSC notified Registrant of his right to file with DEA a written request for hearing, and that if he failed to file such a request, he would be deemed to be in default. *Id.* at 2–3 (citing 21 CFR 1301.43). Here, Registrant did not request a hearing. RFAA, at 1.[1] ''A default, unless excused, shall be deemed to constitute a waiver of the [registrant's] right to a hearing and an admission of the factual allegations of the [OSC].'' 21 CFR 1301.43(e).

Further, ''[i]n the event that a registrant . . . is deemed to be in

[2] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Registrant may dispute the Agency's finding by filing a properly supported motion for reconsideration of findings of fact within fifteen calendar days of the date of this Order. Any such motion and response shall be filed and served by email to the other party and to the DEA Office of the Administrator, Drug Enforcement Administration at *dea.addo.attorneys@dea.gov.*

[3] This rule derives from the text of two provisions of the Controlled Substances Act (CSA). First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(g)(1). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR 71371–72; *Sheran Arden Yeates, D.O.,* 71 FR 39130, 39131 (2006); *Dominick A. Ricci, D.O.,* 58 FR 51104, 51105 (1993); *Bobby Watts, D.O.,* 53 FR 11919, 11920 (1988); *Frederick Marsh Blanton,* 43 FR 27617.

[1] Based on the Government's submissions in its RFAA dated April 25, 2023, the Agency finds that service of the OSC on Registrant was adequate. Specifically, the included copy of the certified mail return receipt indicates that on March 11, 2023, Registrant was personally served with the OSC at his personal address. RFAAX 1, at 8.

default . . . DEA may then file a request for final agency action with the Administrator, along with a record to support its request. In such circumstances, the Administrator may enter a default final order pursuant to [21 CFR] § 1316.67.'' *Id.* § 1301.43(f)(1). Here, the Government has requested final agency action based on Registrant's default pursuant to 21 CFR 1301.43(c) and (f). RFAA, at 1.

**Findings of Fact**

The Agency finds that, in light of Registrant's default, the factual allegations in the OSC are admitted. According to the OSC, on April 8, 2022, Registrant ''entered into an Agreement with the State of Oklahoma Board of Medical Licensure and Supervision 'not to practice in any manner as a Medical Doctor in the State of Oklahoma,' '' and ''[o]n October 31, 2022, [Registrant's] State of Oklahoma controlled substance registration expired.'' RFAAX 2, at 2.

According to Oklahoma's online records, of which the Agency takes official notice, Registrant is not ''Registered to Dispense,'' and Registrant's Oklahoma controlled substance license remains inactive.[2] Oklahoma Board of Medical Licensure and Supervision, Search Licenses, *https://www.okmedicalboard.org/search* (last visited date of signature of this Order); Oklahoma Bureau of Narcotics and Dangerous Drugs Control, Registrant Search, *https://obnddc.us.thentiacloud.net/webs/obnddc/register/#* (last visited date of signature of this Order). Therefore, the Agency finds that Registrant is not authorized to dispense or handle controlled substances in Oklahoma, the state in which he is registered with DEA.

**Discussion**

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under 21 U.S.C. 823 ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, D.O.,* 76 FR 71371, 71372 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, D.O.,* 43 FR 27616, 27617 (1978).[3]

Pursuant to the Oklahoma's Uniform Controlled Dangerous Substances Act, ''[e]very person who manufactures, distributes, dispenses, prescribes, administers or uses for scientific purposes any controlled dangerous substance within or into this state . . . shall obtain a registration issued by the Director of the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control, in accordance with rules promulgated by the Director.'' Okla. Stat. tit. 63, section 2–302(A).[4]

Here, the evidence in the record is that Registrant currently lacks authority to handle controlled substances in Oklahoma because his Oklahoma controlled substance license has expired. As already discussed, a person must hold a valid controlled substance license to dispense a controlled substance in Oklahoma, subject to limited exceptions. Thus, because Registrant lacks authority to handle controlled substances in Oklahoma, Registrant is not eligible to maintain a DEA registration. Accordingly, the Agency will order that Registrant's DEA registration be revoked.

**Order**

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. BM0663523 issued to Demille W. Madoux, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(g)(1), I hereby deny any pending applications of Demille W. Madoux, M.D., to renew or modify this registration, as well as any other pending application of Demille W. Madoux, M.D., for additional registration in Oklahoma. This Order is effective November 30, 2023.

**Signing Authority**

This document of the Drug Enforcement Administration was signed on October 20, 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. 2023–23953 Filed 10–30–23; 8:45 am]

**BILLING CODE 4410–09–P**

[2] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Registrant may dispute the Agency's finding by filing a properly supported motion for reconsideration of findings of fact within fifteen calendar days of the date of this Order. Any such motion and response shall be filed and served by email to the other party and to the DEA Office of the Administrator, Drug Enforcement Administration at *dea.addo.attorneys@dea.gov.*

[3] This rule derives from the text of two provisions of the Controlled Substances Act. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(g)(1). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR at 71371–72; *Sheran Arden Yeates, D.O.,* 71 FR 39130, 39131 (2006); *Dominick A. Ricci, D.O.,* 58 FR 51104, 51105 (1993); *Bobby Watts, D.O.,* 53 FR 11919, 11920 (1988); *Frederick Marsh Blanton,* 43 FR at 27617.

[4] Although there are limited circumstances under which a person ''may lawfully possess controlled dangerous substances'' without a registration issued by the Director of the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control, based on the information furnished by the Government, none are applicable here. *Id.* Section 2–302(H).

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Fares F. Yasin, M.D.; Decision and Order

On June 30, 2021, the Drug Enforcement Administration (hereinafter, DEA or Government) issued an Order to Show Cause (hereinafter, OSC) to Fares F. Yasin, M.D. (hereinafter, Applicant). Request for Final Agency Action (hereinafter, RFAA), Exhibit (hereinafter, RFAAX) 2, at 1, 4; RFAAX 4, at 1. The OSC proposed the denial of Applicant's application for a DEA Certificate of Registration, Control No. W19137777C, with the proposed registered address of

11 Calle Central, Coto Laurel, Puerto Rico 00780. RFAAX 2, at 1. The OSC alleged that Applicant's application should be denied because Applicant materially falsified his application and because Applicant's registration would be inconsistent with the public interest. *Id.* (citing 21 U.S.C. 824(a)(1), 823(g)(1) [1]).

By letter dated August 31, 2021, Applicant requested that DEA ''[f]ormally withdraw [his] DEA registration application and cancel the hearing.'' RFAAX 3.[2] On May 25, 2023, the Government submitted its RFAA, alleging that Applicant's Puerto Rico controlled substance license had been suspended and proposing the denial of Applicant's application on the grounds that Applicant lacks authority to handle controlled substances in Puerto Rico, the territory in which he seeks registration with DEA. RFAA, at 1, 3.[3] The Government had not alleged that Applicant lacked authority in the OSC. *See* RFAAX 2. Nonetheless, the Government is not required to issue an amended OSC to notice an allegation of a registrant's lack of state (or in this case territory) authority that arises during the pendency of a proceeding regarding a DEA registration. *Hatem M. Ataya, M.D.,* 81 FR 8221, 8244 (2016). Previous Agency decisions have stated that because the possession of state authority is a prerequisite for obtaining and maintaining a registration, the issue of state authority can be raised at any stage of a proceeding. *See Ataya,* 81 FR at 8244; *Joe M. Morgan, D.O.,* 78 FR 61961, 61973–74 (2013).[4]

The Agency makes the following findings of fact based on the uncontroverted evidence submitted by the Government in its RFAA.

## Findings of Fact

On August 10, 2022, the Puerto Rico Department of Health suspended Applicant's Puerto Rico controlled substance license. RFAAX 5, Appendix A, at 1. As of August 15, 2022, Applicant's Puerto Rico controlled substance license remained suspended. *Id.*[5] Accordingly, the Agency finds that Applicant is not licensed to handle controlled substances in Puerto Rico, the territory in which he seeks registration with DEA.

## Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the CSA ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71,371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27616, 27617 (1978).[6]

According to the Puerto Rico Controlled Substances Act, ''[a]ny person who manufactures, distributes and dispenses controlled substances in the Commonwealth of Puerto Rico . . . shall obtain a registration certification annually, issued by the Secretary of Health, pursuant to the rules and regulations approved and promulgated by said government official.'' P.R. Laws Ann. tit. 24, section 2302(a) (West, current through all acts translated by the Translation Office of the Puerto Rico Government through the 2011 Legislative Session and various acts from 2012 to the present). Further, ''dispense'' means ''the prescribing, administering or delivering of a controlled substance to an ultimate user, by prescription or order for administering it. It includes the process of the compounding, labeling and packaging of a controlled substance for such delivery. The term 'dispenser' means the practitioner who so delivers a controlled substance.'' *Id.* at section 2102(11).

Here, the undisputed evidence in the record is that Applicant lacks authority to dispense controlled substances in Puerto Rico. As discussed above, a physician must hold a controlled substances license to dispense a controlled substance in Puerto Rico. Thus, because Applicant lacks authority to handle controlled substances in Puerto Rico, Applicant is not eligible to receive a DEA registration. Accordingly,

[1] Effective December 2, 2022, the Medical Marijuana and Cannabidiol Research Expansion Act, Public Law 117–215, 136 Stat. 2257 (2022) (Marijuana Research Amendments or MRA), amended the Controlled Substances Act (CSA) and other statutes. Relevant to this matter, the MRA redesignated 21 U.S.C. 823(f), cited in the OSC, as 21 U.S.C. 823(g)(1). This Decision cites to the current designation, 21 U.S.C. 823(g)(1), and to the MRA-amended CSA throughout.

[2] Based on the Declaration of a DEA Special Agent, the Agency finds that the Government's service of the OSC on Applicant was adequate and that Applicant was served with the OSC on July 8, 2021. RFAAX 4, at 1; *see also* RFAAX 4, Appendix A. According to Applicant, he responded to the OSC by email on August 8, 2021, and communicated several times thereafter with DEA regarding his desire to withdraw his application prior to submitting the August 31, 2021 letter. RFAAX 3.

[3] In its RFAA, the Government appears to have dropped the allegations regarding material falsification and public interest. RFAA, at 2–3.

[4] Even so, in such cases, a registrant must be provided with a meaningful opportunity to contest the allegation. *See, e.g., Lawrence E. Stewart, M.D.,* 86 FR 15257, 15257 (2021); *Cypress Creek Pharmacy LLC,* 86 FR 71927, 71927 (2021); *Lesly Pompy, M.D.,* 84 FR 57749, 57749–50 (2019); *Ataya,* 81 FR at 8245; *Morgan,* 78 FR at 61973–74. On July 27, 2023, the Government submitted a Notice of Notification of RFAA in which the Government asserted that it had notified Applicant of the lack of authority allegation and had provided Applicant with a copy of the RFAA via email. Notice of Notification of RFAA, at 1; *see also* Notice of Notification of RFAA, Exhibit 1. The Government's evidence included an email to Applicant with instructions for submitting a response, if desired, to the lack of authority allegation. *Id.* Accordingly, the Agency finds that Applicant was notified of the RFAA and was provided with a meaningful opportunity to contest the lack of authority allegation. Further, more than two months have passed since the Government notified Applicant and Applicant has not availed himself of the opportunity to respond.

[5] The Agency has no indication that the status of Applicant's controlled substance license (which is not publicly available information) has changed. Following the submission of the Government's RFAA and its notification to Applicant that it had submitted the RFAA, the Agency to date has not received any correspondence from Applicant regarding any changes to the status of his controlled substance license. Accordingly, the Agency finds that Applicant's Puerto Rico controlled substance license remains suspended as of the date of signature of this Order. *See Heather M. Entrekin, DVM,* 88 FR 17266, 17266 (2023). Applicant may dispute the Agency's finding by filing a motion for reconsideration of findings of fact within fifteen calendar days of the date of this Order with supporting documentation (showing that Applicant was able to dispense controlled substances on or before the date of this Order). Any such motion and response shall be filed and served by email to the other party and to the DEA Office of the Administrator, Drug Enforcement Administration, at *dea.addo.attorneys@dea.gov.*

[6] This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(g)(1) (this section, formerly section 823(f), was redesignated as part of the Medical Marijuana and Cannabidiol Research Expansion Act, Public Law 117–215, 136 Stat. 2257 (2022)). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR at 71371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39130, 39131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51104, 51105 (1993); *Bobby Watts, M.D.,* 53 FR 11919, 11920 (1988); *Frederick Marsh Blanton,* 43 FR at 27,617.

the Agency will order that Applicant's application for a DEA registration be denied.

**Order**

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(g)(1), I hereby deny the pending application for a Certificate of Registration, Control Number W19137777C, submitted by Fares F. Yasin, M.D., as well as any other pending application of Fares F. Yasin, M.D., for additional registration in Puerto Rico. This Order is effective November 30, 2023.

**Signing Authority**

This document of the Drug Enforcement Administration was signed on October 20, 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. 2023–23957 Filed 10–30–23; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Stephen E. Van Noy, P.A.; Decision and Order

On March 24, 2023, the Drug Enforcement Administration (DEA or Government) issued an Order to Show Cause (OSC) to Stephen E. Van Noy, P.A. (Registrant). Request for Final Agency Action (RFAA), Exhibit (RFAAX) 1, at 1, 3. The OSC proposed the revocation of Registrant's Certificate of Registration No. MV2612681 at the registered address of 2101 Box Butte Avenue, Alliance, Nebraska 69301. *Id.* at 1. The OSC alleged that Registrant's registration should be revoked because Registrant is ''currently without authority to prescribe, administer, dispense, or otherwise handle controlled substances in the state of Nebraska, the state in which [he is] registered with DEA.'' *Id.* at 1–2 (citing 21 U.S.C. 824(a)(3)).

The OSC notified Registrant of his right to file with DEA a written request for hearing, and that if he failed to file such a request, he would be deemed to have waived his right to a hearing and be in default. *Id.* at 2 (citing 21 CFR 1301.43). Here, Registrant did not request a hearing. RFAA, at 1, 2.[1] ''A default, unless excused, shall be deemed to constitute a waiver of the registrant's/applicant's right to a hearing and an admission of the factual allegations of the [OSC].'' 21 CFR 1301.43(e).

Further, ''[i]n the event that a registrant . . . is deemed to be in default . . . DEA may then file a request for final agency action with the Administrator, along with a record to support its request. In such circumstances, the Administrator may enter a default final order pursuant to [21 CFR] § 1316.67.'' *Id.* § 1301.43(f)(1). Here, the Government has requested final agency action based on Registrant's default pursuant to 21 CFR 1301.43(c), (f). *See also id.* § 1316.67.

**Findings of Fact**

The Agency finds that, in light of Registrant's default, the factual allegations in the OSC are admitted. According to the OSC, on October 1, 2022, the Nebraska Department of Health and Human Services revoked Registrant's Nebraska physician assistant license. RFAAX 1, at 1.

According to Nebraska's online records, of which the Agency takes official notice, Registrant's Nebraska physician assistant license remains revoked.[2] Nebraska Department of Health and Human Services License Information System Search, *https://www.nebraska.gov/LISSearch/search.cgi* (last visited date of signature of this Order). Accordingly, the Agency finds that Registrant is not licensed to practice as a physician assistant in Nebraska, the state in which he is registered with DEA.

**Discussion**

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under 21 U.S.C. 823 ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, D.O.,* 76 FR 71371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, D.O.,* 43 FR 27616, 27617 (1978).[3]

According to Nebraska statute, ''[d]ispense means to deliver a controlled substance to an ultimate user or a research subject pursuant to a medical order issued by a practitioner authorized to prescribe, including the packaging, labeling, or compounding necessary to prepare the controlled substance for such delivery.'' Neb. Rev. Stat. section 28–401(8) (2023). Further, a ''[p]ractitioner means a physician, a physician assistant . . . or any other person licensed, registered, or otherwise

[1] Based on the Government's submissions in its RFAA dated August 2, 2023, the Agency finds that service of the OSC on Registrant was adequate. Specifically, the included Declaration of a DEA Diversion Investigator asserts that on March 30, 2023, Registrant was served with the OSC at his registered address via certified mail. RFAAX 2, at 1.

[2] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Registrant may dispute the Agency's finding by filing a properly supported motion for reconsideration of findings of fact within fifteen calendar days of the date of this Order. Any such motion and response shall be filed and served by email to the other party and to DEA Office of the Administrator, Drug Enforcement Administration at *dea.addo.attorneys@dea.gov.*

[3] This rule derives from the text of two provisions of the Controlled Substances Act (CSA). First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(g)(1) (this section, formerly section 823(f), was redesignated as part of the Medical Marijuana and Cannabidiol Research Expansion Act, Public Law 117–215, 136 Stat. 2257 (2022)). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR at 71371–72; *Sheran Arden Yeates, D.O.,* 71 FR 39130, 39131 (2006); *Dominick A. Ricci, D.O.,* 58 FR 51104, 51105 (1993); *Bobby Watts, D.O.,* 53 FR 11919, 11920 (1988); *Frederick Marsh Blanton,* 43 FR at 27617.

permitted to distribute, dispense, prescribe, conduct research with respect to, or administer a controlled substance in the course of practice or research in this state.'' *Id.* Section 28–401(21).

Here, the undisputed evidence in the record is that Registrant lacks authority to practice as a physician assistant in Nebraska. As discussed above, a physician assistant must be a licensed practitioner to dispense a controlled substance in Nebraska. Thus, because Registrant lacks authority to practice as a physician assistant in Nebraska and, therefore, is not authorized to handle controlled substances in Nebraska, Registrant is not eligible to maintain a DEA registration. Accordingly, the Agency will order that Registrant's DEA registration be revoked.

## Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. MV2612681 issued to Stephen E. Van Noy, P.A. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(g)(1), I hereby deny any pending applications of Stephen E. Van Noy, P.A., to renew or modify this registration, as well as any other pending application of Stephen E. Van Noy, P.A., for additional registration in Nebraska. This Order is effective November 30, 2023.

## Signing Authority

This document of the Drug Enforcement Administration was signed on October 20, 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. 2023–23955 Filed 10–30–23; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF JUSTICE

### Federal Bureau of Investigation

### Meeting of the Criminal Justice Information Services Advisory Policy Board

**AGENCY:** Federal Bureau of Investigation, Department of Justice.

**ACTION:** Meeting notice.

**SUMMARY:** The purpose of this notice is to announce a meeting of the Federal Bureau of Investigation's (FBI) Criminal Justice Information Services (CJIS) Advisory Policy Board (APB). The CJIS APB is a Federal advisory committee established pursuant to the Federal Advisory Committee Act (FACA). This meeting announcement is being published as required by section 10 of the FACA.

**DATES:** The APB will meet in open session from 8:30 a.m. until 6 p.m. on November 30, 2023.

**ADDRESSES:** The meeting will take place at the Marriott Savannah Riverfront Hotel, 100 General McIntosh Boulevard, Savannah, GA 31401; telephone: 912–233–7722. The CJIS Division is offering a blended participation option that allows for individuals to participate in person or via a telephone bridge line. The public will be permitted to provide comments and/or questions related to matters of the APB prior to the meeting. Please see details in the supplemental information.

**FOR FURTHER INFORMATION CONTACT:** Inquiries may be addressed to Ms. Melissa Abel, Management and Program Analyst, Advisory Process Management Office, Law Engagement and Data Sharing Section; 1000 Custer Hollow Road, Clarksburg, West Virginia 26306; email: *agmu@leo.gov;* telephone: 304–625–5670.

**SUPPLEMENTARY INFORMATION:** The FBI CJIS APB is responsible for reviewing policy issues and appropriate technical and operational issues related to the programs administered by the FBI's CJIS Division, and thereafter, making appropriate recommendations to the FBI Director. The programs administered by the CJIS Division are the Law Enforcement Enterprise Portal, National Crime Information Center, Next Generation Identification, National Instant Criminal Background Check System, National Data Exchange System, and Uniform Crime Reporting.

The meeting will be conducted with a blended participation option. The public may participate in-person or virtually via a telephone bridge. Registrants attending virtually will be provided with a phone bridge number to participate.

Registrations will be taken via email to *agmu@leo.gov.* Information regarding the phone access will be provided prior to the meeting to all registered individuals. Interested persons whose registrations have been accepted may be permitted to participate in the discussions at the discretion of the meeting chairman and with approval of the Designated Federal Officer (DFO).

The Federal Government is currently operating on a continuing resolution that expires at 11:59 p.m. on November 17, 2023. Should any lapse in its annual appropriations continue through November 21, 2023, the APB will be unable to conduct its business in person. If this occurs, a virtual meeting with a limited agenda will be conducted during the same date and time as appropriate. All individuals registered by the deadline to attend the meeting will be provided the virtual meeting invitation.

Any member of the public may file a written statement with the APB. Written comments shall be focused on the APB's issues under discussion and may not be repetitive of previously submitted written statements. Written comments should be provided to Mr. Nicky J. Megna, DFO, at least seven (7) days in advance of the meeting so the comments may be made available to the APB members for their consideration prior to the meeting.

Individuals requiring special accommodations should contact Mr. Megna by no later than November 15, 2023. Personal registration information will be made publicly available through the minutes for the meeting published on the FACA website.

**Nicky J. Megna,**

*CJIS Designated Federal Officer, Criminal Justice Information Services Division, Federal Bureau of Investigation.*

[FR Doc. 2023–23965 Filed 10–30–23; 8:45 am]

**BILLING CODE 4410–02–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2023–0183]**

### 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 30, 2023. A request for a hearing or petitions for leave to intervene must be filed by January 2, 2024. This monthly notice includes all amendments issued, or proposed to be issued, from September 15, 2023, to October 12, 2023. The last monthly notice was published on October 3, 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–2023–0183. 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:** Angela Baxter, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–8209; email: *Angela.Baxter@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Obtaining Information and Submitting Comments

### *A. Obtaining Information*

Please refer to Docket ID NRC–2023–0183, 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–2023–0183.
- *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–2023–0183, 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.

LICENSE AMENDMENT REQUEST(S)

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| **Constellation Energy Generation, LLC; Clinton Power Station, Unit No. 1; DeWitt County, IL** | |
| Docket No | 50–461. |
| Application date | August 21, 2023. |
| ADAMS Accession No | ML23233A168. |
| Location in Application of NSHC | Pages 16–18 of Attachment 1. |
| Brief Description of Amendment | The proposed amendment would revise the timing of the reactor water cleanup isolation valves specified in Technical Specification Table 3.3.6.1–1. |
| 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. |
| **Constellation Energy Generation, LLC; Clinton Power Station, Unit No. 1; DeWitt County, IL; Constellation Energy Generation, LLC; Dresden Nuclear Power Station, Units 2 and 3; Grundy County, IL; Constellation Energy Generation, LLC; LaSalle County Station, Units 1 and 2; LaSalle County, IL; Constellation Energy Generation, LLC; Quad Cities Nuclear Power Station, Units 1 and 2; Rock Island County, IL; Nine Mile Point Nuclear Station, LLC and Constellation Energy Generation, LLC; Nine Mile Point Nuclear Station, Unit 2; Oswego County, NY** | |
| Docket Nos | 50–461, 50–237, 50–249, 50–373, 50–374, 50–410, 50–254, 50–265. |
| Application date | August 30, 2023. |
| ADAMS Accession No | ML23242A107. |
| Location in Application of NSHC | Pages 4–6 of Attachment 1. |
| Brief Description of Amendments | The proposed amendments would incorporate Technical Specifications Task Force (TSTF) Improved Standard Technical Specifications Change Traveler TSTF–264–A, Revision 0, ''3.3.9 and 3.3.10—Delete Flux Monitors Specific Overlap Requirement SRs [Surveillance Requirements]'' into each listed site's technical specifications. |
| Proposed Determination | NSHC. |
| Name of Attorney for Licensee, Mailing Address | Jason Zorn, Associate General Counsel, Constellation Energy Generation, 101 Constitution Ave. NW, Suite 400 East, Washington, DC 20001. |
| NRC Project Manager, Telephone Number | Scott Wall, 301–415–2855. |
| **Constellation Energy Generation, LLC; Dresden Nuclear Power Station, Units 2 and 3; Grundy County, IL** | |
| Docket Nos | 50–237, 50–249. |
| Application date | August 30, 2023. |
| ADAMS Accession No | ML23242A044. |
| Location in Application of NSHC | Pages 5–6 of Attachment 1. |
| Brief Description of Amendments | The proposed amendments request technical specification (TS) changes to adopt Technical Specification Task Force (TSTF) Traveler TSTF–564, Revision 2, ''Safety Limit MCPR [minimum critical power ratio].'' The change will revise the TS safety limit for MCPR. |
| 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 | Surinder Arora, 301–415–1421. |
| **Constellation FitzPatrick, LLC and Constellation Energy Generation, LLC; James A. FitzPatrick Nuclear Power Plant; Oswego County, NY** | |
| Docket No | 50–333. |
| Application dates | August 3, 2023, as supplemented by letter dated August 31, 2023. |
| ADAMS Accession Nos | ML23215A012, ML23243A946. |
| Location in Application of NSHC | Pages 4–5 of Attachment 1. |
| Brief Description of Amendment | The proposed amendment would revise the James A. FitzPatrick Nuclear Plant fuel handling accident analysis and technical specification bases definition of recently irradiated fuel to account for changes to the analyses in support of the transition from the refuel bridge mast NF–400 (*i.e.,* triangular mast) to the new NF–500 mast. |

LICENSE AMENDMENT REQUEST(S)—Continued

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| Proposed Determination | NSHC. |
| Name of Attorney for Licensee, Mailing Address | Jason Zorn, Associate General Counsel, Constellation Energy Generation, 101 Constitution Ave. NW, Suite 400 East, Washington, DC 20001. |
| NRC Project Manager, Telephone Number | Justin Poole, 301–415–2048. |

**Constellation FitzPatrick, LLC and Constellation Energy Generation, LLC; James A. FitzPatrick Nuclear Power Plant; Oswego County, NY**

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| Docket No | 50–333. |
| Application date | July 28, 2023. |
| ADAMS Accession No | ML23209A003. |
| Location in Application of NSHC | Pages 9–11 of Attachment 1. |
| Brief Description of Amendment | The proposed amendment would revise the James A. FitzPatrick Nuclear Power Plant Technical Specifications 3.4, ''Reactor Coolant System (RCS),'' Section 3.4.3, ''Safety/Relief Valves (S/RVs).'' Specifically, Constellation Energy Generation, LLC proposes a new safety function lift setpoint lower tolerance for the S/RVs as delineated in SR 3.4.3.1. The proposed change would revise the lower setpoint tolerance from $-3$ percent to $-5$ percent. |
| Proposed Determination | NSHC. |
| Name of Attorney for Licensee, Mailing Address | Jason Zorn, Associate General Counsel, Constellation Energy Generation, 101 Constitution Ave. NW, Suite 400 East, Washington, DC 20001. |
| NRC Project Manager, Telephone Number | Justin Poole, 301–415–2048. |

**Constellation FitzPatrick, LLC and Constellation Energy Generation, LLC; James A. FitzPatrick Nuclear Power Plant; Oswego County, NY**

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| Docket No | 50–333. |
| Application date | June 28, 2023. |
| ADAMS Accession No | ML23179A021. |
| Location in Application of NSHC | Pages 4–5 of Attachment 1. |
| Brief Description of Amendment | The proposed amendment modifies Surveillance Requirement (SR) 3.3.1.2.4 to incorporate an additional acceptance criterion based on a higher signal to noise ratio as provided in General Electric Service Information Letter 478 dated December 16, 1988. Specifically, an ''or'' statement will be added to SR 3.3.1.2.4 as follows: ''or Verify count rate is ≥0.7 [counts per second] cps with a signal to noise ratio ≥20:1.'' |
| Proposed Determination | NSHC. |
| Name of Attorney for Licensee, Mailing Address | Jason Zorn, Associate General Counsel, Constellation Energy Generation, 101 Constitution Ave. NW, Suite 400 East, Washington, DC 20001. |
| NRC Project Manager, Telephone Number | Justin Poole, 301–415–2048. |

**Duke Energy Progress, LLC; Brunswick Steam Electric Plant, Units 1 and 2; Brunswick County, NC**

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| Docket No(s) | 50–325, 50–324. |
| Application date | August 17, 2023. |
| ADAMS Accession No | ML23229A456. |
| Location in Application of NSHC | Pages 18–20 of the Enclosure. |
| Brief Description of Amendments | The proposed amendments would revise the license condition associated with the adoption of 10 CFR 50.69, ''Risk-informed categorization and treatment of structures, systems and components for nuclear power reactors,'' that was added to the Brunswick Renewed Facility Operating Licenses upon the issuance of Amendments 292 (Unit 1) and 320 (Unit 2) and revised by Amendment Nos. 305 (Unit 1) and 333 (Unit 2). Specifically, the proposed change would revise the respective license condition to reflect an alternative approach for evaluating the impact of the seismic hazard in the 10 CFR 50.69 categorization process. |
| Proposed Determination | NSHC. |
| Name of Attorney for Licensee, Mailing Address | Tracey Mitchell LeRoy, Deputy General Counsel, Duke Energy Corporation, 4720 Piedmont Row Dr., Charlotte, NC 28210. |
| NRC Project Manager, Telephone Number | Luke Haeg, 301–415–0272. |

**Duke Energy Progress, LLC; H.B. Robinson Steam Electric Plant, Unit No. 2; Darlington County, SC**

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| Docket No | 50–261. |
| Application date | August 30, 2023. |
| ADAMS Accession No | ML23242A086. |
| Location in Application of NSHC | Pages 18–19 of Attachment 1. |
| Brief Description of Amendment | The proposed amendment would eliminate the dynamic effects of postulated pipe ruptures to auxiliary piping systems attached to the reactor coolant system from the Robinson design and licensing basis using leak-before-break methodology. |
| Proposed Determination | NSHC. |
| Name of Attorney for Licensee, Mailing Address | Tracey Mitchell LeRoy, Deputy General Counsel, Duke Energy Corporation, 4720 Piedmont Row Dr., Charlotte, NC 28210. |
| NRC Project Manager, Telephone Number | Luke Haeg, 301–415–0272. |

LICENSE AMENDMENT REQUEST(S)—Continued

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| **Duke Energy Progress, LLC; Shearon Harris Nuclear Power Plant, Unit 1; Wake and Chatham Counties, NC** | |
| Docket No | 50–400. |
| Application date | May 31, 2023. |
| ADAMS Accession No | ML23151A724. |
| Location in Application of NSHC | Page 18 of 20 of the Enclosure. |
| Brief Description of Amendment | The proposed amendment to the Shearon Harris Nuclear Power Plant (Harris) technical specifications (TS) will modify the TS Surveillance Requirement (SR) 4.6.1.1 to eliminate the requirement to perform periodic position verification for containment penetrations that are maintained locked, sealed, or otherwise secured closed, as well as adopt Technical Specifications Task Force (TSTF) Improved Standard TS (ISTS) Change Traveler No. 45 (TSTF–45–A), Revision 2, ''Exempt Verification of Containment Isolation Valves that are Not Locked, Sealed, or Otherwise Secured.'' The proposed amendment will also revise TS 3.3.3.5, ''Remote Shutdown System,'' to increase the completion time for inoperable Remote Shutdown System components to a time that is more consistent with their safety significance and remove the requirement to submit a Special Report. It will also relocate the content in Table 3.3–9, ''Remote Shutdown System,'' and Table 4.3–6, ''Remote Shutdown Monitoring Instrumentation Surveillance Requirements,'' in accordance with TSTF–266–A, Revision 3, ''Eliminate the Remote Shutdown System Table of Instrumentation and Controls.'' Additionally, the proposed amendment will update SR 4.3.1.1, Table 4.3–1, ''Reactor Trip System Instrumentation Surveillance Requirements,'' to address the application of the Surveillance Frequency Control Program to establish the frequency for performance of the Analog Channel Operational Test of select Reactor Trip System instrumentation. Finally, changes are proposed to the administrative controls section of the Harris TS to reflect current organizational titles as well as remove reporting requirements that are redundant to existing regulations. The aforementioned proposed changes reflect requirements consistent with those in Revision 5 of NUREG–1431, ''Standard Technical Specifications—Westinghouse Plants.'' |
| Proposed Determination | NSHC. |
| Name of Attorney for Licensee, Mailing Address | Tracey Mitchell LeRoy, Deputy General Counsel, Duke Energy Corporation, 4720 Piedmont Row Dr., Charlotte, NC 28210. |
| NRC Project Manager, Telephone Number | Michael Mahoney, 301–415–3867. |
| **Energy Northwest; Columbia Generating Station; Benton County, WA** | |
| Docket No | 50–397. |
| Application date | August 29, 2023. |
| ADAMS Accession No | ML23241B044. |
| Location in Application of NSHC | Pages 5–7 of Enclosure 1. |
| Brief Description of Amendment | The proposed amendment would modify Technical Specification 3.6.2.3, ''Residual Heat Removal (RHR) Suppression Pool Cooling,'' to allow two RHR suppression pool cooling subsystems to be inoperable for 8 hours. The proposed change is consistent with NRC-approved Technical Specification Task Force (TSTF) Traveler TSTF–230–A, Revision 1, ''Add New Condition B to LCO [Limiting Condition for Operation] 3.6.2.3, RHR Suppression Pool Cooling.'' |
| Proposed Determination | NSHC. |
| Name of Attorney for Licensee, Mailing Address | Ryan Lukson, Assistant General Counsel, Energy Northwest, MD 1020, P.O. Box 968, Richland, WA 99352. |
| NRC Project Manager, Telephone Number | Mahesh Chawla, 301–415–8371. |
| **NextEra Energy Point Beach, LLC; Point Beach Nuclear Plant, Units 1 and 2; Manitowoc County, WI** | |
| Docket No(s) | 50–266, 50–301. |
| Application date | September 19, 2023. |
| ADAMS Accession No | ML23262B018. |
| Location in Application of NSHC | Pages 4–5 of Enclosure. |
| Brief Description of Amendments | The proposed amendments will revise Technical Specification (TS) 5.5.17, ''Pre-Stressed Concrete Containment Tendon Surveillance Program,'' for consistency with the requirements of 10 CFR 50.55(a), ''Codes and standards.'' Specifically, the proposed changes replace the reference to Regulatory Guide 1.35 with a reference to section XI, subsection IWL, of the American Society of Mechanical Engineers Boiler and Pressure Vessel Code as contained in NUREG–1431, Revision 5, ''Standard Technical Specifications—Westinghouse Plants.'' The licensee also proposes to delete the provisions of Surveillance Requirement 3.0.2 in TS 5.5.17. |
| Proposed Determination | NSHC. |
| Name of Attorney for Licensee, Mailing Address | Steven Hamrick, Senior Attorney, 801 Pennsylvania Ave. NW, Suite 220, Washington, DC 20004. |
| NRC Project Manager, Telephone Number | Scott Wall, 301–415–2855. |

LICENSE AMENDMENT REQUEST(S)—Continued

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| **Nine Mile Point Nuclear Station, LLC and Constellation Energy Generation, LLC; Nine Mile Point Nuclear Station, Units 1 and 2; Oswego County, NY** | |
| Docket Nos | 50–220, 50–410. |
| Application date | August 18, 2023. |
| ADAMS Accession No | ML23230A010. |
| Location in Application of NSHC | Pages 2–3 of Attachment 1. |
| Brief Description of Amendments | The proposed amendments would remove the Nine Mile Point 3 Nuclear Project, LLC, (NMP3) designation from the Nine Mile Point Nuclear Station, Unit 1 (NMP1), and Nine Mile Point Nuclear Station. Unit 2 (NMP2) technical specifications (TSs) which are not applicable to the current design features of the NMP site. Specifically, Section 5.0, ''Design Features,'' in the NMP1 TS and Section 4.0, ''Design Features,'' Figure 4.1–1 in the NMP2 TS would be revised to reflect as they were prior to the issuance of License Amendments Nos. 212 (NMP1) and 142 (NMP2), which were issued on July 12, 2012 (ADAMS Accession No. ML12157A556). In addition, the name ''Entergy Nuclear FitzPatrick, LLC'' would be revised on Figure 5.1–1 for NMP1 and Figure 4.1–1 for NMP2 to ''James A. FitzPatrick Nuclear Power Plant, LLC,'' to reflect the current name of the licensee for the James A. Fitzpatrick nuclear power plant site. The original license amendment requests associated with License Amendment Nos. 212 and 142 were submitted with reference to the Combined License (COL) application supporting the proposed NMP3 project. Following receipt of the aforementioned approved amendments, Constellation Energy Nuclear Group, LLC (CENG), the previous owners of NMP1 and NMP2, halted further progress in pursuing a COL for NMP3. As a result, CENG decided not to implement the changes into the NMP1 and NMP2 TS. Additionally, CEG has no proposed plans for NMP3. |
| Proposed Determination | NSHC. |
| Name of Attorney for Licensee, Mailing Address | Jason Zorn, Associate General Counsel, Constellation Energy Generation, 101 Constitution Ave. NW, Suite 400 East, Washington, DC 20001. |
| NRC Project Manager, Telephone Number | Richard Guzman, 301–415–1030. |
| **PSEG Nuclear LLC; Hope Creek Generating Station; Salem County, NJ; PSEG Nuclear LLC; Salem Nuclear Generating Station, Unit Nos. 1 and 2; Salem County, NJ** | |
| Docket Nos | 50–354, 50–272, 50–311. |
| Application date | September 6, 2023. |
| ADAMS Accession No | ML23249A260 (Package). |
| Location in Application of NSHC | Pages 57–59 of the Enclosure. |
| Brief Description of Amendments | The proposed amendments change the licensing basis as described in the Salem Generating Station, (Salem), Units 1 and 2, and Hope Creek Generating Station (Hope Creek) Updated Final Safety Analysis Reports to account for modifications to the Exclusion Area Boundary for Salem and Hope Creek. |
| Proposed Determination | NSHC. |
| Name of Attorney for Licensee, Mailing Address | Francis Romano, PSEG—Services Corporation, 80 Park Plaza, T–10, Newark, NJ 07102. |
| NRC Project Manager, Telephone Number | James Kim, 301–415–4125. |
| **Southern Nuclear Operating Company, Inc.; Vogtle Electric Generating Plant, Unit 4; Burke County, GA** | |
| Docket No | 52–026. |
| Application date | August 28, 2023. |
| ADAMS Accession No | ML23240A706. |
| Location in Application of NSHC | Pages E–6 and E–7 of the Enclosure. |
| Brief Description of Amendment | Southern Nuclear Operating Company requests an amendment to the combined license (COL) for Vogtle Electric Generating Plant (VEGP) Unit 4 (License Number NPF–92). The proposed amendment would revise the VEGP Unit 4 COL by removing the content of Appendix C, ''Inspections, Tests, Analyses, and Acceptance Criteria,'' in its entirety along with appropriate revisions to specific references to Appendix C within the COL. |
| Proposed Determination | NSHC. |
| Name of Attorney for Licensee, Mailing Address | Millicent Ronnlund, Vice President and General Counsel, Southern Nuclear Operating Co., Inc., P.O. Box 1295, Birmingham, AL 35201–1295. |
| NRC Project Manager, Telephone Number | William Gleaves, 301–415–5848. |
| **Tennessee Valley Authority; Watts Bar Nuclear Plant, Units 1 and 2; Rhea County, TN** | |
| Docket No(s) | 50–390, 50–391. |
| Application date | August 7, 2023. |
| ADAMS Accession No | ML23219A011. |
| Location in Application of NSHC | Pages E6—E7 of the Enclosure. |
| Brief Description of Amendment(s) | The proposed amendments would permanently revise Watts Bar Nuclear Plant, Units 1 and 2 Technical Specification Table 1.1–1, ''MODES,'' footnotes (b) and (c) to allow continued operation of Watts Bar Units 1 and 2 with at least 53 of 54 reactor pressure vessel head closure bolts fully tensioned. |

LICENSE AMENDMENT REQUEST(S)—Continued

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| 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 | Kimberly Green, 301–415–1627. |

**Virginia Electric and Power Company; Surry Power Station, Unit Nos. 1 and 2; Surry County, VA**

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| Docket No(s) | 50–280, 50–281. |
| Application date | August 10, 2023. |
| ADAMS Accession No | ML23226A186. |
| Location in Application of NSHC | Section 4.2 of Attachment 1. |
| Brief Description of Amendment(s) | The proposed amendments would revise the Surry Unit 1 and Unit 2 Technical Specifications 3.7, ''Instrumentation Systems,'' to add low head safety injection flow indication for accident monitoring instrumentation in accordance with Regulatory Guide 1.97, Revision 3, ''Criteria for Accident Monitoring Instrumentation for Nuclear Power Plants.'' |
| Proposed Determination | NSHC. |
| Name of Attorney for Licensee, Mailing Address | W.S. Blair, Senior Counsel, Dominion Energy Services, Inc., 120 Tredegar St., RS–2, Richmond, VA 23219. |
| NRC Project Manager, Telephone Number | John Klos, 301–415–5136. |

## 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, were 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.

LICENSE AMENDMENT ISSUANCE(S)

**Dominion Energy Nuclear Connecticut, Inc.; Millstone Power Station, Unit No. 3; New London County, CT**

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| Docket No | 50–423. |
| Amendment Date | September 26, 2023. |
| ADAMS Accession No | ML23226A005. |
| Amendment No | 287. |
| Brief Description of Amendment(s) | The amendment supplemented a portion of the current nuclear criticality safety analysis for the Millstone Power Station, Unit 3 (Millstone 3), spent fuel pool and would allow Dominion Energy Nuclear Connecticut, Inc. to store a new fuel design, GAIA, containing gadolinia, a neutron burnable poison, in the Millstone 3 fuel storage racks. |
| Public Comments Received as to Proposed NSHC (Yes/No). | No. |

**Duke Energy Progress, LLC; Shearon Harris Nuclear Power Plant, Unit 1; Wake and Chatham Counties, NC**

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| Docket No | 50–400. |
| Amendment Date | October 3, 2023. |
| ADAMS Accession No | ML23234A170. |
| Amendment No | 199. |
| Brief Description of Amendment(s) | The amendment revised the Shearon Harris Nuclear Power Plant, Unit 1, Renewed Facility Operating License (RFOL) and technical specifications (TSs). Specifically, the amendment revised the TSs to remove the reference to Duke Energy procedure EGR–NGGC–0153, ''Engineering Instrument Setpoints.'' The amendment also removed Attachment 1 ''[Transamerica Delaval, Inc.] TDI Diesel Engine Requirements,'' in the RFOL. |

LICENSE AMENDMENT ISSUANCE(S)—Continued

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| Public Comments Received as to Proposed NSHC (Yes/No). | No. |

**Energy Harbor Nuclear Corp. and Energy Harbor Nuclear Generation LLC; Beaver Valley Power Station, Units 1 and 2; Beaver County, PA**

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| Docket No(s) | 50–334, 50–412. |
| Amendment Date | October 2, 2023. |
| ADAMS Accession No | ML23198A359. |
| Amendment No(s) | 322 (Unit 1) and 212 (Unit 2). |
| Brief Description of Amendment(s) | The amendments revised the Beaver Valley Technical Specifications (TS) 5.6.3, ''Core Operating Limits Report (COLR),'' by adding the Westinghouse Electric Company LLC (Westinghouse) Topical Report WCAP–16996–P–A, Revision1, ''Realistic LOCA [loss-of-coolant accident] Evaluation Methodology Applied to the Full Spectrum of Break Sizes (FULL SPECTRUM LOCA Methodology),'' to the list of approved analytical methods used to determine the core operating limits and by adding a note to the LOCA methods listed in TS 5.6.3.b to restrict their future use. The amendment also removed the reference to Zircalloy from the list of fuel rod cladding in TS 4.2.1, ''Fuel Assemblies.'' |
| Public Comments Received as to Proposed NSHC (Yes/No). | No. |

**Florida Power & Light Company; Turkey Point Nuclear Generating Unit Nos. 3 and 4; Miami-Dade County, FL**

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| Docket No(s) | 50–250, 50–251. |
| Amendment Date | September 27, 2023. |
| ADAMS Accession No | ML23234A192. |
| Amendment No(s) | 297 (Unit 3) and 290 (Unit 4). |
| Brief Description of Amendment(s) | The amendments revised the Turkey Point Nuclear Generating, Unit Nos. 3 and 4, technical specifications to Improved Standard Technical Specifications, consistent with NUREG–1431, Revision 5, ''Standard Technical Specifications—Westinghouse Plants.'' |
| Public Comments Received as to Proposed NSHC (Yes/No). | No. |

**Nebraska Public Power District; Cooper Nuclear Station; Nemaha County, NE**

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| Docket No | 50–298. |
| Amendment Date | October 11, 2023. |
| ADAMS Accession No | ML23264A805. |
| Amendment No | 273. |
| Brief Description of Amendment(s) | The amendment revised the technical specifications to add an exception to entering Mode 4 if both required residual heat removal (RHR) shutdown cooling subsystems are inoperable. The changes incorporated Technical Specifications Task Force (TSTF) Traveler TSTF–580, Revision 1, ''Provide Exception from Entering Mode 4 with No Operable RHR Shutdown Cooling.'' |
| Public Comments Received as to Proposed NSHC (Yes/No). | No. |

**Tennessee Valley Authority; Browns Ferry Nuclear Plant, Units 1, 2, and 3; Limestone County, AL**

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| Docket No(s) | 50–259, 50–260, 50–296. |
| Amendment Date | September 8, 2023. |
| ADAMS Accession No | ML23205A213. |
| Amendment No(s) | 332 (Unit 1), 355 (Unit 2), and 315 (Unit 3). |
| Brief Description of Amendment(s) | The amendments revised Browns Ferry technical specification (TS) actions applicable when a residual heat removal (RHR) shutdown cooling subsystem is inoperable and provide a TS exception to entering Mode 4 if both required RHR shutdown cooling subsystems are inoperable. |
| Public Comments Received as to Proposed NSHC (Yes/No). | No. |

**Union Electric Company; Callaway Plant, Unit No. 1; Callaway County, MO**

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| Docket No | 50–483. |
| Amendment Date | September 20, 2023. |
| ADAMS Accession No | ML23166B088. |
| Amendment No | 233. |
| Brief Description of Amendment | The amendment revised the Callaway technical specifications and authorized changes to the Callaway Final Safety Analysis Report to support a full scope application of the regulations in 10 CFR 50.67, ''Accident source term,'' and described in Regulatory Guide 1.183, Revision 0, ''Alternative Radiological Source Terms for Evaluating Design Basis Accidents at Nuclear Power Reactors.'' |

LICENSE AMENDMENT ISSUANCE(S)—Continued

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| Public Comments Received as to Proposed NSHC (Yes/No). | No. |
| **Union Electric Company; Callaway Plant, Unit No. 1; Callaway County, MO** | |
| Docket No | 50–483. |
| Amendment Date | September 25, 2023. |
| ADAMS Accession No | ML23228A025. |
| Amendment No | 234. |
| Brief Description of Amendment | The amendment revised Callaway Technical Specification 5.5.16, ''Containment Leakage Rate Testing Program,'' by replacing the existing reference to Regulatory Guide 1.163, ''Performance-Based Containment Leak-Test Program,'' with a reference to Nuclear Energy Institute (NEI) Topical Report NEI 94–01, Revision 3–A, ''Industry Guideline for Implementing Performance-Based Option of 10 CFR part 50, appendix J,'' dated July 2012, and the limitations and conditions specified in NEI 94–01, Revision 2–A, dated October 2008, as the documents used to implement the performance-based containment leakage testing program in accordance with Option B of 10 CFR part 50, appendix J, ''Primary Reactor Containment Leakage Testing for Water-Cooled Power Reactors.'' |
| Public Comments Received as to Proposed NSHC (Yes/No). | No. |
| **Union Electric Company; Callaway Plant, Unit No. 1; Callaway County, MO** | |
| Docket No | 50–483. |
| Amendment Date | October 5, 2023. |
| ADAMS Accession No | ML23240A369. |
| Amendment No | 235. |
| Brief Description of Amendment | The amendment revised the Callaway technical specifications to allow loading of a limited number of Framatome, Inc GAIA fuel with M5® as a fuel cladding material in operating cycle 27 to obtain incore performance data and acquire operational experience associated with the GAIA fuel design. In addition to this amendment, the NRC issued an exemption from certain requirements of 10 CFR 50.46, ''Acceptance criteria for emergency core cooling systems [(ECCS)] for light-water nuclear power reactors,'' and 10 CFR part 50, appendix K, ''ECCS Evaluation Models,'' to allow the use of Framatome M5® alloy as a fuel rod cladding material. |
| Public Comments Received as to Proposed NSHC (Yes/No). | No. |

## III. 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 amendments. The Commission has determined for these amendments 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 these license amendments.

Because of exigent circumstances or emergency situation associated with the date the amendments were 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 amendments have 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 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 51.12(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 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.

LICENSE AMENDMENT ISSUANCE(S)—EXIGENT/EMERGENCY CIRCUMSTANCES

| **DTE Electric Company; Fermi, Unit 2; Monroe County, MI** | |
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| Docket No | 50–341. |
| Amendment Date | September 18, 2023. |
| ADAMS Accession No | ML23243A885. |
| Amendment No | 225. |
| Brief Description of Amendment(s) | This exigent amendment allowed a one-time extension of the Condition A, completion time, in Fermi 2 Technical Specifications 3.7.2, ''Emergency Equipment Cooling Water (EECW)/Emergency Equipment Service Water (EESW) System and Ultimate Heat Sink (UHS),'' from 72 hours to 7 days to allow online repairs to the Division I Mechanical Draft Cooling Tower A and C fan pedestals. The one-time extension would be used twice, once for each fan, and will expire at 11:59 p.m. on November 19, 2023. |
| Local Media Notice (Yes/No) | No. |
| Public Comments Requested as to Proposed NSHC (Yes/No). | No. |
| **Southern Nuclear Operating Company, Inc.; Joseph M. Farley Nuclear Plant, Units 1 and 2; Houston County, AL** | |
| Docket No(s) | 50–348, 50–364. |
| Amendment Date | August 24, 2023. |
| ADAMS Accession No | ML23235A296. |
| Amendment No(s) | 247 (Unit 1) and 244 (Unit 2). |
| Brief Description of Amendment(s) | The amendments revised Technical Specification (TS) 3.6.5, ''Containment Air Temperature.'' Specifically, the amendments revised the operating license and approved a one-time NOTE to Appendix A TS 3.6.5, ''Limiting Condition for Operation,'' to revise the limit on containment average air temperature from ≤120°F to ≤122°F (Fahrenheit) effective until 0600 hours central time on September 9, 2023. The license amendments were issued under emergency circumstances as described in the provisions of 10 CFR 50.91(a)(5), due to the time critical nature of the amendment. |
| Local Media Notice (Yes/No) | Yes. |
| Public Comments Requested as to Proposed NSHC (Yes/No). | No. |

Dated: October 18, 2023.

For the Nuclear Regulatory Commission.

**Victor G. Cusumano,**

*Acting Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2023–23382 Filed 10–30–23; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 50–003, 50–247, and 50–286; NRC–2022–0223]**

## Holtec Decommissioning International, LLC, Holtec Indian Point 2, LLC, and Holtec Indian Point 3, LLC, Indian Point Nuclear Energy Center

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Environmental assessment and finding of no significant impact; issuance.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of exemptions that would permit the licensee to reduce its emergency planning (EP) activities at the Indian Point Nuclear Generating Unit Nos. 1, 2, and 3, collectively referred to as the Indian Point Energy Center (IPEC). Specifically, Holtec Decommissioning International, LLC (HDI), an indirect wholly owned subsidiary of Holtec International (Holtec) is seeking exemptions on behalf of Holtec Indian Point 2, LLC (''Holtec IP2'') and Holtec Indian Point 3, LLC (''Holtec IP3''), the licensees, that would eliminate the requirements to maintain formal offsite radiological emergency plans, as well as reduce the scope of some of the onsite EP activities based on the reduced risks at IPEC, which is

permanently shut down and defueled. However, requirements for an onsite radiological emergency plan and for certain onsite capabilities to communicate and coordinate with offsite response authorities would be retained. In addition, offsite EP provisions would still exist through State and local government use of a comprehensive emergency management plan process, in accordance with the Federal Emergency Management Agency's (FEMA's) Comprehensive Preparedness Guide (CPG) 101, ''Developing and Maintaining Emergency Operations Plans.'' The NRC staff is issuing an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) associated with the proposed exemptions.

**DATES:** The EA and FONSI referenced in this document are available on October 31, 2023.

**ADDRESSES:** Please refer to Docket ID NRC–2022–0223 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0223. 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*. For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section of 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:** Karl Sturzebecher, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–8534, email: *Karl.Sturzebecher@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Introduction

By letter dated February 8, 2017, in accordance with sections 50.4(b)(8) and 50.82(a)(1)(i) to title 10 of the *Code of Federal Regulations* (10 CFR) part 50, ''Domestic Licensing of Production and Utilization Facilities,'' Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC (the IPEC licensees at that time, collectively, Entergy) notified the NRC that they had decided to permanently cease power operations at the Indian Point Nuclear Generating Unit No. 2 (IP2) by April 30, 2020, and at the Indian Point Nuclear Generating Unit No. 3 (IP3) by April 30, 2021.

Pursuant to 10 CFR 50.82(a)(1)(ii), by letters dated May 12, 2020, and May 11, 2021, Entergy certified to the NRC that the fuel had been permanently removed from the IP2 and IP3 reactor vessels and placed in the IP2 and IP3 spent fuel pools (SFPs). Upon the docketing of these certifications, under 10 CFR 50.82(a)(2), the IP2 and IP3 licenses no longer authorize operation of the reactors or emplacement or retention of fuel into the reactor vessels. The spent fuel from IP2 and IP3 is stored in the SFPs and in dry cask storage at the onsite independent spent fuel storage installation (ISFSI) until it is shipped offsite.

Indian Point Nuclear Generating Unit No. 1 (IP1) permanently ceased operations on October 31, 1974, and all fuel was removed from the IP1 reactor vessel by January 1976. In 1996, the NRC issued an Order approving the safe-storage condition of IP1. In 2003, the NRC issued Amendment No. 52 to IP1's provisional operating license that changed the license's expiration date to be consistent with that of the IP2 license at that time. Pursuant to 10 CFR 50.82(a)(2), the IP1 license no longer authorizes operation of the reactor or emplacement or retention of fuel into the reactor vessel. There is no IP1 spent fuel in wet storage at the IPEC site; IP1 spent fuel is stored onsite in dry cask storage in an ISFSI.

By Order dated November 23, 2020, the NRC approved a transfer of the IP licenses from Entergy to Holtec Decommissioning International, LLC, Holtec IP2, LLC (which became the licensee of IP1 and IP2), and Holtec IP3, LLC (which became the licensee of IP3). By letter dated December 22, 2021, as supplemented by letters dated February 1, 2022, February 2, 2022, and May 12, 2022, HDI, who conducts the decommissioning operating services on behalf of Holtec IP2 and Holtec IP3, requested exemptions from specific portions of 10 CFR 50.47, ''Emergency plans,'' and appendix E, ''Emergency Planning and Preparedness for Production and Utilization Facilities,'' to 10 CFR part 50 for the IPEC licenses. More specifically, HDI requested exemptions from certain planning standards in 10 CFR 50.47(b) regarding onsite and offsite radiological emergency preparedness (REP) plans for nuclear power reactors; from certain requirements in 10 CFR 50.47(c)(2) for establishment of plume exposure pathway and ingestion pathway emergency planning zones (EPZs) for nuclear power reactors; and from certain requirements in 10 CFR part 50, appendix E, section IV, ''Content of Emergency Plans.''

HDI's requested exemptions would eliminate the NRC requirements to maintain formal offsite REP plans in accordance with 44 CFR, ''Emergency Management and Assistance,'' part 350, ''Review and Approval of State and Local Radiological Emergency Plans and Preparedness,'' and would reduce the scope of the onsite EP activities at IPEC. HDI based its request on the reduced risks of an offsite radiological release at IPEC after permanent cessation of power operations and all spent fuel has decayed for at least 15 months. The exemptions would maintain the requirements for an onsite radiological emergency plan and would continue to ensure the capability to communicate and coordinate with offsite response authorities.

The EP requirements of 10 CFR 50.47 and appendix E to 10 CFR part 50 do not distinguish between operating reactors and those that have ceased operations and defueled. As such, a permanently shut down and defueled reactor must continue to maintain the same EP requirements as an operating power reactor under the existing regulatory requirements. To establish a level of EP commensurate with the reduced risks of a permanently shut down and defueled reactor, the licensee must seek exemptions from certain EP regulatory requirements before it can change its emergency plans.

The NRC is therefore considering issuing to the licensee the proposed exemptions from portions of 10 CFR 50.47 and appendix E to 10 CFR part 50, which would eliminate the requirements for the licensee to maintain offsite radiological emergency plans and reduce some of the onsite EP

activities based on the reduced radiological risks as IPEC has permanently ceased power operations and all spent fuel has decayed for more than 15 months.

Consistent with 10 CFR 51.21, ''Criteria for and identification of licensing and regulatory actions requiring environmental assessments,'' the NRC has determined that an EA is the appropriate form of environmental review for the requested action. Based on the results of the EA, which is provided in Section II of this document, the NRC has determined not to prepare an environmental impact statement for the proposed action and is issuing a FONSI.

**II. Environmental Assessment**

*Description of the Proposed Action*

The proposed action would exempt the licensee from: (1) certain standards as set forth in 10 CFR 50.47(b) regarding onsite and offsite emergency response plans for nuclear power reactors; (2) requirements in 10 CFR 50.47(c)(2) to establish plume exposure and ingestion pathway EPZs for nuclear power reactors; and (3) certain requirements in 10 CFR part 50, appendix E, section IV, which establishes the elements that make up the content of emergency plans. The proposed action of granting these exemptions would eliminate the NRC requirements for the licensee to maintain offsite radiological emergency plans in accordance with 44 CFR part 350 and reduce some of the onsite EP activities at IPEC. However, requirements for certain onsite capabilities to communicate and coordinate with offsite response authorities would be retained.

Additionally, if necessary, offsite protective actions could still be implemented using a comprehensive emergency management plan (CEMP) process. A CEMP in this context, also referred to as an emergency operations plan, is addressed in FEMA's CPG 101. The CPG 101 is the foundation for State, territorial, Tribal, and local EP in the United States under the National Preparedness System. It promotes a common understanding of the fundamentals of risk-informed planning and decision making and assists planners at all levels of government in their efforts to develop and maintain viable, all-hazards, all-threats emergency plans. A CEMP is flexible enough for use in all emergencies. It describes how people and property will be protected; details who is responsible for carrying out specific actions; identifies the personnel, equipment, facilities, supplies, and other resources available; and outlines how all actions will be coordinated. A CEMP is often referred to as a synonym for ''all-hazards'' planning. The proposed action is in accordance with the licensee's exemption request dated December 22, 2021, as supplemented by letters dated February 1, 2022, February 2, 2022, and May 12, 2022.

*Need for the Proposed Action*

The proposed action is needed for the licensee to revise the IPEC Emergency Plan. Since the certifications for permanent cessation of operations and permanent removal of fuel from the reactor vessels have been docketed, pursuant to 10 CFR 50.82(a)(2), the IPEC licenses no longer authorize use of the facility for power operation or emplacement or retention of fuel into the reactor vessels and, therefore, the occurrence of postulated accidents associated with IPEC reactor operation is no longer credible. As the EP requirements do not distinguish between operating reactors and a power reactor that has been permanently shut down and defueled, the licensee requests an exemption from certain EP requirements commensurate with the radiological risks at the site.

In its exemption request, the licensee identified three possible design-basis accidents (DBAs) at IPEC in its permanently shut down and defueled condition. These are: (1) a fuel handling accident in the fuel storage buildings; (2) an accidental release of waste gas; and (3) an accidental release of waste liquid. The licensee also considered the consequences of a beyond DBA involving a complete loss of SFP water inventory and no accompanying heat loss (*i.e.,* adiabatic heat up). The NRC staff evaluated these possible radiological accidents, as well as the associated analyses provided by the licensee, in the Commission Paper (SECY) 22–0102, ''Request by Holtec Decommissioning International, LLC for Exemptions from Certain EP Requirements for the Indian Point Nuclear Generating Unit Nos. 1, 2, and 3,'' dated November 18, 2022.

In SECY–22–0102, the NRC staff verified that the licensee's analyses and calculations provided reasonable assurance that if the requested exemptions were granted, then: (1) for a DBA, an offsite radiological release will not exceed the early phase protective action guides (PAGs) at the exclusion area boundary, as detailed in Table 1–1, ''Summary Table for PAGs, Guidelines, and Planning Guidance for Radiological Incidents,'' to the EPA's ''PAG Manual: Protective Action Guides and Planning Guidance for Radiological Incidents,'' EPA–400/R–17/001, dated January 2017; (2) in the highly unlikely event of a beyond DBA resulting in a loss of all SFP cooling, there is sufficient time to initiate appropriate mitigating actions; and (3) in the event a radiological release has or is projected to occur, there would be sufficient time for offsite agencies to take protective actions using a CEMP to protect the health and safety of the public if offsite governmental officials determine that such action is warranted. The Commission approved the NRC staff's recommendation to grant the exemptions based on this evaluation in its Staff Requirements Memorandum to SECY–22–0102, dated October 24, 2023.

Based on the licensee's analyses and reduced radiological risks, the licensee states that complete application of the EP regulations to IPEC 15 months after its permanent cessation of power operations would not serve the underlying purpose of the regulations or is not necessary to achieve the underlying purpose of the regulations. The licensee also states that it would incur undue costs in the application of operating plant EP requirements for the maintenance of an emergency response organization in excess of that actually needed to respond to the diminished scope of credible accidents for IPEC 15 months after its permanent cessation of power operations.

*Environmental Impacts of the Proposed Action*

The NRC staff has completed its evaluation of the environmental impacts of the proposed action.

The proposed action consists mainly of changes related to the elimination of NRC requirements for the licensee to maintain offsite radiological emergency plans in accordance with 44 CFR part 350 and reduce some of the onsite EP activities at IPEC, based on the reduced risks once the reactor has been permanently shut down for a period of 15 months. However, requirements for certain onsite capabilities to communicate and coordinate with offsite response authorities will be retained and offsite EP provisions to protect public health and safety will still exist through State and local government use of a CEMP.

With regard to potential nonradiological environmental impacts, the proposed action would have no direct impacts on land use or water resources, including terrestrial and aquatic biota, as it involves no new construction, land disturbance, or modification of plant operational systems. There would be no changes to the quality or quantity of

nonradiological effluents and no changes to the plants' National Pollutant Discharge Elimination System permits would be needed. In addition, there would be no noticeable effect on socioeconomic conditions in the region, no environmental justice impacts, no air quality impacts, and no impacts to historic and cultural resources from the proposed action. Therefore, there are no significant nonradiological environmental impacts associated with the proposed action.

With regard to potential radiological environmental impacts, the proposed action would not significantly increase the probability or consequences of radiological accidents. Additionally, the NRC staff has concluded that the proposed action would have no direct radiological environmental impacts. There would be no change to the types or amounts of radioactive effluents that may be released and, therefore, no change in occupational or public radiation exposure from the proposed action. Moreover, no changes would be made to plant buildings or to the site property from the proposed action. For these reasons, there are no significant radiological environmental impacts associated with the proposed action.

**Environmental Impacts of the Alternatives to the Proposed Action**

As an alternative to the proposed action, the NRC staff considered the denial of the proposed action (*i.e.,* the ''no-action'' alternative). The denial of the application would result in no change in current environmental impacts. Therefore, the environmental impacts of the proposed action and the alternative action are similar.

**Alternative Use of Resources**

The proposed action does not involve the use of any different resources than those previously considered in the ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Final Report,'' NUREG–1437, Supplement 38, dated December 2010, as supplemented in June 2013 and April 2018.

**Agencies or Persons Consulted**

No additional agencies or persons were consulted regarding the environmental impact of the proposed action. On October 25, 2023, the State of New York representative was notified of this EA and FONSI.

**State of New York Comments**

By letters dated November 22, 2022, and January 6, 2023, the New York State Energy Research Development Authority, and the New York Department of Public Service along with the Indian Point Decommissioning Oversight Board, respectively submitted comments regarding the proposed exemptions. Although the comments were not specific to this EA, the NRC staff reviewed the comments and did not identify any information that was not previously considered in the preparation of this EA.

**III. Finding of No Significant Impact**

The licensee has proposed exemptions from: (1) certain standards in 10 CFR 50.47(b) regarding onsite and offsite emergency response plans for nuclear power reactors; (2) the requirements in 10 CFR 50.47(c)(2) to establish plume exposure and ingestion pathway EPZs for nuclear power reactors; and (3) certain requirements in 10 CFR part 50, appendix E, section IV, which establishes the elements that make up the content of emergency plans. The proposed action of granting these exemptions would eliminate the NRC requirements for the licensee to maintain offsite radiological emergency plans in accordance with 44 CFR part 350 and reduce some of the onsite EP activities at IPEC, based on the reduced risks once the reactor has been permanently shut down for a period of 15 months. However, requirements for certain onsite capabilities to communicate and coordinate with offsite response authorities will be retained and offsite EP provisions to protect public health and safety will still exist through State and local government use of a CEMP.

The NRC is considering issuing the exemptions. The proposed action would not significantly affect plant safety, would not have a significant adverse effect on the probability of an accident occurring, and would not have any significant radiological or nonradiological impacts. This FONSI is a final finding and incorporates by reference the EA in Section II of this document. Therefore, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

**IV. Availability of Documents**

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

| Document description | ADAMS Accession No./weblink |
|---|---|
| Federal Emergency Management Agency, ''Developing and Maintaining Emergency Operations Plans,'' Comprehensive Preparedness Guide (CPG) 101, Version 2.0, November 2010. | *https://www.fema.gov/media-library-data/20130726-1828-25045-0014/cpg_101_comprehensive_preparedness_guide_developing_and_maintaining_emergency_operations_plans_2010.pdf.* |
| Fleming, Jean A., Holtec Decommissioning International, LLC, letter to NRC, ''Request for Exemptions from Certain Emergency Planning Requirements of 10 CFR 50.47 and 10 CFR part 50, appendix E,'' dated December 22, 2021. | ML21356B693. |
| Fleming, Jean A., Holtec Decommissioning International, LLC, letter to NRC, ''Supplement to Holtec Decommissioning International, LLC (HDI) Request for Exemptions from Certain Emergency Planning Requirements of 10 CFR 50.47 and 10 CFR part 50, appendix E for Indian Point Unit Nos. 1, 2, and 3 Including Site-Specific Calculations,'' dated February 1, 2022. | ML22032A017. |
| NRC Order on Indian Point Nuclear Generating Unit Nos. 1, 2, and 3, Order Approving Transfer of Facility Operating Licenses to Holtec International, Owner, and Holtec Decommissioning International, LLC Operator, dated November 23, 2020. | ML20297A325. |
| Fleming, Jean A., Holtec Decommissioning International, LLC, letter to NRC, ''Revision to Holtec Decommissioning International, LLC (HDI) Request for Exemptions from Certain Emergency Planning Requirements of 10 CFR 50.47 and 10 CFR part 50, Appendix E for Indian Point Unit Nos. 1, 2, and 3,'' dated February 2, 2022. | ML22033A348. |

| Document description | ADAMS Accession No./weblink |
|---|---|
| Fleming, Jean A., Holtec Decommissioning International, LLC, letter to NRC, ''Response to Requests for Additional Information Related to Exemption Request and License Amendment Request to Revise the Facility's Emergency Plan,'' dated May 12, 2022. | ML22132A169. |
| Vitale, Anthony J., Entergy Nuclear Operations, Inc., letter to NRC, ''Notification of Permanent Cessation of Power Operations Indian Point Nuclear Generating Unit Nos. 2 and 3, Docket Nos. 50–247 and 50–286, License Nos. DPR–26 and DPR–64,'' dated February 8, 2017. | ML17044A004. |
| Vitale, Anthony J., Entergy Nuclear Operations, Inc., letter to NRC, ''Certifications of Permanent Cessation of Power Operations and Permanent Removal of Fuel from the Reactor Vessel Indian Point Nuclear Generating Unit No. 2 NRC, Docket No. 50–247, Renewed Facility Operating License No. DPR–26,'' dated May 12, 2020. | ML20133J902. |
| Vitale, Anthony J., Entergy Nuclear Operations, Inc., letter to NRC, ''Certifications of Permanent Cessation of Power Operations and Permanent Removal of Fuel from the Reactor Vessel Indian Point Nuclear Generating Unit No. 3, NRC Docket No. 50–286, Renewed Facility Operating License No. DPR–64,'' dated May 11, 2021. | ML21131A157. |
| U.S. Environmental Protection Agency (EPA), EPA–400/R–17/001, ''PAG Manual: Protective Action Guides and Planning Guidance for Radiological Incidents,'' January 2017. | ML17044A073. |
| New York State Energy Research and Development Authority, ''Emergency Planning Exemption Request and License Amendment Request for the Indian Point Site,'' dated November 22, 2022. | ML22332A048. |
| New York State Department of Public Service, ''Public Statement Hearing regarding the Exemption Requests and License Amendment Requests for the Indian Point Site,'' dated January 6, 2023. | ML23009B687. |
| SECY–22–0102, ''Request by Holtec Decommissioning International, LLC for Exemptions from Certain Emergency Planning Requirements for the Indian Point Nuclear Generating Unit Nos. 1, 2, and 3,'' dated November 18, 2022. | ML22231A155 (Package). |
| Staff Requirements Memorandum to SECY–22–0102, ''Request by Holtec Decommissioning International, LLC for Exemptions from Certain Emergency Planning Requirements for the Indian Point Nuclear Generating Unit Nos. 1, 2, and 3,'' dated October 24, 2023. | ML23297A027. |
| NUREG–1437, Supplement 38, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Final Report,'' December 2010. | *https://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/supplement38/index.html.* |

Dated: October 26, 2023.

For the Nuclear Regulatory Commission.

**Shaun M. Anderson,**

*Chief, Reactor Decommissioning Branch, Division of Decommissioning, Uranium Recovery and Waste Programs, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. 2023–23971 Filed 10–30–23; 8:45 am]

**BILLING CODE 7590–01–P**

## OFFICE OF PERSONNEL MANAGEMENT

### Submission for Review: Renewal of an Existing Information Collection, (Generic Clearance for Improving Customer Experience), OMB Control No. 3206–0276.

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** 60-Day Notice and request for comments.

**SUMMARY:** The Office of Personnel Management (OPM) offers the general public and other Federal agencies the opportunity to comment on a previously approved information collection request (ICR) 3206–0276, (Generic Clearance for Improving Customer Experience).

**DATES:** Comments are encouraged and will be accepted until January 2, 2024. This process is conducted in accordance with 5 CFR 1320.1.

**ADDRESSES:** Interested persons are invited to submit written comments on the proposed information collection by one of the following means:

*Federal Rulemaking Portal: https://www.regulations.gov* 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.

• Email *michelle.earley@opm.gov.* Please put ''OPM Customer Experience'' in the subject line of the email.

**FOR FURTHER INFORMATION CONTACT:** A copy of this information collection request, with applicable supporting documentation, may be obtained by contacting the Human Resources Solution, Office of Personnel Management, 1900 E Street NW, Washington, DC 20415, Attention: Michelle Earley, 202–936–2034, or via electronic mail to *michelle.earley@opm.gov*.

**SUPPLEMENTARY INFORMATION:** Under the PRA, (44 U.S.C. 3501–3520) Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval.

*A modern, streamlined and responsive customer experience means:* Raising government-wide customer experience to the average of the private sector service industry; developing indicators for high-impact Federal programs to monitor progress towards excellent customer experience and mature digital services; and providing the structure (including increasing transparency) and resources to ensure customer experience is a focal point for agency leadership. To support this, OMB Circular A–11 Section 280 established government-wide standards for mature customer experience organizations in government and measurement. To enable Federal programs to deliver the experience taxpayers deserve, they must undertake three general categories of activities: Conduct ongoing customer research, gather and share customer feedback, and test services and digital products.

These data collection efforts may be either qualitative or quantitative in

nature or may consist of mixed methods. Additionally, data may be collected via a variety of means, including but not limited to electronic or social media, direct or indirect observation (*i.e.,* in person, video and audio collections), interviews, questionnaires, surveys, and focus groups. OPM will limit its inquiries to data collections that solicit strictly voluntary opinions or responses. Steps will be taken to ensure anonymity of respondents in each activity covered by this request.

The results of the data collected will be used to improve the delivery of Federal services and programs. It will include the creation of personas, customer journey maps, and reports and summaries of customer feedback data and user insights. It will also provide government-wide data on customer experience that can be displayed on *performance.gov* to help build transparency and accountability of Federal programs to the customers they serve.

**Method of Collection**

OPM will collect this information by electronic means when possible, as well as by mail, fax, telephone, technical discussions, and in-person interviews. OPM may also utilize observational techniques to collect this information.

This request proposes to renew a previously approved collection. OPM updated the burden hours to account for anticipated expansion of this type of work. Therefore, we invite comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

**Analysis**

*Agency:* Office of Personnel Management.

*Title:* OPM Customer Experience.

*OMB Number:* 3206–0276.

*Frequency:* Annually.

*Affected Public:* Individuals.

*Number of Respondents:* 4,013,750.

*Estimated Time per Respondent:* 15 Minutes.

*Total Burden Hours:* 1,006,125.

U.S. Office of Personnel Management

**Stephen Hickman,**

*Federal Register Liaison.*

[FR Doc. 2023–24031 Filed 10–30–23; 8:45 am]

**BILLING CODE 6325–43–P**

## POSTAL REGULATORY COMMISSION

**[Docket Nos. MC2024–25 and CP2024–25; MC2024–26 and CP2024–26]**

## 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:* November 2, 2023.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

**FOR FURTHER INFORMATION CONTACT:** David A. Trissell, General Counsel, at 202–789–6820.

**SUPPLEMENTARY INFORMATION:**

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**I. Introduction**

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

**II. Docketed Proceeding(s)**

1. *Docket No(s).:* MC2024–25 and CP2024–25; *Filing Title:* USPS Request to Add Priority Mail, USPS Ground Advantage & Parcel Select Contract 1 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* October 25, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* November 2, 2023.

2. *Docket No(s).:* MC2024–26 and CP2024–26; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 85 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* October 25, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* November 2, 2023.

[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).

This Notice will be published in the **Federal Register**.

**Erica A. Barker,**

*Secretary.*

[FR Doc. 2023–23995 Filed 10–30–23; 8:45 am]

**BILLING CODE 7710–FW–P**

## POSTAL REGULATORY COMMISSION

**[Docket No. MT2022–1; Order No. 6758]**

## Market Test of Experimental Product

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission is recognizing a recently filed Postal Service request to extend the duration of USPS Connect Local Mail market test. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

**DATES:** *Comments are due:* November 16, 2023.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at *https://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

**FOR FURTHER INFORMATION CONTACT:** David A. Trissell, General Counsel, at 202–789–6820.

**SUPPLEMENTARY INFORMATION:**

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### I. Introduction

On January 4, 2022, the Commission authorized the Postal Service to proceed with a 2-year market test of an experimental product called USPS Connect Local Mail.[1] The market test began on January 9, 2022 and is scheduled to expire on January 8, 2024 unless extended or canceled. Order No. 6080 at 20. USPS Connect Local Mail offers an alternative to long-distance end-to-end mailing that business mailers may use to send documents locally with regular frequency. *Id.* at 2. USPS Connect Local Mail provides same-day or next-day delivery, 6 days per week, with customers receiving same-day or next-day delivery based on when they enter their mail. *Id.* On October 24, 2023, the Postal Service filed a request pursuant to 39 U.S.C. 3641 and 39 CFR 3045.11 to extend the duration of the USPS Connect Local Mail market test until January 9, 2025, an additional 12 months.[2]

### II. Background

Before filing the Request, the Postal Service filed two requests to convert USPS Connect Local Mail to a permanent offering that were both dismissed without prejudice. On October 11, 2022, the Postal Service filed its initial request, which the Commission considered in Docket No. MC2023–12.[3] The Commission dismissed the Initial Request without prejudice because it did not ''contain the information required by law and necessary for the Commission to determine the appropriateness of converting USPS Connect Local Mail to a permanent product offering. . . .''[4] It provided the Postal Service the opportunity to refile a compliant request, which the Postal Service submitted on November 9, 2022.[5] After reviewing the record and considering comments received, the Commission dismissed the Revised Request without prejudice because the Postal Service did not adequately address significant issues regarding potential unfair competition under 39 U.S.C. 404a.[6] In Order No. 6423, the Commission stated that it expects a future request to convert USPS Connect Local Mail to a permanent product offering to address four topics regarding sufficient data, financial stability, pricing, and impact of new sorting and delivery centers on customer demand. Order No. 6423 at 12–15.

In its Request for extension, the Postal Service explains that extending the market test for another year would allow it to address the topics identified in Order No. 6423. Request at 3. It seeks a 12-month extension of the USPS Connect Local Mail market test, which if approved would set a new expiration date of January 9, 2025. *Id.* at 1. It asserts that the Request meets the criteria for granting an extension under 39 U.S.C. 3641(d)(2) and 39 CFR 3045.11. *Id.* at 3.

39 U.S.C. 3641(d)(2) allows a market test to be extended ''[i]f necessary in order to determine the feasibility or desirability of a product being tested'' in a market test. 39 U.S.C. 3641(d)(2). The Commission's rules require the Postal Service to provide certain information in a request for extension. First, it must ''[e]xplain why an extension is necessary to determine the feasibility or desirability of the experimental product'' USPS Connect Local Mail. 39 CFR 3045.11(b)(1). The Postal Service asserts that it ''needs additional time to determine the viability of USPS Connect Local Mail as a standalone offering and develop further strategies to ensure its success.'' Request at 3. Specifically, it states that an extension would allow it to better understand customer usage and any related obstacles. *Id.* at 4. It observes that an extension would provide a meaningful opportunity to evaluate USPS Connect Local Mail's viability in the context of the redesigned network, which was a concern raised in Order No. 6423.[7]

Second, a request for extension must list the new end date of the market test. 39 CFR 3045.11(b)(2). In the Request, the Postal Service identifies a new market test termination date of January 9, 2025. Request at 5. Third, a request for extension must ''[c]alculate the total revenue received by the Postal Service from the market test for each fiscal year the market test has been in operation and provide supporting documentation for the calculations[.]'' 39 CFR 3045.11(b)(3). The Postal Service provides revenue and volume of mailpieces for each fiscal quarter the market test has been operating and attaches quarterly reports supporting these calculations. Request at 6.

Fourth, the request for extension must ''[e]stimate the additional revenue that is anticipated by the Postal Service for each fiscal year remaining on the market test, including the requested extension period, and provide available supporting documentation[.]'' 39 CFR 3045.11(b)(4). The Postal Service asserts that based on the quarterly reports, it reasonably anticipates continued volume of approximately 100 pieces per month, which would amount to estimated additional revenue of approximately $4,000 through December 2024 assuming that volume

[1] Order Authorizing Market Test of Experimental Product—USPS Connect Local Mail, January 4, 2022 (Order No. 6080).

[2] United States Postal Service Request for Extension of Market Test, October 24, 2023, at 1 (Request).

[3] Docket No. MC2023–12, United States Postal Service Request to Convert USPS Connect Local Mail to a Permanent Offering, October 11, 2022 (Initial Request).

[4] Docket No. MC2023–12, Order Dismissing Without Prejudice Postal Service's Request to Convert USPS Connect Local Mail Market Test to a Permanent Offering, October 17, 2022, at 5–6 (Order No. 6301).

[5] Docket No. MC2023–12, United States Postal Service Revised Request to Convert USPS Connect Local Mail to a Permanent Offering, November 9, 2022 (Revised Request).

[6] Docket No. MC2023–12, Order Dismissing Without Prejudice the Postal Service's Revised Request to Convert USPS Connect Local Mail Market Test to a Permanent Offering, January 20, 2023, at 3 (Order No. 6423).

[7] *Id.* at 5; *see* Order No. 6423 at 14.

remains steady during the extension. Request at 6–7.

Fifth, the request for extension must include ''any additional information necessary for the Commission to evaluate the continued consistency with the requirements of 39 U.S.C. 3641.'' 39 CFR 3045.11(b)(5). The Postal Service explains that it has considered some of the Commission's concerns in Order No. 6423 and ''is currently exploring additional options beyond Click-N-Ship and the Postal Service API that would enable third-party payment providers to sell USPS Connect Local Mail through their existing evidencing systems while still maintaining the desired end-user experience.'' Request at 7–8. It also explains that after considering price alternatives, the current price for USPS Connect Local Mail is appropriate. *Id.* at 8.

## III. Notice of Filing

The Commission will continue to consider matters raised by the Postal Service's Request in Docket No. MT2022–1. The Commission invites comments on whether the Request complies with applicable statutory and regulatory requirements, including 39 U.S.C. 3641, 39 CFR part 3045, and Order No. 6080. Comments are due by November 16, 2023. The public portions of filings in this docket can be accessed via the Commission's website (*http://www.prc.gov*).

39 U.S.C. 505 requires the Commission to designate an officer of the Commission to represent the interests of the general public in all public proceedings (Public Representative). The Commission previously appointed Mallory L. Smith to serve as the Public Representative in this proceeding. She remains appointed to serve as the Public Representative.

## VI. Ordering Paragraphs

*It is ordered:*

1. The Commission invites comments on the United States Postal Service Request for Extension of Market Test, filed on October 24, 2023.

2. Pursuant to 39 U.S.C. 505, Mallory L. Smith remains appointed to serve as the Public Representative in this proceeding.

3. Comments are due by November 16, 2023.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

**Erica A. Barker,**

*Secretary.*

[FR Doc. 2023–24010 Filed 10–30–23; 8:45 am]

**BILLING CODE 7710–FW–P**

## POSTAL REGULATORY COMMISSION

**[Docket Nos. CP2022–5; CP2023–119]**

## 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:* November 1, 2023.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

**FOR FURTHER INFORMATION CONTACT:** David A. Trissell, General Counsel, at 202–789–6820.

**SUPPLEMENTARY INFORMATION:**

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## I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

## II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2022–5; *Filing Title:* USPS Notice of Amendment to Priority Mail & First-Class Package Service Contract 204, Filed Under Seal; *Filing Acceptance Date:* October 24, 2023; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* November 1, 2023.

2. *Docket No(s).:* CP2023–119; *Filing Title:* USPS Notice of Amendment to Priority Mail, First-Class Package Service & Parcel Select Contract 7, Filed Under Seal; *Filing Acceptance Date:* October 24, 2023; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* November 1, 2023.

This Notice will be published in the **Federal Register**.

**Erica Barker,**

*Secretary.*

[FR Doc. 2023–23933 Filed 10–30–23; 8:45 am]

**BILLING CODE 7710–FW–P**

[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).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–98798; File No. SR–NYSEAMER–2023–49]**

## Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Delete Legacy Disciplinary Rules 475, 476, 476A, and 477 and Make Conforming Changes to Rule 41, Rules 8001, 8130(d), 8320(d), 9001, 9216(b)(1), 9810(a), and 781 of the Office Rules, Rules 2A, 12E, 3170(a)(3), 902NY and Adopt a New Rule 600 and Make Conforming Changes to Rules 3170(C)(3), and Adopt a New Rule 601

October 25, 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 October 13, 2023, NYSE American LLC (''NYSE American'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to (1) delete legacy disciplinary Rules 475, 476, 476A, and 477 of the Office Rules as obsolete and make conforming changes to Rule 41 of the General Rules, Rules 8001, 8130(d), 8320(d), 9001, 9216(b)(1), 9810(a), and 781 of the Office Rules, Rules 2A, 12E, and 3170(a)(3) of the Equities Rules, and Rule 902NY of the Options Rules; (2) adopt a new Rule 600 of the Office Rules incorporating the substantive violations currently in Rule 476(a) without change and make conforming changes to Rules 3170(C)(3)—Equities and 9217 of the Office Rules; and (3) adopt a new Rule 601 of the Office Rules similar to Cboe Exchange, Inc. Rule 13.11, Supplementary Material .01. 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 Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to (1) delete legacy disciplinary Rules 475, 476, 476A, and 477 of the Office Rules as obsolete and make conforming changes to Rule 41 of the General Rules, Rules 8001, 8130(d), 8320(d), 9001, 9216(b)(1), 9810(a), and 781 of the Office Rules, Rules 2A, 12E, and 3170(a)(3) of the Equities Rules, and Rule 902NY of the Options Rules; (2) adopt a new Rule 600 of the Office Rules incorporating the substantive violations currently in Rule 476(a) without change and make conforming changes to Rules 3170(C)(3)—Equities and 9217 of the Office Rules; and (3) adopt a new Rule 601 of the Office Rules setting forth sanctions guidelines similar to Cboe Exchange, Inc. (''Cboe'') Rule 13.11 (Judgment and Sanctions), Supplementary Material .01.

Background and Proposed Rule Change

In 2016, the Exchange adopted rules relating to investigation, discipline, and sanctions, and other procedural rules based on the rules of its affiliate New York Stock Exchange LLC and the Financial Industry Regulatory Authority (''FINRA'').[3] The Exchange represented in that filing that when the transition to the new disciplinary rules was complete and there were no longer any member organizations or persons subject to Rules 475, 476, 476A, and 477 of the Office Rules, the Exchange would submit a proposed rule change that would delete such rules (except for the listed offenses under Rule 476(a)).[4] The Exchange represents that the transition to the new disciplinary rules is complete and there are no longer any member organizations or persons subject to Rules 475, 476, 476A, and 477, and that those rules can therefore be deleted as obsolete.

The Exchange proposes conforming changes to the following rules that contain references to one or more of the rules proposed to be deleted:

General Rules

- Rule 41 (Failure to Pay Exchange Fees)

Office Rules

- Rule 9216(b)(1) (Acceptance, Waiver, and Consent; Procedure for Imposition of Fines for Minor Violation(s) of Rules)
- Rule 9810(a) (Initiation of Proceeding), and
- Rule 781 (Insolvency)

Equities Rules

- Rules 2A (Jurisdiction)
- Rule 12E (Arbitration), and
- Rule 3170(a)(3) (Tape Recording of Registered Persons by Certain Firms)

Options Rules

- Rule 902NY (Admission and Conduct on the Options Trading Floor)

The following rules in the General Rules reflecting the transition from the legacy disciplinary rules to the current rule set would be deleted in their entirety:

- Rule 8130(d) (Retention of Jurisdiction);
- Rule 8320(d) (Payment of Fines, Other Monetary Sanctions, or Costs; Summary Action for Failure to Pay); Rule 8001 (Effective Date of Rule 8000 Series); and
- Rule 9001 (Effective Date of Rule 9000 Series).

Section 9A of the Office Rules titled ''Legacy Disciplinary Rules'' where Rules 475, 476, 476A, and 477 are currently set forth would also be deleted.

Section 9B of the Office Rules where the Rule 8000 and Rule 9000 Series are currently set forth would become Section 10. The remaining headings—current Sections 10 (Advertising), 11 (Wires and Other Means of Communication), 12 (Reports), 13 (Secondary Distributions), 14 (Special Offerings and Special Bids), 15 (Exchange Distributions and Exchange Acquisitions), and 16 (Proxies)—would be renumbered.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 77241 (February 26, 2016), 81 FR 11311 (March 3, 2016) (SR–NYSEMKT–2016–30) (''Release No. 77241'') (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Adopting Investigation, Disciplinary, Sanction, and Other Procedural Rules Modeled on the Rules of the New York Stock Exchange LLC and Certain Conforming and Technical Changes).

[4] *See id.,* 81 FR at 11318.

Finally, Rule 478T, currently marked ''Deleted'', would be removed as obsolete.

In connection with the deletion of Rule 476, the Exchange also proposes two new Rules that would be located in a new Section 18 titled ''Offenses and Sanctions Guidelines.''

First, the Exchange would adopt new Rule 600 titled ''Other Offenses'' that would, consistent with its filing adopting its current disciplinary rules modeled on the NYSE and FINRA rules, retain the listed offenses in Rule 476(a)(1)–(11) without substantive change. Proposed Rule 600 would provide that a member, member organization, principal executive, approved person, registered or non-registered employee of a member or member organization or person otherwise subject to the jurisdiction of the Exchange violates the provisions of the Rule if it commits any of the enumerated offenses, which would be transposed from Rule 476(a) in the same order and without changes except for Rule 476(a)(8), which is marked ''Reserved.'' The Exchange further proposes conforming changes to the following rules to replace references to Rule 476(a) with references to Rule 600: Rules 3170(C)(3)—Equities (Tape Recording of Registered Persons by Certain Firms) and Rule 9217 (Violations Appropriate for Disposition Under Rule 9216(b)).

Second, the Exchange would adopt new Rule 601 titled ''Sanction Guidelines'' that would incorporate sanctions guidelines similar to Cboe Rule 13.11, Supplementary Material .01, in place of the Sanction Guidelines in Rule 476, Supplementary Material .10.

The current Sanction Guidelines in Rule 476.10 were adopted pursuant to the provisions of Section IV.B.i of the Commission's September 11, 2000 Order Instituting Administrative Proceedings Pursuant to Section 19(h)(1) of the Act (the ''2000 Order''), which required the Exchange to adopt rules establishing, or modifying existing, sanctioning guidelines such that they are reasonably designed to effectively enforce compliance with options order handling rules, including the duty of best execution with respect to the handling of orders after the broker-dealer routes the order to such respondent exchange, limit order display, priority, firm quote, and trade reporting rules.[5]

Unlike other exchanges subject to the 2000 Order,[6] the Exchange incorporated specific fine ranges in its sanctions guidelines for violations (other than minor rule violations) setting forth the principal considerations to be applied to the resolution of disciplinary matters. The specific fine ranges incorporated into the guidelines have remained static and, in many instances, set forth recommended fine levels for rules that have been superseded and deleted.[7] For the remaining operative rules, such as Rule 16 (Business Conduct), 995NY (Prohibited Conduct) and 975NY (Nullification and Adjustment of Options Transactions including Obvious Errors), the fine ranges have largely been eclipsed as the disciplinary landscape evolves.[8] In short, the Exchange believes that, more than two decades after they were adopted, the monetary sanctions ranges are no longer necessary or useful in determining appropriate sanctions in a given case.

The Exchange accordingly believes that adopting a new rule that continues to reflect a principles-based approach to sanctions guidelines applicable to all options rules that does not contain specific recommended fine ranges for a subset of rules would modernize and update the rule in important respects while continuing to provide flexible guidelines for determining appropriate remedial sanctions consistent with the intention of the original rule.[9] The principles-based guidelines contained in Cboe Rule 13.11 that the Exchange proposes to adopt are similar to those set forth in the current guidelines. However, because Cboe Rule 13.11 takes a more streamlined approach, the Exchange believes the proposed rule more clearly and succinctly sets forth current relevant considerations regarding the adjudication of disciplinary actions. Further, the Exchange believes that the proposed rule would be consistent with the 2000 Order because the proposal would closely track approved Cboe Rule 13.11 that was also adopted to satisfy the Commission's order. Indeed, by modernizing and updating the Exchange's sanctions guidelines, proposed Rule 601 would further enhance its disciplinary processes consistent with the 2000 Order. Finally, the proposed rule would promote regulatory consistency across options exchanges in determining appropriate remedial sanctions for violations of options rules.

Like current Rule 476.10, proposed Rule 601 would not apply to the equities market.[10] As such, Rule 601 would carry forward the current practice under Rule 476.10 whereby the various bodies with responsibility for the adjudication of disciplinary actions, including Hearing Panels, Hearing Officers, the Committee for Review (''CFR''), and the Board of Directors (''Board''), defined in the proposed Rule collectively as ''Adjudicatory Bodies,'' [11] would consider relevant Exchange precedent or such other precedent as they deem appropriate in determining sanctions imposed against ATP Holders or ATP Firms and their covered persons.

The remainder of the proposed Rule, with the following exceptions, would be substantially the same as Cboe Rule 13.11.01:

- First, the second paragraph in the proposed Rule would transpose the updated definition of ''Adjudicatory Bodies'' [12] from the second paragraph of

[5] *See* Securities Exchange Act Release Nos. 45412 (February 7, 2002), 67 FR 6770 (February 13, 2002) (Notice); 45566 (March 15, 2002), 67 FR 13379 (March 22, 2002) (SR–Amex–2001–68) (Order). *See generally* Securities Exchange Act Release No. 43268 (September 11, 2000), Administrative Proceeding File No. 3–10282.

[6] *See, e.g.,* Securities Exchange Act Release Nos. 45427 (February 8, 2002), 67 FR 6958 (February 14, 2002) (Notice); 45571 (March 15, 2002), 67 FR 13382 (March 22, 2002) (SR–CBOE–2001–71) (Order Granting Accelerated Approval of Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 1 Thereto by the Chicago Board Options Exchange, Inc. To Incorporate Certain Principal Considerations in Determining Sanctions and To Incorporate in the Exchange's Minor Rule Violation Plan Violations of the Exchange's Order Handling Rules).

[7] These rules include former Rules 958A, 111, 126, 155, 950, and 958. For instance, Rule 958A governing application of the firm quote rule was superseded by Rule 970NY in 2008 and deleted in 2009. Similarly, Section 900NY replaced former Rules 950 (Rules of General Applicability) and 958 (Options Transactions of Registered Traders) in 2008 and were also deleted in 2009. *See generally* Securities Exchange Act Release No. 59472 (February 27, 2009), 74 FR 9843 (March 6, 2009) (SR–NYSEALTR–2008–14) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Establish Rules for the Trading of Listed Options); Securities Exchange Act Release No. 59454 (February 25, 2009), 74 FR 9461 (March 9, 2009) (SR–NYSEALTR–2009–17) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Alternext U.S. LLC To Delete Certain Rules Governing the Trading of Listed Options).

[8] For example, the guideline for Rule 16 violations is $1,000 to $5,000. In 2013, a respondent consented to a $50,000 fine for a violation of Rule 16. *See SG Americas Securities* (NYSE American Matter No. 13–NYSEMKT–4). In 2020, the fine for a similar violation was $95,000—nearly 20 times the top of the guideline range. *See Citigroup Global Markets Inc.* (NYSE American Matter No. 2017–11–00111).

[9] *See* 67 FR at 6771.

[10] *See* note 6, *supra.*

[11] The Exchange proposes to add two terms to the definition of ''Adjudicatory Bodies'': ''Extended Hearing Panels,'' which are provided for in the Exchange's disciplinary rules, and Chief Regulatory Officer (''CRO''), given the CRO's role in the disciplinary and settlement processes.

[12] *See* note 10, *supra.*

current Rule 476.10(A) and the last two sentences of the third paragraph of current Rule 476.10(A).

• Second, references to ''Cboe Options Trading Permit Holders'' in Cboe Rule 13.11.01 would be replaced with ''ATP Holders or ATP Firms'' to reflect the Exchange's membership.

• Third, in proposed Rule 601(d), the Exchange would omit the second sentence in Cboe Rule 13.11.01(d), which is duplicative of the first sentence that the Exchange would retain.

• Fourth, in proposed Rule 601(e), the Exchange would omit the first sentence of Cboe Rule 13.11.01(e), which provides that ''Aggregation of violations may be appropriate in certain instances for purposes of determining sanctions,'' as redundant of the second sentence of Cboe Rule 13.11.01(e), which the Exchange would retain.

• Fifth, in proposed Rule 601(f), the Exchange would omit the first sentence of Cboe Rule 13.11.01(f), which provides that ''The Hearing Panel or the CRO, as applicable, should evaluate appropriateness of disgorgement and/or restitution,'' as redundant of the sentence of Cboe Rule 13.11.01(f), which the Exchange would retain.

Finally, consistent with the Exchange's desire to adopt streamlined, principles-based sanctions guidelines along the lines set forth in Cboe Rule 13.11.01, the Exchange would not carry forward the specific recommended monetary and non-monetary sanctions applicable to certain specific rule violations found in current Rule 476.10.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,[13] 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. In addition, the Exchange believes that the proposed rule change furthers the objectives of Section 6(b)(7) of the Act,[14] in particular, in that it provides fair procedures for the disciplining of members and persons associated with members,[15] the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the Exchange of any person with respect to access to services offered by the Exchange or a member thereof.

Specifically, the Exchange believes that deletion of the obsolete legacy disciplinary rules now that there are no longer any member organizations or persons subject to those rules, and making conforming changes to the rules referencing those legacy disciplinary rules, would increase the clarity and transparency of the Exchange's rules and remove impediments to and perfect the mechanism of a free and open market by ensuring that persons subject to the Exchange's jurisdiction, regulators, and the investing public could more easily navigate and understand the Exchange Bylaws and rules. The Exchange further believes that the proposed amendments would not be inconsistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from increased transparency and clarity, thereby reducing potential confusion.

The Exchange further believes that retaining the substantive offenses in Rule 476(a) without change is designed to prevent fraudulent and manipulative acts and practices by permitting the Exchange to continue to carry out its oversight and enforcement responsibilities with respect to the substantive provisions currently enumerated in Rule 476(a). For the same reasons, retention of those provisions would not be inconsistent with the public interest and the protection of investors.

Finally, the Exchange believes that adopting sanction guidelines similar to Cboe Rule 13.11.01 with only non-substantive, conforming changes that do not contain specific recommended fine ranges for a subset of rules would continue to permit the Exchange to impose sanctions consistently and fairly by reference to a streamlined rule, thereby continuing to provide fair procedures for the disciplining of members and persons associated with members, the denial of membership to any person seeking Exchange membership, the barring of any person from becoming associated with a member, and the prohibition or limitation by the Exchange of any person with respect to access to services offered by the Exchange or a member thereof pursuant to Section 6(b)(7)[16] of the Act.

The proposed rule would provide flexible and appropriate principles-based guidelines applicable to all options rules for determining remedial sanctions consistent with the intention of the Exchange's current sanctions guidelines rule.[17] However, the Exchange believes that dispensing with recommended fine ranges would modernize and update the rule in important respects. As noted, there are currently fine ranges for numerous rules that have been superseded or deleted, and the fine ranges for the remaining operative rules do not reflect more recent regulatory considerations and fine levels. Moreover, by adopting Cboe Rule 13.11's more streamlined approach to sanctions guidelines, the Exchange believes the proposed rule would more clearly and succinctly set forth the current relevant considerations regarding the adjudication of disciplinary actions. Further, the Exchange believes that the proposed rule would also be consistent with the 2000 Order because the proposal would closely track approved Cboe Rule 13.11 that was adopted to satisfy the same Commission order. Indeed, the Exchange believes that by modernizing and updating its sanctions guidelines, proposed Rule 601 would further enhance its disciplinary processes consistent with the 2000 Order and further ensure that the Exchange implements the most appropriate disciplinary mechanisms for violations and a fair process in determining same. Finally, the proposed rule would promote regulatory consistency and uniformity across options exchanges in determining appropriate remedial sanctions and the imposition of penalties.

*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 Exchange Act. The proposed rule change is not intended to address competitive issues but rather is concerned solely with deleting obsolete rules and making related and conforming changes.

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78f(b)(7).

[15] Under the Exchange's equities rules, the equivalent to the term ''member'' in this context is ''member organization.'' References to ''member'' and ''member organization'' as those terms are used in the rules of the Exchange include ATP Holders. *See* Rules 18, 24 & 900.2NY(5). *See* Release No. 77241, 81 FR 11318, notes 25–26, & 11334, n. 75.

[16] 15 U.S.C. 78f(b)(7).

[17] *See* 67 FR at 6771.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [18] and Rule 19b–4(f)(6) thereunder.[19] Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.[20]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [21] of the Act to determine whether the proposed rule change should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–NYSEAMER–2023–49 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–NYSEAMER–2023–49. 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 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–NYSEAMER–2023–49 and should be submitted on or before November 21, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

**Sherry R. Haywood,**

*Assistant Secretary.*

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[18] 15 U.S.C. 78s(b)(3)(A)(iii).

[19] 17 CFR 240.19b–4(f)(6).

[20] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[21] 15 U.S.C. 78s(b)(2)(B).

[22] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–98799; File No. SR–ICEEU–2023–021]**

## Self-Regulatory Organizations; ICE Clear Europe Limited; Order Approving Proposed Rule Change, as Modified by Amendment No. 1, Relating to Amendments to its Operational Risk and Resilience Policy

October 25, 2023.

**I. Introduction**

On August 15, 2023, ICE Clear Europe Limited (''ICE Clear Europe'' or ''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 thereunder,[2] a proposed rule change to amend its Operational Risk and Resilience Policy (the ''Policy''). On August 24, 2023, ICE Clear Europe filed Amendment No. 1 to the proposed rule change to make certain changes to the Exhibits 5.[3] Notice of the proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on September 5, 2023.[4] On October 3, 2023, the Commission designated a longer period for Commission action on the proposed rule change until December 4, 2023.[5] The Commission has not received comments regarding the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change, as modified by Amendment No. 1 (hereinafter ''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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 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.

[4] 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 (Aug. 29, 2023); 88 FR 60727 (Sep. 5, 2023) (SR–ICEEU–2023–021) (''Notice'').

[5] 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; Exchange Act Release No. 98573 (Sep. 27, 2023), 88 FR 68240 (Oct. 3, 2023) (File No. SR–ICEEU–2023–021).

the purpose of clearing security-based swaps. In its role as a clearing agency for security-based swaps, ICE Clear Europe maintains the Policy to address how ICE Clear Europe identifies, assesses, manages, monitors, and reports its operational risks. ICE Clear Europe is proposing to amend the Policy to add new scenario analysis and testing relating to operational risk and resilience, require that ICE Clear Europe assess emerging risks, and update the review process for the Policy. The Policy has five sections: (1) Introduction, (2) Operational Risk and Resilience Framework, (3) Risk and Control Assessments, (4) Governance and Oversight, and (5) Appendix. To effect these amendments, the Proposed Rule Change would amend all sections except the Introduction, renumber or relabel various provisions throughout the Policy, and update the version history to reflect these changes.

*B. Operational Risk and Resilience Framework*

Section 2 of the Policy, ''Operational Risk and Resilience Framework,'' describes the overall framework that ICE Clear Europe uses to address operational risk [6] and maintain operational resilience. Specifically, ICE Clear Europe uses this framework to reduce the likelihood of an operational disruption event within acceptable tolerance, and mitigate and quickly recover from an operational disruption event. In addition to the Policy itself, the policies and procedures in the framework are: (i) the Incident Management Policy; (ii) the Business Continuity & Disaster Recovery Policy; (iii) the Information Security Policy and Cyber Security Strategy; (iv) the Outsourcing Policy; and (v) the Vendor Management Policy.[7]

ICE Clear Europe proposes to update the description of the operational risk and resilience framework to reflect the new name of the Outsourcing Policy. ICE Clear Europe recently changed the name of the Outsourcing Policy to the Outsourcing and Third Party Risk Management Policy, and the Proposed Rule Change would reflect this update.[8] The Proposed Rule Change also would add language to reflect that the updated policy has been approved by the Board and is pending regulatory approval.[9]

ICE Clear Europe proposes to update the description of its scenario analysis and testing found in Section 2.6 of the Policy. As noted in the Policy, ICE Clear Europe has scenario analysis and testing in place to identity any operational resilience weakness, and it conducts such testing on important business services to determine if it can remain within the impact tolerances under a range of extreme but plausible disruption scenarios. ICE Clear Europe proposes to make additions to this section without deleting any language, except for one exception noted below relating to the Board.

Specifically, the Proposed Rule Change would add a requirement that the Clearing House must maintain an inventory of scenarios for the purposes of scenario analysis and testing. Moreover, the Policy currently specifies that the testing should include scenarios which disrupt more than one important business service simultaneously and take into account dependencies.[10] The Proposed Rule Change would specify that such dependencies should be both internal and external. The Proposed Rule Change would also add language stating that a portion of the scenarios should be identified and selected for reverse stress testing (through a practical test where possible or a desk top exercise), and that, over a three-year cycle, all scenarios would have to be tested at least once by either a practical test or a desk top exercise. In addition, the inventory of scenarios would need to be reviewed on at least an annual basis in order to determine if the scenarios are still fit for purpose and if updates are required. The annual review of the inventory would be the responsibility of the First Line with Second Line review, and would be approved by the Executive Risk Committee (''ERC'').[11] The ERC would also be responsible for approving any changes to the list of scenarios outside of the annual review cycle. The detailed scope of the testing based on the scenarios in the inventory and the results of testing and assessment against the risk register would be shared with the Second Line for review. The Proposed Rule Change would also specify that the scenario analysis and testing results would be submitted to the ERC or relevant Board sub-committee by removing a reference to the Board and replacing it with the relevant Board sub-committee.

*C. Risk and Control Assessments*

Section 3 of the Policy, ''Risk and Control Assessments,'' addresses the process that identifies, assesses, manages, monitors, and reports operational risk. The Proposed Rule Change would add a new section on control validation and assessment, outlining that upon entry to the risk register or when a material change is made to a Key Control, Enterprise Risk Management (''ERM'') will confirm that validation of Key Controls is carried out. Additionally, the amendments would state that validation may be verified directly by ERM or through ERM's oversight of validations performed by the First Line. The amendments would also replace two references to control testing with control validation throughout the Policy to be consistent with the new section. The Proposed Rule Change does not redefine control testing and is meant to align with the Clearing House's Global Enterprise Risk Management Policy.

In Section 3.2, ''Risk Assessment,'' the amendments would address emerging risks by adding a paragraph stating that there should be an assessment of the Velocity for emerging risks. Velocity would be defined as an estimate of the time frame within which impact of a risk may be realized, and would be considered as an additional factor utilized in prioritizing Emerging Risks. Other non-substantive drafting clarifications would be made in this section, such as renumbering to account for the new section on control validation and assessment.

[6] The Policy defines operational risk as the risk of an event occurring which negatively impacts the achievement of business objectives resulting from inadequate or failed internal operational controls, people, systems, or external events.

[7] *See* Self-Regulatory Organizations; ICE Clear Europe Limited; Order Approving Proposed Rule Change Relating to ICE Clear Europe Operational Risk and Resilience Policy, Exchange Act Release No. 96351 (Nov. 18, 2022); 87 FR 72553 (Nov. 25, 2022) (SR–ICEEU–2022–015).

[8] For more information regarding the changes relating to the Outsourcing and Third Party Risk Management Policy, *See* Self-Regulatory Organizations; ICE Clear Europe Limited; Order Approving Proposed Rule Change, as Modified by Amendment No. 1 and Partial Amendment No. 2, Relating to Amendments to the Outsourcing Policy, Exchange Act Release No. 98387 (Sep. 14, 2023); 88 FR 64953 (Sep. 20, 2023) (SR–ICEEU–2023–018).

[9] Following publication of the Notice, the Commission approved ICE Clear Europe's proposed change to the name of the Outsourcing Policy, as well as other changes to the Outsourcing Policy. *See* Self-Regulatory Organizations; ICE Clear Europe Limited; Order Approving Proposed Rule Change, as Modified by Amendment No. 1 and Partial Amendment No. 2, Relating to Amendments to the Outsourcing Policy, Exchange Act Release No. 98387 (Sep. 14, 2023); 88 FR 64953 (Sep. 20, 2023) (SR–ICEEU–2023–019).

[10] The Clearing House requires that for each important business service, the following dependencies must be identified: people, processes, technology, facilities, and underlying information.

[11] Enteprise Risk Management is the Second Line of defense and is responsible for challenging the First Line and monitoring adherence to the requirement of this policy. Key Controls have an expected high level of mitigation and the associated risks have an inherent risk score of ''High'' or ''Very High''. First Line refers to the defense (or Risk Owner) responsible for managing the risks to within the Board appetite and ensuring adherence to all the requirements in the Policy.

*D. Governance and Oversight*

In Section 4, ''Governance and Oversight,'' the amendments would add three new sections: ''Reviews,'' ''Breach Management,'' and ''Exception Handling.''

The ''Reviews'' section would replace the previous ''Oversight of the Policy'' section, which stated only that the Policy is subject to the oversight of the Risk Oversight Department and that failure to comply with the Policy shall be escalated to the Board. This statement must be removed to ensure consistency with the Operational Risk and Resilience Framework section discussed above, which specifies that the First Line of defense is responsible for ensuring adherence to all the requirements in the Policy, with the Risk Oversight Department and Enterprise Risk Management acting as the Second Line of defense, with responsibility for challenging the First Line and monitoring adherence to the requirement of the Policy.

Instead, the new ''Reviews'' section of the Policy would include a number of provisions governing the oversight and review of the Policy. First, it would specify that the owner of the Policy would be responsible for ensuring that the Policy remains up to date and is reviewed in accordance with ICE Clear Europe's governance processes. It would also provide that, unless otherwise stated, a document review will be conducted by the document owner and/or relevant staff as appropriate, with sign off being provided by the head of the department (or their delegate) and the Chief Risk Officer. Such document reviews would need to encompass, at a minimum, regulatory compliance; documentation and purpose; implementation; use; and open items from previous validations or reviews (where appropriate). The results of the review, including any findings, would need to be reported to ICE Clear Europe's Executive Risk Committee, along with the priority of findings, proposed remediations, and target due date to remediate the findings. Finally, the ''Reviews'' section would specify that the document owner will aim to remediate the findings, complete internal governance, and receive regulatory approvals (where applicable) before the next annual review is due.

The new ''Breach Management'' section would specify that the document owner would be responsible for reporting material breaches or unapproved deviations from the Policy to their Head of Department, the Chief Risk Officer, and the Head of Regulation and Compliance (or, as applicable, their respective delegates). Those individuals together would determine if further escalation should be made to relevant senior executives, the Board, and/or competent authorities.

Finally, the new ''Exception Handling'' section would specify that exceptions to the Policy must be approved in accordance with ICE Clear Europe's governance process for the approval of changes, which would only take effect after completion of all necessary internal and regulatory approvals.

*E. Appendix*

The Proposed Rule Change also would modify and update three of the appendixes, add one new appendix, and remove a section from one appendix.

Specifically, the Proposed Rule Change would modify and update the table included as Appendix D, ''Assessment of Expected Level of Risk Mitigation,'' by renaming the current ''Mitigation'' column as ''Rating'' and adding a new column labeled ''Examples,'' which would include specific examples for each level of rating (high, medium, and low).

The Proposed Rule Change would update and modify the table included as Appendix E, ''Control Effectiveness Ratings,'' by renaming the current ''Effectiveness'' and ''Guidelines'' columns as ''Rating'' and ''Control Assessment Guidelines,'' respectively. In addition, an additional bullet point would be in the guideline column for the ''Unsatisfactory'' rating, specifying that this rating would apply where the control validation and/or assessment and audit programs result in major findings.

The columns for the table included as Appendix F, ''Control Remediation Recommendation & Timelines,'' (Appendix F) would also be renamed. The current heading labeled Control Effectiveness would be renamed to Control Effectiveness Rating, and the heading labeled Mitigation would be renamed to Level of Risk Mitigation. In addition, for the scenario with a Control Effectiveness Rating of Needs Improvement and a High Level of Risk Mitigation, the recommendation would be changed from Medium to High.

A new table would be added as Appendix G, ''Velocity Assessment Guidance,'' in connection with the amendments to Section 3.2 discussed above relating to an assessment of the velocity of emerging risks. This section would include a chart separating the Velocity Rating into categories of Immediate (less than six months), Short Term (between six and 18 months), and Medium Term (greater than 18 months), and a description noting that each rating is assessed based on the time in which the impact of a risk may be realized if the risk is unmitigated (*e.g.,* an immediate risk is one for which the impact may be realized within six months of the risk event occurring if the risk is unmitigated).

Finally, the amendments would remove the section labeled Control Testing Scope following the chart on Risk Mitigation in Appendix H, to conform to the change in the Policy to refer to control validation rather than control testing.

## 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.[12] For the reasons discussed below, the Commission finds that the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act,[13] and Rules 17Ad–22(e)(2)(v) and 17Ad–22(e)(17) thereunder.[14]

i. 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.[15] Based on its review of the record, and for the reasons discussed below, the Commission finds that the proposed changes to the Policy are consistent with the promotion of the prompt and accurate clearance and settlement of securities transactions.

As a registered clearing agency, ICE Clear Europe faces a number of operational risks that could impact or threaten its ability to clear and settle transactions if they are not eliminated or mitigated. As noted above, ICE Clear Europe maintains the Policy to address how it identifies, assesses, manages, monitors, and reports such operational risks. Improving or enhancing the Policy likewise improves or enhances ICE Clear Europe's ability to manage or mitigate its operational risks and

[12] 15 U.S.C. 78s(b)(2)(C).

[13] 15 U.S.C. 78q–1(b)(3)(F).

[14] 17 CFR 240.17Ad–22(e)(2)(v) and (e)(17).

[15] 15 U.S.C. 78q–1(b)(3)(F).

therefore ensure that it can continue to clear and settle securities transactions.

For example, as discussed above, the Proposed Rule Change would update the Policy to require ICE Clear Europe to maintain an inventory of scenarios for the purposes of scenario analysis and testing, which inventory would need to be reviewed on at least an annual basis in order to determine if the scenarios are still fit for purpose and if updates are required. These new requirements should help ensure that ICE Clear Europe personnel identify and maintain an appropriate inventory of scenarios, determine in a timely manner if updates to the inventory or scenarios are needed, and identify any gaps and necessary resolutions or updates to the inventory and scenarios sooner than what is currently required.

Taken together, these enhancements to the Policy should enhance ICE Clear Europe's operational resilience, which in turn should decrease the likelihood that operational incidents would disrupt its ability to promptly and accurately clear and settle securities transactions. Accordingly, the Commission finds that the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act.[16]

ii. Consistency With Rule 17Ad–22(e)(2)(v)

Rule 17Ad–22(e)(2)(v) require that ICE Clear Europe establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide governance arrangements that, among other things, are clear and transparent and specify clear and direct lines of responsibility.[17]

As discussed above, the Proposed Rule Change would add new sections to the Policy addressing reviews, breach management, and exception handling. Among other things, the section addressing reviews would make the document owner responsible for ensuring that the Policy remains up-to-date and is reviewed in accordance with ICE Clear Europe's governance processes. Additionally, document reviews will be conducted by the document owner and signed off by the head of the department (or their delegate) and the Chief Risk Officer. These reviews would encompass, at a minimum, regulatory compliance; documentation and purpose; implementation; use; and, where appropriate, open items from previous validations or reviews.

Under the new section covering breach management, the document owner also would be responsible for reporting material breaches or unapproved deviations from the Policy to their Head of Department, the Chief Risk Officer, and the Head of Regulation and Compliance (or, as applicable, their respective delegates).

Under the new section addressing exception handling, exceptions to the Policy would need to be approved in accordance with ICE Clear Europe's governance process for the approval of changes, and could only take effect after completion of all necessary internal and regulatory approvals.

Additionally, the Proposed Rule Change would add a new section to the Policy on control validation and assessment, outlining that upon entry to the risk register or when a material change is made to a Key Control, ERM will confirm that validation of Key Controls is carried out. The Proposed Rule Change would also amend the Policy to state that validation may be verified directly by ERM or through ERM's oversight of validations performed by the First Line.

Taken together, these changes would help establish clear and direct responsibilities for the document owner of the Policy. Accordingly, the Commission finds that the Proposed Rule Change is consistent with Rule 17Ad–22(e)(2)(v).[18]

*iii. Consistency With Rule 17Ad–22(e)(17)*

Rule 17Ad–22(e)(17) requires that ICE Clear Europe establish, implement, maintain, and enforce written policies and procedures reasonably designed to manage its operational risks by, among other things, identifying the plausible sources of operational risk, both internal and external, and mitigating their impact through the use of appropriate systems, policies, procedures, and controls.[19]

By adding a requirement to maintain an inventory of scenarios for the purposes of scenario analysis and test and review those scenarios annually, the Proposed Rule Change would support ICE Clear Europe's ability to identify plausible sources of operational risk, both internal and external, and mitigate their impact through the Policy, which supports Ice Clear Europe's efforts to manage and mitigate its operational risks. Accordingly, the Commission finds that the Proposed Rule Change is consistent with Rule 17Ad–22(e)(17).[20]

## IV. 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(b)(3)(F) of the Act,[21] and Rules 17Ad–22(e)(2)(v) and 17Ad–22(e)(17) thereunder.[22]

It is therefore ordered pursuant to Section 19(b)(2) of the Act[23] that the Proposed Rule Change (SR–ICEEU–2023–021) 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.*

[FR Doc. 2023–23941 Filed 10–30–23; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. PA–61; File No. S7–19–23]**

## Privacy Act of 1974; System of Records

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Notice of a new system of records.

**SUMMARY:** The Securities and Exchange Commission (SEC) proposes to establish SEC–36, Harassment Prevention and Response Program Records under the Privacy Act of 1974. The information in the system concerns internal inquiries and/or investigations into allegations of harassment reported to SEC by applicants for employment, current and former SEC employees, fellows, interns, and individuals who conduct business with the SEC; and resolutions of allegations of workplace harassment. The Harassment Prevention and Response Program addresses harassment concerns that are raised separate and apart from harassment claims that may also be raised under the procedures for administrative equal employment opportunity complaints.

**DATES:** The system of records will become effective October 31, 2023, with the exception of the routine uses, which will become effective November 30,

[16] 15 U.S.C. 78q–1(b)(3)(F).

[17] 17 CFR 240.17Ad–22(e)(2)(v).

[18] 17 CFR 240.17Ad–22(e)(2)(v).

[19] 17 CFR 240.17Ad–22(e)(17).

[20] 17 CFR 240.17Ad–22(e)(17).

[21] 15 U.S.C. 78q–1(b)(3)(F).

[22] 17 CFR 240.17Ad–22(e)(2)(v) and (e)(17).

[23] 15 U.S.C. 78s(b)(2).

[24] 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).

[25] 17 CFR 200.30–3(a)(12).

2023, to permit public comment on the routine uses. The Commission will publish a new notice if the effective date is delayed to review comments or if changes are made based on comments received. To assure consideration, comments should be received on or before November 30, 2023.

**ADDRESSES:** Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*https://www.sec.gov/comments/s7-19-23/privacy-act-1974-system-records*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–19–23 on the subject line.

*Paper Comments*

- Send paper comments to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–19–23. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method of submission. The Commission will post all comments on the Commission's website (*https://www.sec.gov/rules/2023/10/s7-19-23*). Comments also are 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. 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.

**FOR FURTHER INFORMATION CONTACT:** Ronnette McDaniel, Privacy and Information Assurance Branch Chief, 202–551–7200 or *privacyhelp@sec.gov.*

**SUPPLEMENTARY INFORMATION:** The Harassment Prevention and Response Program strives to create a work environment that is respectful and inclusive for all in the SEC workplace and SEC sanctioned activities and events, including those outside of SEC facilities. The program provides a mechanism for SEC employees, fellows, interns, or individuals who conduct business with the SEC to report allegations of harassment to the SEC. In order to intake, manage and track inquiries to a resolution the SEC is establishing SEC–36, Harassment Prevention and Response Program Records, under the Privacy Act. Records may include contact information of individuals involved in reports or allegations of harassment, statements of witnesses, exhibits, reports of interviews, findings and recommendations, close-out materials, documentation of any corrective action taken by management, and related correspondence. Information from this system of records will be collected, maintained, and disclosed in accordance with applicable law, regulations, and statutes, including but not limited to Prohibited Personnel Practices; Executive Order 11478, 34 FR 12985 (as amended by Executive Orders 13087, 13145 and 13152); Equal Employment Opportunity Commission Management Directive 715 (EEO–MD–715); and Equal Employment Opportunity Commission, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999).

**SYSTEM NAME AND NUMBER**

SEC–36 Harassment Prevention and Response Program Records.

**SECURITY CLASSIFICATION:**

Non-classified.

**SYSTEM LOCATION:**

U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

**SYSTEM MANAGER(S):**

Director, Office of Equal Employment Opportunity, 100 F Street NE, Washington, DC 20549.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Records Management by Federal Agencies, 44 U.S.C. 3101 *et seq.;* Civil Service Reform Act of 1978, 5 U.S.C. 2302(b), Prohibited Personnel Practices; Executive Order 11478, 34 FR 12985 (as amended by Executive Orders 13087, 13145 and 13152); title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–16 *et seq.;* Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.;* Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791; titles I and V of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.,* as amended by ADA the Amendments Act of 2008; Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, Public Law 107–174, as amended by the Elijah E. Cummings Federal Employee Antidiscrimination Act of 2020; title II of the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. 2000ff *et seq.;* Equal Pay Act of 1963, 29 U.S.C. 206(d); Equal Employment Opportunity Commission Management Directive 715 (EEO–MD–715); and Equal Employment Opportunity Commission, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999).

**PURPOSE(S) OF THE SYSTEM:**

The Harassment Prevention and Response Program system of records maintains records regarding allegations of workplace harassment. These records are maintained for the purpose of conducting internal inquiries and/or investigations into allegations of harassment reported to the SEC by applicants for employment, current and former SEC employees, fellows, interns, or individuals who conduct business with the SEC and resolving allegations of workplace harassment. The records contained in this system do not duplicate any existing agency or government-wide system of records, even though some of the documents might also appear in other systems of records maintained for other purposes. Particularly, records are not collected to advance claims of discrimination pursuant to processes outlined in title 29 CFR part 1614. Rather, these records are collected for administrative action relating to allegations of workplace harassment, including bases found in EEO laws and elsewhere. The agency policy and processes govern the collection and maintenance of these records to further the agency's commitment to appropriately respond to allegations of workplace harassment.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

This system of records maintains information on individuals who have reported harassing conduct by or against SEC personnel and harassing conduct by or against non-SEC personnel to the program manager for prevention of harassment and response, in accordance with the agency's administrative regulation relating to harassment prevention and response. Individuals covered include, but are not limited to applicants for SEC employment, current and former SEC employees, fellows, interns, and individuals who conduct business with the SEC. Covered individuals include those who report harassment concerns, provide information in support of harassment inquiries or investigations, or are witnesses or are otherwise contacted as part of the fact-finding process for

inquiries, investigations, and reports relating to workplace harassment.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

The system contains all records related to a report of harassment received by the SEC through the harassment prevention and response program manager or through referrals from the Office of Equal Employment Opportunity, other SEC organizations necessary for the implementation of the SEC Harassment Prevention and Response Program (or its successor program), or management officials. The records may include contact information of individuals involved in reports or allegations of harassment, statements of witnesses, exhibits, reports of interviews, findings and recommendations, close-out materials, documentation of any corrective action taken by management, and related correspondence. The specific data elements found in these records may include names, positions, Social Security numbers, mailing addresses, email addresses, employment histories, employee evaluations, disciplinary actions, case-related communications and notes, and audit logs of user access and activities within the SEC Harassment Prevention and Response Program electronic databases maintained by the SEC.

**RECORD SOURCE CATEGORIES:**

The SEC obtains information in this system from alleged targets of harassment, alleged harassers, witnesses, members of the public, other Federal agencies, and other individuals involved in the allegations. Some information, such as the alleged target's or harasser's name, personal identification number (PIN), employee identification number, position, and job location may be obtained from other SEC system of records as relevant and necessary to carry out the SEC's function. Other record sources include documents related to reports of harassment to the SEC Harassment Prevention and Response Program staff or management; information obtained through correspondence, letters, telephone calls, emails, or any other form of communication; data obtained from investigative material and any information relevant to an investigation; materials and information gathered by staff in the performance of their duties; electronic databases maintained by the staff; other SEC files; and from individuals, including where practicable, those to whom the records relate.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the Commission as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

1. To appropriate agencies, entities, and persons when (1) the SEC suspects or has confirmed that there has been a breach of the system of records; (2) the SEC has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the SEC (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 SEC's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

2. To another Federal agency or Federal entity, when the SEC 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.

3. To a Congressional office from the record of an individual in response to an inquiry from the Congressional office made at the request of that individual.

4. To any persons during the course of any inquiry, examination, or investigation conducted by the SEC's staff, or in connection with civil litigation, if the staff has reason to believe that the person to whom the record is disclosed may have further information about the matters related therein, and those matters appeared to be relevant at the time to the subject matter of the inquiry. Such disclosure is permitted in connection with civil litigation only when it is relevant and necessary to the litigation.

5. To the National Archives and Records Administration (NARA) in records management inspections conducted under 44 U.S.C. 2904 and 2906, to permit the National Archivist to inspect SEC records or inspect the SEC records management program and practices.

6. To interns, grantees, experts, contractors, and others who have been engaged by the Commission to assist in the performance of a service related to this system of records and who need access to the records for the purpose of assisting the Commission in the efficient administration of its programs, including by performing clerical, stenographic, or data analysis functions, or by reproduction of records by electronic or other means. Recipients of these records shall be required to comply with the requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a.

7. To Federal, State, local, and/or foreign law enforcement agencies or other appropriate entity charged with the responsibility of investigating or prosecuting a violation or potential violation of law, whether civil, criminal, or regulatory in nature.

8. To respond to subpoenas in any litigation or other proceeding.

9. To the U.S. Department of Justice (DOJ), when:

(a) The SEC or any component thereof; or

(b) Any SEC employee in his or her official capacity; or

(c) Any SEC employee in his or her individual capacity that DOJ has agreed to represent; or

(d) The United States or any agency thereof where the SEC determines the litigation is likely to affect the SEC or any of its components is a party to a litigated matter or has an interest in a litigated matter and the SEC determines that the use of such records by DOJ is relevant and necessary to the litigation.

10. In any proceeding before a court or adjudicative body before which the SEC is authorized to appear, when:

(a) The SEC or any component thereof; or

(b) Any SEC employee in his or her official capacity; or

(c) Any SEC employee in his or her individual capacity; or

(d) The United States or any agency thereof where the SEC determines the litigation is likely to affect the SEC or any of its components is a party to the proceeding or has an interest in the proceeding and SEC determines that the use of such records is relevant and necessary to the proceeding.

11. To provide information to the EEOC when requested in connection with investigations into alleged or possible discriminatory practices in the Federal sector, examination of Federal affirmative employment programs, compliance by Federal agencies with Uniformed Guidelines on Employee Selection Procedures, or other functions vested in the EEOC.

12. To provide information to officials of labor organizations recognized under

5 U.S.C. chapter 71, when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting conditions of employment.

**POLICIES AND PRACTICE FOR STORAGE OF RECORDS:**

Records in this system of records are stored electronically or on paper in secure facilities. Electronic records are stored on the SEC's secure network and/or an SEC-approved cloud storage location. Access to and use of these records is limited to those persons whose official duties require such access.

**POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:**

These records are cross-indexed by the name of the individual who reports harassment, the name of the alleged target of harassment, if any, and the name of the alleged harasser. The records may be retrieved by any of the above three indexes and other indexes, as appropriate.

**POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:**

These records are maintained for three years after the report of harassment is closed and are then deleted or destroyed in accordance with NARA, General Records Schedule (GRS) 023, Item 40 and the SEC Comprehensive Records Schedule. Authorized staff follow the SEC's records management procedures for safeguarding and disposing of records related to reports of harassment that have met their retention period.

**ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:**

Access to SEC facilities, data centers, and information or information systems is limited to authorized personnel with official duties requiring access. SEC facilities are equipped with security cameras, and, at certain SEC facilities, 24-hour security guard service. Computerized records are safeguarded in a secured environment. Records are maintained in a secure, password-protected electronic system that will utilize commensurate safeguards that may include: firewalls, intrusion detection and prevention systems, and role-based access controls. Additional safeguards will vary by program. All records are protected from unauthorized access through appropriate administrative, operational, and technical safeguards. These safeguards include restricting access to authorized personnel who have a ''need to know'' and using locked file cabinets and/or locked offices or file rooms. Contractors and other recipients providing services to the Commission shall be required to maintain equivalent safeguards.

**RECORDS ACCESS PROCEDURES:**

Persons seeking to gain access to any record contained in this system of records must submit a written request in accordance with instructions in SEC Privacy Act Regulations; 17 CFR 200.301 *et seq.* Address such request to: FOIA/PA Officer, Securities and Exchange Commission, 100 F Street NE, Mail Stop 5100, Washington, DC 20549–2465.

**CONTESTING RECORD PROCEDURES:**

Persons seeking to contest the content of any record contained in this system of records may inquire in writing in accordance with instructions in SEC Privacy Act Regulations, 17 CFR 200.301 *et seq.* Address such requests to: FOIA/PA Officer, Securities and Exchange Commission, 100 F Street NE, Mail Stop 5100, Washington, DC 20549–2736.

**NOTIFICATION PROCEDURES:**

See ''Record Access Procedures'' above.

**EXEMPTIONS PROMULGATED FOR THE:**

None.

**HISTORY:**

New SORN.

By the Commission.

Dated: October 26, 2023.

**Vanessa A. Countryman,**

*Secretary.*

[FR Doc. 2023–23981 Filed 10–30–23; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[SEC File No. 270–154, OMB Control No. 3235–0122]**

## Submission for OMB Review; Comment Request; Extension: Rule 17a–10

*Upon Written Request, Copies Available From:* Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (''PRA''), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the previously approved collection of information discussed below.

The primary purpose of Rule 17a–10 is to obtain the economic and statistical data necessary for an ongoing analysis of the securities industry. Paragraph (a)(1) of Rule 17a–10 generally requires broker-dealers that are exempt from the filing requirements of paragraph (a) of Exchange Act Rule 17a–5 (17 CFR 240.17a–5) to file with the Commission the Facing Page, a Statement of Income (Loss), and balance sheet from Part IIA of Form X–17A–5 [1] (17 CFR 249.617), and Schedule I of Form X–17A–5 not later than 17 business days after the end of each calendar year.

Paragraph (a)(2) of Rule 17a–10 requires a broker-dealer subject to paragraph (a) of Rule 17a–5 to submit Schedule I of Form X–17A–5 with its Form X–17A–5 for the calendar quarter ending December 31 of each year.

Paragraph (b) of Rule 17a–10 provides that the provisions of paragraph (a) do not apply to members of national securities exchanges or registered national securities associations that maintain records containing the information required by Form X–17A–5 and which transmit to the Commission copies of the records pursuant to a plan which has been declared effective by the Commission.

The Commission staff estimates that the total hour burden under Rule 17a–10 is approximately 44,892 hours per year and the total cost burden is $0 per year. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent by November 30, 2023 to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: October 26, 2023.

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2023–23974 Filed 10–30–23; 8:45 am]

**BILLING CODE 8011–01–P**

[1] Form X–17A–5 is the Financial and Operational Combined Uniform Single Report (''FOCUS Report''), which is used by broker-dealers to provide certain required information to the Commission.

## SECURITIES AND EXCHANGE COMMISSION

**[SEC File No. 270–495, OMB Control No. 3235–0553]**

### Submission for OMB Review; Comment Request; Extension: Rule 19b–7 and Form 19b–7

Upon Written Request, Copies Available From Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the previously approved collection of information discussed below.

The Exchange Act provides a framework for self-regulation under which various entities involved in the securities business, including national securities exchanges and national securities associations (collectively, self-regulatory organizations or ''SROs''), have primary responsibility for regulating their members or participants. The role of the Commission in this framework is primarily one of oversight; the Exchange Act charges the Commission with supervising the SROs and assuring that each complies with and advances the policies of the Exchange Act.

The Exchange Act was amended by the Commodity Futures Modernization Act of 2000 (''CFMA''). Prior to the CFMA, federal law did not allow the trading of futures on individual stocks or on narrow-based stock indexes (collectively, ''security futures products''). The CFMA removed this restriction and provided that trading in security futures products would be regulated jointly by the Commission and the Commodity Futures Trading Commission (''CFTC'').

The Exchange Act requires all SROs to submit to the SEC any proposals to amend, add, or delete any of their rules. Certain entities (Security Futures Product Exchanges) would be notice-registered national securities exchanges only because they trade security futures products. Similarly, certain entities (Limited Purpose National Securities Associations) would be limited-purpose national securities associations only because their members trade security futures products. The Exchange Act, as amended by the CFMA, established a procedure for Security Futures Product Exchanges and Limited Purpose National Securities Associations to provide notice of proposed rule changes relating to certain matters.[1] Rule 19b–7 and Form 19b–7 implemented this procedure. Effective April 28, 2008, the SEC amended Rule 19b–7 and Form 19b–7 to require that Form 19b–7 be submitted electronically.[2]

The collection of information is designed to provide the Commission with the information necessary to determine, as required by the Exchange Act, whether the proposed rule change is consistent with the Exchange Act and the rules thereunder. The information is used to determine if the proposed rule change should remain in effect or be abrogated.

The respondents to the collection of information are SROs.[3] The estimated total industry burden per year for rule changes, updating and posting rule changes and updating the online rulebook is 68 burden hours.[4] The total estimated internal cost of compliance for a respondent for legal and paralegal work related to filings is $11,110 per year and the total industry internal cost of compliance is $22,220 per year.[5] In the proposed extension, there is no change to the burden hour estimate per respondent. However, there is a decrease in the total burden hours because the Commission now estimates that there are two respondents instead of three respondents in 2020 (a decrease of on respondent). Thus, the net change in estimated total aggregate burden hours decreased from 102 to 68 (reduction of 34 burden hours). Similarly, with respect to the internal dollar cost burden of respondents, the total industry internal dollar costs have decreased overall due to one less respondent. The total industry internal cost of compliance decreased from $30,300 to $22,220.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent by November 30, 2023 to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov*.

Dated: October 26, 2023.

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2023–23978 Filed 10–30–23; 8:45 am]

**BILLING CODE 8011–01–P**

[1] These matters are higher margin levels, fraud or manipulation, recordkeeping, reporting, listing standards, or decimal pricing for security futures products; sales practices for security futures products for persons who effect transactions in security futures products; or rules effectuating the obligation of Security Futures Product Exchanges and Limited Purpose National Securities Associations to enforce the securities laws. *See* 15 U.S.C. 78s(b)(7)(A).

[2] *See* Securities Exchange Act Release No. 57526 (March 19, 2008), 73 FR 16179 (March 27, 2008).

[3] There are currently two Security Futures Product Exchanges and one Limited Purpose National Securities Association, the National Futures Association. One of the Security Futures Product Exchanges, however, is conditionally exempted from filing proposed rule changes using Form 19b–7. Therefore, there are currently two respondents to Form 19b–7.

[4] This estimate is the sum of the total industry (2 respondents) burden hours for rule filings (50 hours), updating and posting rule changes (2 hours) and updating rules (16 hours).

[5] This estimate is based on 2 responses × $5,555 per response equals $11,110 per respondent per year and 2 respondents × $11,110 equals $22,220 or the total industry cost per year.

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #20016 and #20017; PENNSYLVANIA Disaster Number PA–20001]**

### Administrative Declaration of a Disaster for the Commonwealth of Pennsylvania

**AGENCY:** Small Business Administration.

**ACTION:** Notice.

**SUMMARY:** This is a notice of an Administrative declaration of a disaster for the Commonwealth of Pennsylvania dated 10/25/2023.

*Incident:* Oxford Apartment Complex Fire.

*Incident Period:* 09/14/2023.

**DATES:** Issued on 10/25/2023.

*Physical Loan Application Deadline Date:* 12/26/2023.

*Economic Injury (EIDL) Loan Application Deadline Date:* 07/25/2024.

**ADDRESSES:** *Visit the MySBA Loan Portal at https://lending.sba.gov* to apply for a disaster assistance loan.

**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 submitted online using the MySBA Loan Portal *https://lending.sba.gov* or other locally announced locations. Please contact the SBA disaster assistance customer service center by email at *disastercustomerservice@sba.gov* or by phone at 1–800–659–2955 for further assistance.

The following areas have been determined to be adversely affected by the disaster:

*Primary Counties:* Chester.

*Contiguous Counties:*

Pennsylvania: Berks, Delaware, Lancaster, Montgomery.

Delaware: New Castle.

Maryland: Cecil.

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:* | |
| Business and 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 200165 and for economic injury is 200170.

The States which received an EIDL Declaration are Delaware, Maryland, Pennsylvania.

(Catalog of Federal Domestic Assistance Number 59008)

**Isabella Guzman,**

*Administrator.*

[FR Doc. 2023–24022 Filed 10–30–23; 8:45 am]

**BILLING CODE 8026–09–P**

## SMALL BUSINESS ADMINISTRATION

### Senior Executive Service and Senior Level: Performance Review Board Members

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notice of appointees to the Performance Review Board.

**SUMMARY:** Agencies are required to publish notification of the appointment of individuals who may serve as members of that agency's Performance Review Board (PRB). The following individuals have been designated to serve on the PRB for the U.S. Small Business Administration.

**Members**

1. Victor Parker (Chair), Deputy Associate Administrator, Office of Field Operations
2. Christina Hale, Assistant Administrator, Office of Women's Business Ownership, Office of Entrepreneurial Development
3. Claire Ehmann, Deputy Associate Administrator, Office of International Trade
4. George Holman, Associate Administrator, Office of Congressional and Legislative Affairs
5. John Miller, Deputy Associate Administrator, Office of Capital Access
6. Yvette T. Collazo Reyes, Deputy Associate Administrator, Office of Entrepreneurial Development

*Authority:* 5 U.S.C. 4314(c)(4).

**Isabella Casillas Guzman,**

*Administrator.*

[FR Doc. 2023–23973 Filed 10–30–23; 8:45 am]

**BILLING CODE P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #20030 and #20031; COLORADO Disaster Number CO–20001]**

### Administrative Disaster Declaration of a Rural Area for the State of Colorado

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notice.

**SUMMARY:** This is a notice of an Administrative disaster declaration of a rural area for the State of Colorado dated 10/25/2023.

*Incident:* Severe Storms, Flooding and Tornadoes.

*Incident Period:* 06/08/2023 through 06/23/2023.

**DATES:** Issued on 10/25/2023.

*Physical Loan Application Deadline Date:* 12/26/2023.

*Economic Injury (EIDL) Loan Application Deadline Date:* 07/25/2024.

**ADDRESSES:** *Visit the MySBA Loan Portal at https://lending.sba.gov* to apply for a disaster assistance loan.

**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 of a rural area, applications for disaster loans may be submitted online using the MySBA Loan Portal *https://lending.sba.gov* or other locally announced locations. Please contact the SBA disaster assistance customer service center by email at *disastercustomerservice@sba.gov* or by phone at 1–800–659–2955 for further assistance.

The following areas have been determined to be adversely affected by the disaster:

*Primary Counties:* El Paso, Elbert, Lincoln, Logan.

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:* | |
| Business and 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 20030B and for economic injury is 200310.

The State which received an EIDL Declaration is Colorado.

(Catalog of Federal Domestic Assistance Number 59008)

**Isabella Guzman,**

*Administrator.*

[FR Doc. 2023–24020 Filed 10–30–23; 8:45 am]

**BILLING CODE 8026–09–P**

## DEPARTMENT OF STATE

**[Public Notice: 12249]**

### Exchange Visitor Program

**ACTION:** Special Student Relief Notification: extension of temporary waiver and modification of certain regulatory requirements.

**SUMMARY:** In accordance with the General Provisions of the Exchange Visitor Program regulations, the Assistant Secretary for Educational and Cultural Affairs (ECA), U.S. Department of State extends the waiver and modification of certain regulatory requirements with respect to a temporary educational and cultural exchange program established pursuant to an arrangement between the Government of the United States and the Government of Ukraine. Under the original arrangement for Special Student Relief, eligible Ukrainian college and university students on J–1 visas who have continuously resided in the United States since April 11, 2022, could carry lighter course loads and work full- or part- time, on or off campus until October 23, 2023. Under the modified and extended arrangement, eligible Ukrainian college and university students on J–1 visas who have continuously resided in the United States since August 16, 2023, may carry lighter course loads and work full- or part-time, on or off campus until April 19, 2025. This arrangement was established to ameliorate these students' financial and other hardships due to the Russian invasion of Ukraine.

**DATES:** The extension and modification of SSR was effective on October 20, 2023 and will now remain in effect until April 19, 2025, unless the U.S. Government unilaterally ends the arrangement early or the U.S. Government and the Government of Ukraine together extend its termination date.

**FOR FURTHER INFORMATION CONTACT:** Rebecca A. Pasini, Deputy Assistant Secretary, Directorate of Private Sector Exchange, Bureau of Educational and Cultural Affairs, at 2200 C Street NW, SA–5, Washington, DC 20522 or by telephone at (202) 826–4364 or via email at *JExchanges@state.gov.*

**SUPPLEMENTARY INFORMATION:** The Assistant Secretary for Educational and Cultural Affairs extends the waiver and modification of certain regulatory requirements with respect to a temporary educational and cultural exchange program established pursuant to an arrangement between the Government of the United States and the Government of Ukraine for Special Student Relief (SSR). This arrangement was initially established through an exchange of notes on June 14 and August 18, 2022. [The initial terms of the Special Student Relief program were published in the **Federal Register** on April 5, 2023 (88 FR 20202–20203).] Consistent with that arrangement, the Assistant Secretary temporarily waived or modified relevant provisions in 22 CFR part 62.23, such that eligible Ukrainian college and university students on J–1 visas to the United States were able to carry lighter course loads and work full- or part- time, on or off campus, through October 23, 2023.

Under the modified arrangement with the Government of Ukraine, SSR is expanded to apply to eligible Ukrainian college and university students on J–1 visas who have continuously resided in the United States since at least August 16, 2023, consistent with the extension of Temporary Protected Status (TPS) for Ukraine. Similarly, under the extension of the arrangement, SSR is extended to remain in effect until April 19, 2025.

Under the modified and extended arrangement, the temporary waiver and modification of relevant portions of 22 CFR part 62.23 will continue as described in 88 FR 20202–20203, except that eligible individuals must have continuously resided in the United States since at least August 16, 2023.

Responsible Officers of academic institutions may authorize SSR for Ukrainian college and university students in J–1 status if they have continuously resided in the United States since at least August 16, 2023, and meet the reduced course load requirements set forth in the Notice at 88 FR 20202. To authorize on-campus or off-campus employment for these students, Responsible Officers should update the students' records in the Student and Exchange Visitor Information System (SEVIS) by notating the following text in the ''Remarks'' field: ''Special Student Relief work authorization granted until April 19, 2025.'' To authorize a reduced course load due to such employment, Responsible Officers should also notate the ''Comment'' field in the SEVIS record with the following text: ''reduced course load authorized.'' Responsible Officers should monitor students at the start of each term to confirm that students seeking to reduce their course loads intend to work more than 20 hours a week or that students who availed themselves of reduced course loads intend to continue to work more than 20 hours a week.

If the arrangement between the United States and Ukraine is terminated early or extended again, Responsible Officers should update the Remarks field accordingly. Exchange visitors participating in SSR at the time the arrangement ends may continue their current employment and course load through the end of the academic term during which the arrangement ends.

**Rebecca A. Pasini,**

*Deputy Assistant Secretary, Directorate of Private Sector Exchange, Bureau of Educational and Cultural Affairs, U.S. Department of State.*

[FR Doc. 2023–24014 Filed 10–30–23; 8:45 am]

**BILLING CODE 4710–05–P**

## DEPARTMENT OF STATE

**[Public Notice: 12250]**

## Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition—Determinations: ''Sculpted Portraits From Ancient Egypt'' Exhibition

**SUMMARY:** Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to an agreement with their foreign owner or custodian for temporary display in the exhibition ''Sculpted Portraits from Ancient Egypt'' at the J. Paul Getty Museum at the Getty Villa, Pacific Palisades, California, and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display within the United States as aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Reed Liriano, Program Coordinator, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, 2200 C Street NW (SA–5), Suite 5H03, Washington, DC 20522–0505.

**SUPPLEMENTARY INFORMATION:** The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000, and Delegation of

Authority No. 523 of December 22, 2021.

**Nicole L. Elkon,**

*Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2023–23983 Filed 10–30–23; 8:45 am]

**BILLING CODE 4710–05–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

**[Docket No. FHWA–2023–0044]**

### Agency Information Collection Activities: Notice of Request for Renewal of Currently Approved Information Collection

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of request for renewal of currently approved information collection.

**SUMMARY:** The FHWA invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for renewal of an existing information collection that is summarized below under **SUPPLEMENTARY INFORMATION.** We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

**DATES:** Please submit comments by January 2, 2024.

**ADDRESSES:** You may submit comments identified by DOT Docket Number FHWA–2023–0044 by any of the following methods:

- *Website: http://www.regulations.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m.

**FOR FURTHER INFORMATION CONTACT:** Mr. Omar Elkassed, (213) 894–6718, Office of Stewardship, Oversight, and Program Management, Federal Highway Administration, Department of Transportation, 888 South Figueroa Street, Suite 440, Los Angeles, CA 90017. Office hours are from 7 a.m. to 4 p.m., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

*Title:* Preparation and Execution of the Project Agreement and Modifications.

*OMB Control Number:* 2125–0529.

*Background:* Formal agreements between State Transportation Departments and the FHWA are required for Federal-aid highway projects. These agreements, referred to as ''project agreements'' are written contracts between the State and the Federal government that define the extent of work to be undertaken and commitments made concerning a highway project. Section 1305 of the Transportation Equity Act for the 21st Century (TEA–21, Pub. L. 105–178) amended 23 U.S.C. 106(a) and combined authorization of work and execution of the project agreement for a Federal-aid project into a single action. States continue to have the flexibility to use whatever format is suitable to provide the statutory information required, and burden estimates for this information collection are not changed.

*Respondents:* There are 56 respondents, including 50 State Transportation Departments, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, the Virgin Islands and American Samoa. Depending on the size of and activity in the above government agencies, the number of project agreements executed in any agency ranges between 10 and 1,500.

*Frequency:* On an on-going basis as project agreements are written.

*Estimated Average Annual Burden per Response:* There is a total of 23,809 agreements per year. Each agreement requires 1 hour to complete.

*Estimated Total Annual Burden Hours:* 23,809 hours.

*Public Comments Invited:* You are asked to comment on any aspect of this information collection, including: (1) whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of the estimated burdens; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

*Authority:* The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; and 49 CFR 1.48.

Issued on: October 26, 2023.

**Jazmyne Lewis,**

*Information Collection Officer.*

[FR Doc. 2023–23997 Filed 10–30–23; 8:45 am]

**BILLING CODE 4910–22–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket No. FMCSA–2023–0038]**

### Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

**ACTION:** Notice of applications for exemption; request for comments.

**SUMMARY:** FMCSA announces receipt of applications from 17 individuals for an exemption from the prohibition in the Federal Motor Carrier Safety Regulations (FMCSRs) against persons with a clinical diagnosis of epilepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to control a commercial motor vehicle (CMV) to drive in interstate commerce. If granted, the exemptions would enable these individuals who have had one or more seizures and are taking anti-seizure medication to operate CMVs in interstate commerce.

**DATES:** Comments must be received on or before November 30, 2023.

**ADDRESSES:** You may submit comments identified by the Federal Docket Management System Docket No. FMCSA–2023–0038 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *www.regulations.gov/,* insert the docket number (FMCSA–2023–0038) in the keyword box and click ''Search.'' Next, choose the only notice listed, and click on the ''Comment'' button. 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:* West Building Ground Floor, 1200 New Jersey Avenue SE, Washington, DC, 20590–0001 between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal Holidays.

• *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, (202) 366–4001, *fmcsamedical@dot.gov.* Office hours are 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

**SUPPLEMENTARY INFORMATION:**

## I. Public Participation

### *A. Submitting Comments*

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2023–0038), indicate the specific section of this document to which each 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 that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *https://www.regulations.gov/docket/FMCSA-2023-0038.* Next, choose the only notice listed, click the ''Comment'' button, and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

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. FMCSA will consider all comments and material received during the comment period.

### *B. Viewing Comments*

To view comments go to *www.regulations.gov.* Insert the docket number (FMCSA–2023–0038) in the keyword box and click ''Search.'' Next, choose the only notice listed, and click ''Browse Comments.'' If you do not have access to the internet, you may view the docket online by visiting Dockets Operations on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. 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.

### *C. Privacy Act*

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption request. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov.* As described in the system of records notice DOT/ALL 14 (Federal Docket Management System), which can be reviewed at *https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices,* the comments are searchable by the name of the submitter.

## II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statutes also allow the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The 17 individuals listed in this notice have requested an exemption from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8). Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

The physical qualification standard for drivers regarding epilepsy found in § 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist medical examiners (MEs) in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

The criteria states that if an individual has had a sudden episode of a non-epileptic seizure or loss of consciousness of unknown cause that did not require anti-seizure medication, the decision whether that person's condition is likely to cause the loss of consciousness or loss of ability to control a CMV should be made on an individual basis by the ME in consultation with the treating physician. Before certification is considered, it is suggested that a 6-month waiting period elapse from the time of the episode. Following the waiting period, it is suggested that the individual have a complete neurological examination. If the results of the examination are negative and anti-seizure medication is not required, then the driver may be qualified.

In those individual cases where a driver has had a seizure or an episode of loss of consciousness that resulted from a known medical condition (*e.g.,* drug reaction, high temperature, acute infectious disease, dehydration, or acute metabolic disturbance), certification should be deferred until the driver has recovered fully from that condition, has no existing residual complications, and is not taking anti-seizure medication.

Drivers who have a history of epilepsy/seizures, off anti-seizure medication, and seizure-free for 10 years, may be qualified to operate a CMV in interstate commerce. Interstate drivers with a history of a single unprovoked seizure may be qualified to drive a CMV in interstate commerce if seizure-free and off anti-seizure medication for a 5-year period or more.

As a result of MEs misinterpreting advisory criteria as regulation, numerous drivers have been prohibited from operating a CMV in interstate commerce based on the fact that they have had one or more seizures and are taking anti-seizure medication, rather than an individual analysis of their circumstances by a qualified ME based on the physical qualification standards and medical best practices.

On January 15, 2013, FMCSA announced in a notice of final disposition titled, ''Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders,'' (78 FR 3069), its decision to grant requests from 22 individuals for exemptions from the regulatory requirement that interstate CMV drivers have ''no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.'' Since that time, the Agency has

[1] These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. *Epilepsy:* § 391.41(b)(8), paragraphs 3, 4, and 5, which is available on the internet at *https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf.*

published additional notices granting requests from individuals for exemptions from the regulatory requirement regarding epilepsy found in § 391.41(b)(8).

To be considered for an exemption from the epilepsy and seizure disorders prohibition in § 391.41(b)(8), applicants must meet the criteria in the 2007 recommendations of the Agency's Medical Expert Panel (78 FR 3069).

**III. Qualifications of Applicants**

*James Byrd*

James Byrd is a 56-year-old class D license holder in Tennessee. They have a history of seizure disorder and have been seizure free since 2013. They take anti-seizure medication with the dosage and frequency remaining the same since 2021. Their physician states that they are supportive of James Byrd receiving an exemption.

*Francis Chiacchieri*

Francis Chiacchieri is a 66-year-old class B commercial driver's license (CDL) holder in Massachusetts. They have a history of oligodendroglioma and have been seizure free since September 2001. They take anti-seizure medication with the dosage and frequency remaining the same since February 2002. Their physician states that they are supportive of Francis Chiacchieri receiving an exemption.

*Lane Freeman*

Lane Freeman is a 26-year-old class E license holder in Florida. They have a history of generalized epilepsy and have been seizure free since April 1, 2013. They take anti-seizure medication with the dosage and frequency remaining the same since November 3, 2011. Their physician states that they are supportive of Lane Freeman receiving an exemption.

*Jeffrey Gomall*

Jeffrey Gomall is a 52-year-old class D license holder in Minnesota. They have a history of generalized epilepsy and have been seizure free since 2002. They take anti-seizure medication with the dosage and frequency remaining the same since 2008. Their physician states that they are supportive of Jeffrey Gomall receiving an exemption.

*Christine Green-McClure*

Christine Green-McClure is a 50-year-old class D license holder in New York. They have a history of seizure disorder and have been seizure free since 2007. They take anti-seizure medication with the dosage and frequency remaining the same since 2007. Their physician states that they are supportive of Christine Green-McClure receiving an exemption.

*Nicholas Hayes*

Nicholas Hayes is a 32-year-old class B CDL holder in Virginia. They have a history of an isolated seizure and have been seizure free since July 26, 2012. They take anti-seizure medication with the dosage and frequency remaining the same since August 2012. Their physician states that they are supportive of Nicholas Hayes receiving an exemption.

*Alex Hohman*

Alex Hohman is a 22-year-old class C license holder in Pennsylvania. They have a history of epilepsy and have been seizure free since August 2015. They take anti-seizure medication with the dosage and frequency remaining the same since August 2015. Their physician states that they are supportive of Alex Hohman receiving an exemption.

*Michelle Hughes*

Michelle Hughes is a 45-year-old class C license holder in North Carolina. They have a history of epilepsy and have been seizure free since 2007. They take anti-seizure medication with the dosage and frequency remaining the same since 2017. Their physician states that they are supportive of Michelle Hughes receiving an exemption.

*Michael Keys*

Michael Keys is a 44-year-old class C license holder in Pennsylvania. They have a history of seizure disorder and have been seizure free since July 13, 2010. They take anti-seizure medication with the dosage and frequency remaining the same since September 2010. Their physician states that they are supportive of Michael Keys receiving an exemption.

*Matthew Lee*

Matthew Lee is a 48-year-old class CM license holder in Georgia. They have a history of epilepsy and have been seizure free since February 2003. They take anti-seizure medication with the dosage and frequency remaining the same since 2003. Their physician states that they are supportive of Matthew Lee receiving an exemption.

*Lisa Martin*

Lisa Martin is a 41-year-old class D license holder in New York. They have a history of epilepsy and have been seizure free since 1994. They take anti-seizure medication with the dosage and frequency remaining the same since 2012. Their physician states that they are supportive of Lisa Martin receiving an exemption.

*Pedro Martinez*

Pedro Martinez is a 36-year-old class C license holder in Texas. They have a history of epilepsy and have been seizure free since 2012. They take anti-seizure medication with the dosage and frequency remaining the same since October 2002. Their physician states that they are supportive of Pedro Martinez receiving an exemption.

*Cecil Massey*

Cecil Massey is a 33-year-old class R license holder in Mississippi. They have a history of epilepsy and have been seizure free since May 2015. They take anti-seizure medication with the dosage and frequency remaining the same since December 2009. Their physician states that they are supportive of Cecil Massey receiving an exemption.

*James Philips*

James Phillips is a 29-year-old class B CDL holder in North Carolina. They have a history of focal epilepsy and have been seizure free since 2012. They take anti-seizure medication with the dosage and frequency remaining the same since 2012. Their physician states that they are supportive of James Phillips receiving an exemption.

*Joshua Pike*

Joshua Pike is a 33-year-old class C license holder in Maine. They have a history of nocturnal generalized convulsions and have been seizure free since May 2014. They take anti-seizure medication with the dosage and frequency remaining the same since 2016. Their physician states that they are supportive of Joshua Pike receiving an exemption.

*Alex Ramerth*

Alex Ramerth is a 41-year-old class D license holder in Minnesota. They have a history of generalized epilepsy and have been seizure free since 2010. They take anti-seizure medication with the dosage and frequency remaining the same since 2010. Their physician states that they are supportive of Alex Ramerth receiving an exemption.

*Maciej Skrzyniarz*

Maciej Skrzyniarz is a 36-year-old class A license holder in Illinois. They have a history of generalized epilepsy and have been seizure free since 2014. They take anti-seizure medication with the dosage and frequency remaining the same since 2014. Their physician states that they are supportive of Maciej Skrzyniarz receiving an exemption.

## IV. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315(b), FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated under the **DATES** section of the notice.

**Larry W. Minor,**

*Associate Administrator for Policy.*

[FR Doc. 2023–23966 Filed 10–30–23; 8:45 am]

**BILLING CODE 4910–EX–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket No. FMCSA–2014–0383; FMCSA–2014–0385; FMCSA–2014–0387; FMCSA–2018–0139; FMCSA–2019–0109; FMCSA–2019–0110; FMCSA–2021–0015]**

### Qualification of Drivers; Exemption Applications; Hearing

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

**ACTION:** Notice of renewal of exemptions; request for comments.

**SUMMARY:** FMCSA announces its decision to renew exemptions for 13 individuals from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these hard of hearing and deaf individuals to continue to operate CMVs in interstate commerce.

**DATES:** The exemptions are applicable on November 19, 2023. The exemptions expire on November 19, 2025. Comments must be received on or before November 30, 2023.

**ADDRESSES:** You may submit comments identified by the Federal Docket Management System Docket No. FMCSA–2014–0383, Docket No. FMCSA–2014–0385, Docket No. FMCSA–2014–0387, Docket No. FMCSA–2018–013, Docket No. FMCSA–2019–0109, Docket No. FMCSA–2019–0110, or Docket No. FMCSA–2021–0015 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *www.regulations.gov,* insert the docket number (FMCSA–2014–0383, FMCSA–2014–0385, FMCSA–2014–0387, FMCSA–2018–0139, FMCSA–2019–0109, FMCSA–2019–0110, or FMCSA–2021–0015) in the keyword box and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, and click on the ''Comment'' button. 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:* West Building Ground Floor, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001, (202) 366–4001, *fmcsamedical@dot.gov.* Office hours are 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

**SUPPLEMENTARY INFORMATION:**

## I. Public Participation

### *A. Submitting Comments*

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2014–0383, Docket No. FMCSA–2014–0385, Docket No. FMCSA–2014–0387, Docket No. FMCSA–2018–0139, Docket No. FMCSA–2019–0109, Docket No. FMCSA–2019–0110, or Docket No. FMCSA–2021–0015), indicate the specific section of this document to which each 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 that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *www.regulations.gov/,* insert the docket number (FMCSA–2014–0383, FMCSA–2014–0385, FMCSA–2014–0387, FMCSA–2018–0139, FMCSA–2019–0109, FMCSA–2019–0110, or FMCSA–2021–0015) in the keyword box and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, click the ''Comment'' button, and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

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. FMCSA will consider all comments and material received during the comment period.

### *B. Viewing Comments*

To view comments go to *www.regulations.gov.* Insert the docket number (FMCSA–2014–0383, FMCSA–2014–0385, FMCSA–2014–0387, FMCSA–2018–0139, FMCSA–2019–0109, FMCSA–2019–0110, or FMCSA–2021–0015) in the keyword box and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, and click ''Browse Comments.'' If you do not have access to the internet, you may view the docket online by visiting Dockets Operations on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. 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.

### *C. Privacy Act*

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption requests. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov.* As described in the system of records notice DOT/ALL 14 (Federal Docket Management System), which can be reviewed at *https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices,* the comments are searchable by the name of the submitter.

## II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statutes also allow the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The physical qualification standard for drivers regarding hearing found in

49 CFR 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.

This standard was adopted in 1970 and was revised in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, (35 FR 6458, 6463 (Apr. 22, 1970) and 36 FR 12857 (July 8, 1971), respectively).

The 13 individuals listed in this notice have requested renewal of their exemptions from the hearing standard in § 391.41(b)(11), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

## III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b), FMCSA will take immediate steps to revoke the exemption of a driver.

## IV. Basis for Renewing Exemptions

In accordance with 49 U.S.C. 31136(e) and 31315(b), each of the 13 applicants has satisfied the renewal conditions for obtaining an exemption from the hearing requirement. The 13 drivers in this notice remain in good standing with the Agency. In addition, for commercial driver's license (CDL) holders, the Commercial Driver's License Information System and the Motor Carrier Management Information System are searched for crash and violation data. For non-CDL holders, the Agency reviews the driving records from the State Driver's Licensing Agency. These factors provide an adequate basis for predicting each driver's ability to continue to safely operate a CMV in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each of these drivers for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption.

As of November 19, 2023, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following 13 individuals have satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers:

Jeffrey Barbuto (NH)
Wayne Crowl (IN)
Debbie Gaskill (GA)
Jason Gensler (OH)
Emil Iontchev (IL)
Jerrell McCrary (NC)
Danny McGowan (WV)
Matthew Moore (TX)
Abdiwahab Olow (MN)
Stuart Randles (FL)
Anthony Saive (TN)
Jennifer Valentine (TX)
Donald Weyand (MI)

The drivers were included in docket numbers FMCSA–2014–0383, FMCSA–2014–0385, FMCSA–2014–0387, FMCSA–2018–0139, FMCSA–2019–0109, FMCSA–2019–0110, or FMCSA–2021–0015. Their exemptions are applicable as of November 19, 2023 and will expire on November 19, 2025.

## V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) each driver must report any crashes or accidents as defined in § 390.5T; and (2) report all citations and convictions for disqualifying offenses under 49 CFR parts 383 and 391 to FMCSA; and (3) each driver prohibited from operating a motorcoach or bus with passengers in interstate commerce. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. In addition, the exemption does not exempt the individual from meeting the applicable CDL testing requirements. Each exemption will be valid for 2 years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) the person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

## VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

## VII. Conclusion

Based upon its evaluation of the 13 exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the hearing requirement in § 391.41(b)(11). In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for 2 years unless revoked earlier by FMCSA.

**Larry W. Minor,**

*Associate Administrator for Policy.*

[FR Doc. 2023–23967 Filed 10–30–23; 8:45 am]

**BILLING CODE 4910–EX–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Motor Carrier Safety Administration

**[Docket No. FMCSA–2012–0050; FMCSA–2014–0381; FMCSA–2015–0119; FMCSA–2019–0028; FMCSA–2019–0031]**

## Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

**ACTION:** Notice of final disposition.

**SUMMARY:** FMCSA announces its decision to renew exemptions for six individuals from the requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) that interstate commercial motor vehicle (CMV) drivers have ''no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.'' The exemptions enable these individuals who have had one or more seizures and are taking anti-seizure medication to continue to operate CMVs in interstate commerce.

**DATES:** The exemptions were applicable on September 30, 2023. The exemptions expire on September 30, 2025.

**FOR FURTHER INFORMATION CONTACT:** Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, (202) 366–4001, *fmcsamedical@dot.gov.* Office hours are from 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

**SUPPLEMENTARY INFORMATION:**

## I. Public Participation

*A. Viewing Comments*

To view comments, go to *www.regulations.gov.* Insert the docket number (FMCSA–2012–0050, FMCSA–2014–0381, FMCSA–2015–0119, FMCSA–2019–0028, or FMCSA–2019–0031) in the keyword box and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, and click ''Browse Comments.'' If you do not have access to the internet, you may view the docket online by visiting Dockets Operations on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. 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.

*B. Privacy Act*

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption request. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov.* As described in the system of records notice DOT/ALL 14 (Federal Docket Management System), which can be reviewed at *https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices,* the comments are searchable by the name of the submitter.

## II. Background

On September 6, 2023, FMCSA published a notice announcing its decision to renew exemptions for six individuals from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8) to operate a CMV in interstate commerce and requested comments from the public (88 FR 60734). The public comment period ended on October 5, 2023, and no comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved by complying with § 391.41(b)(8).

The physical qualification standard for drivers regarding epilepsy found in § 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist medical examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

## III. Discussion of Comments

FMCSA received no comments in this proceeding.

## IV. Conclusion

Based on its evaluation of the six renewal exemption applications, FMCSA announces its decision to exempt the following drivers from the epilepsy and seizure disorders prohibition in § 391.41(b)(8).

As of September 30, 2023, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following six individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers (88 FR 60734):

Ronald Boogay (NJ)

Todd Brock (CO)

Gary Cox (OR)

Tina Farmer (PA)

Marion Franklin Legg, Jr. (MD)

William Rainer, III (TX)

The drivers were included in docket number FMCSA–2012–0050, FMCSA–2014–0381, FMCSA–2015–0119, FMCSA–2019–0028, or FMCSA–2019–0031. Their exemptions were applicable as of September 30, 2023 and will expire on September 30, 2025.

In accordance with 49 U.S.C. 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) the person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

**Larry W. Minor,**

*Associate Administrator for Policy.*

[FR Doc. 2023–23968 Filed 10–30–23; 8:45 am]

**BILLING CODE 4910–EX–P**

[1] These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. *Epilepsy:* § 391.41(b)(8), paragraphs 3, 4, and 5, which is available on the internet at *https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf.*

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

**[Docket No. FRA–2010–0036]**

### Southeastern Pennsylvania Transportation Authority's Request To Amend Its Positive Train Control System

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Notice of availability and request for comments.

**SUMMARY:** This document provides the public with notice that, on October 20, 2023, the Southeastern Pennsylvania Transportation Authority (SEPTA) submitted a request for amendment (RFA) to its FRA-certified positive train control (PTC) system. FRA is publishing this notice and inviting public comment on the railroad's RFA to its PTC system.

**DATES:** FRA will consider comments received by November 20, 2023. FRA may consider comments received after that date to the extent practicable and without delaying implementation of valuable or necessary modifications to a PTC system.

**ADDRESSES:**

*Comments:* Comments may be submitted by going to *https://www.regulations.gov* and following the online instructions for submitting comments.

*Instructions:* All submissions must include the agency name and the applicable docket number. The relevant PTC docket number for this host railroad is Docket No. FRA–2010–0036. For convenience, all active PTC dockets are hyperlinked on FRA's website at *https://railroads.dot.gov/research-development/program-areas/train-control/ptc/railroads-ptc-dockets.* All comments received will be posted without change to *https://www.regulations.gov;* this includes any personal information.

**FOR FURTHER INFORMATION CONTACT:** Gabe Neal, Staff Director, Signal, Train Control, and Crossings Division, telephone: 816–516–7168, email: *Gabe.Neal@dot.gov.*

**SUPPLEMENTARY INFORMATION:** In general, title 49 United States Code (U.S.C.) section 20157(h) requires FRA to certify that a host railroad's PTC system complies with title 49 Code of Federal Regulations (CFR) part 236, subpart I, before the technology may be operated in revenue service. Before making certain changes to an FRA-certified PTC system or the associated FRA-approved PTC Safety Plan (PTCSP), a host railroad

must submit, and obtain FRA's approval of, an RFA to its PTC system or PTCSP under 49 CFR 236.1021.

Under 49 CFR 236.1021(e), FRA's regulations provide that FRA will publish a notice in the **Federal Register** and invite public comment in accordance with 49 CFR part 211, if an RFA includes a request for approval of a material modification of a signal or train control system. Accordingly, this notice informs the public that, on October 20, 2023, SEPTA submitted an RFA to its PTCSP for its Interoperable Electronic Train Management System (I–ETMS), which seeks FRA's approval for a two- to three-hour outage to support SEPTA's PTC Back Office Subsystem upgrade. That RFA is available in Docket No. FRA–2010–0036. Interested parties are invited to comment on SEPTA's RFA by submitting written comments or data. During FRA's review of this railroad's RFA, FRA will consider any comments or data submitted within the timeline specified in this notice and to the extent practicable, without delaying implementation of valuable or necessary modifications to a PTC system. *See* 49 CFR 236.1021; *see also* 49 CFR 236.1011(e). Under 49 CFR 236.1021, FRA maintains the authority to approve, approve with conditions, or deny a railroad's RFA at FRA's sole discretion.

**Privacy Act Notice**

In accordance with 49 CFR 211.3, FRA solicits comments from the public to better inform its decisions. DOT posts these comments, without edit, including any personal information the commenter provides, to *https://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See *https://www.regulations.gov/privacy-notice* for the privacy notice of regulations.gov. To facilitate comment tracking, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. If you wish to provide comments containing proprietary or confidential information, please contact FRA for alternate submission instructions.

Issued in Washington, DC.

**Carolyn R. Hayward-Williams,**

*Director, Office of Railroad Systems and Technology.*

[FR Doc. 2023–24013 Filed 10–30–23; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

**[Docket No. FTA–2022–0029]**

### Interim Asset Disposition Guidance

**AGENCY:** Federal Transit Administration (FTA), Department of Transportation (DOT).

**ACTION:** Interim Guidance and response to public comments.

**SUMMARY:** The Federal Transit Administration (FTA) hereby establishes Interim Guidance to provide clarity on an asset disposition option under the National Defense Authorization Act (NDAA) for Fiscal Year 2022. Under the new provision, FTA may authorize the transfer of real property acquired or improved with Federal assistance, but no longer needed for the originally authorized purpose, to a local governmental authority, nonprofit organization, or other third-party entity if certain statutory criteria are met.

**DATES:** The effective date of this Interim Guidance is October 31, 2023.

**ADDRESSES:** One may access this interim guidance and public comments on the proposed guidance at docket number FTA–2022–0029. For access to the docket, please visit *https://www.regulations.gov* or the Docket Operations office located in the West Building of the United States Department of Transportation, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** For policy guidance questions, contact Maggie Schilling, Office of Budget and Policy, Federal Transit Administration, 1200 New Jersey Ave. SE, Room E52–315, Washington, DC 20590, phone: 202–366–1487, or email *margaret.schilling@dot.gov.* For legal questions, contact Kathryn Loster at (202) 360–2322 or email *kathryn.loster@dot.gov.*

**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

This guidance explains changes made to 49 U.S.C. 5334(h)(1) by the National Defense Authorization Act (NDAA) for Fiscal Year 2022 (Pub. L. 117–81). Specifically, section 6609 of the NDAA added a new disposition option for real property acquired or improved with Federal assistance that are no longer needed for the originally authorized purpose. Under the new provision, FTA may authorize the transfer of property to a local government authority, nonprofit organization, or other third-party entity if, among other criteria enumerated in the law, it will be used for transit-oriented development and include affordable housing.

FTA published a notice of availability of the proposed asset disposition guidance and request for comments on March 15, 2023 (88 FR 16076), and the comment period ended April 14, 2023. This notice provides a summary of the comments received, responses and guidance clarifications from FTA, and the publication of the interim guidance in the form of FAQs, which is available on the agency's public website at *https://www.transit.dot.gov/funding/funding-finance-resources/interim-asset-disposition-guidance.*

**II. Response to Public Comments**

FTA received comments from five respondents on its Proposed Asset Disposition Guidance. The commenters represent transit agencies and industry stakeholders, including the American Public Transportation Association, Sound Transit, and the Local Initiatives Support Corporation. In this section, FTA responds to public comments in the following topical order: (A) General Comments; (B) Eligibility; (C) Review and Approval Process; (D) Affordable Housing Requirements; (E) Monitoring Requirements; (F) Other Requirements; and (G) Categorization of Special Purpose Entities. One commenter raised issues that are outside the scope of the Proposed Guidance and Legislative Authority, and FTA does not address those concerns in this Interim Guidance.

*A. General Comments*

i. Two commenters expressed support for the legislative change, which provides this additional asset disposition option, and the benefit this will have on Transit Oriented Development and affordable housing. One comment notes this guidance is helpful and constructive.

*FTA Response:* FTA appreciates these comments and the transit agency and industry stakeholder support for affordable housing.

*B. Eligibility*

i. One commenter requested clarity on whether provisions apply to real property that was either acquired *or* improved with FTA assistance. For example, those improved as part of an FTA-assisted project, even if it was originally acquired with non-federal funds.

ii. One commenter requested clarity on whether provisions in question apply to projects whose Federal funding

source was an FTA-administered RAISE grant or flexed funds from other Operating Administrations, such as Federal Highway Administration (FHWA).

*FTA Response:*

i. In accordance with the definition of ''real property'' in 49 CFR 262.3, eligible assets include land improvements. FTA will provide additional clarity in the Interim Guidance.

ii. This provision applies to assets acquired, or improved, with FTA-administered funds, including those flexed over from other operating administrations such as FHWA. FHWA funds flexed to FTA allow utilization of 49 U.S.C. 5334(h)(1) disposition provisions and these funds take on Chapter 53 elements. RAISE grants are not authorized under Chapter 53. As such, any property funded by a RAISE grant would be outside the scope of this provision.

*C. Review and Approval Process*

i. A commenter requested confirmation that a disposition under this new provision is approved by an FTA Regional Administrator and does not require publication in the **Federal Register**.

*FTA Response:*

i. This disposition option does not require publication in the **Federal Register**. Further, requests for asset disposition under this provision follow existing asset disposition approval processes, beginning with the FTA Regional Office and may involve additional review by FTA Headquarters offices.

*D. Affordable Housing Requirements*

i. A commenter noted that the language includes owner income requirements, which they state is not necessary for affordable rental housing projects since they are required to serve low-income households, and they recommend removing this language for affordable rental housing projects.

ii. Clarification is requested on whether affordability requirements are kept intact if the asset is subsequently sold or changes partnership after the initial transfer.

iii. Additionally, a commenter requested clarification regarding FAQ 2(c) of the Proposed Guidance, on whether the 20 percent of units that must meet the 30 percent area median income (AMI) are included within the total 40 percent of units that must meet the 60 percent AMI level.

iv. Request for clarification on whether the non-housing space within an affordable housing project is exempt from the ongoing housing requirement.

*FTA Response:*

i. This is a statutory requirement, per 49 U.S.C. 5334(h)(1)(B)(i)–(iii), and as such cannot be removed from this guidance. However, FTA clarifies that only individuals purchasing or renting units that are sold or rented as affordable owner-occupied units need to meet these income thresholds. The income requirement does not apply to the developer or property owner offering rentals.

ii. FTA confirms that the affordability requirements remain intact for the 30-year period, even if the asset is sold or changes partnership. The FTA recipient disposing of the property under this provision is responsible for ensuring compliance with this requirement.

iii. The guidance states that at least 40 percent of housing units must be legally binding affordability restricted to tenants and owners at or below 60 percent AMI, *which shall include* at least 20 percent of such housing units restricted to tenants and owners at or below 30 percent AMI. This is read to mean that the 20 percent of units that must meet 30 percent AMI are included within the total 40 percent of units that must meet the 60 percent AMI, meaning that at least 8 percent of the *total* amount of housing units must meet 30 percent AMI. Please note that this requirement is separate from the requirement that at least 20 percent of the total floor area ratio of the development be dedicated to affordable housing. The Interim Guidance will be amended to include this clarification.

iv. The requirement that 20 percent of the total floor area ratio (FAR) applies to the totality of the project, including non-housing space. The FTA recommendation is that, further, at least 50 percent of the TOD's FAR is dedicated to housing or other community benefits; this also applies to the totality of the project. The requirements for 40 percent of housing units to be legally binding affordability restricted to tenants and owners at or below the 60 percent AMI level, which includes 20 percent of units restricted at or below the 30 percent AMI level, apply only to the project's housing space.

*E. Monitoring Requirements*

i. A requirement of this asset disposition option includes monitoring of affordable housing requirements over a 30-year term. Two commenters expressed that a monitoring requirement may place an undue burden on an agency.

Further, commenters recommended that FTA allow the long-term monitoring to be performed by other entities that conduct compliance monitoring activities, including the new ownership entity, other public agencies, state housing finance agencies, and other housing agencies with subsidies in the project that require long-term affordability. Other suggestions include a standard reporting mechanism to ease the burden.

*FTA Response:*

i. The Proposed Guidance did not prescribe how the recipient must ensure compliance with affordable housing requirements over the 30-year term. The requirement for a property to remain in use and compliant with affordable housing requirements for 30 years after the date of transfer is a statutory requirement. FTA recognizes that there are many ways in which a recipient could ensure oversight and compliance with this requirement, including long-term monitoring by a third party or other public agency.

*F. Other Requirements*

i. Under this provision, an asset can be transferred to a Third-Party Entity if a Local Government Authority or Nonprofit Organization is ''unable to receive'' the property. A commenter requested clarification on whether ''choosing not to receive'' is assumed to be the same as ''unable to receive.''

*FTA Response:*

i. Under this provision, a local government or nonprofit entity ''choosing not to receive'' the property can be considered the same as ''unable to receive.'' Documentation demonstrating that the property has been offered and refused would be sufficient to meet this requirement.

*G. Categorization of Special Purpose Entities*

i. Three commenters requested that FTA clarify that Special Purpose Entities created by a nonprofit organization for the purpose of utilizing Low-Income Housing Tax Credits (LIHTC) will be treated as nonprofit organizations, rather than third-party entities, for the purposes of transferring eligible assets under this provision.

Nonprofit developers typically form Special Purpose Entities (*e.g.,* Limited Liability Companies or Limited Partnerships) to utilize the LIHTC available under Internal Revenue Code (IRC) 26 U.S.C. Chapter 42. As commenters note, LIHTC encourages private parties to invest in affordable housing projects, constituting an important and commonly used method for financing affordable housing. While the Special Purpose Entity is a private entity, it may be controlled and managed by the nonprofit housing

developer. This is important to clarify because, in some cases, the Special Purpose Entity may not be able to satisfy the statutory requirements for transfer to a third-party entity, such as demonstrating a ''satisfactory history of constructing or operating an affordable housing development;'' this is because a new Special Purpose Entity is created for each project and would not have a history of past projects.

*FTA Response:*

i. FTA recognizes that this is a common concern among transit agencies and stakeholders interested in utilizing this provision. FTA further notes that Special Purpose Entities receiving LIHTC's may take many different forms. In interpreting Special Purpose Entities formed for the purpose of utilizing LIHTCs under this provision, FTA will look to which party (*i.e.,* public or nonprofit vs. for-profit entity) has control over the project. Ownership may be transferred to a for-profit entity to facilitate the use of tax credits for the project only if the public or nonprofit entity demonstrates in its application that it retains control over the property (*i.e.,* still considered ''owned'' for purposes of this provision). Sufficient control may be satisfied by any of the following: (1) a fee simple interest in the Project property, (2) owns 51 percent or more of the general partner interests in a limited partnership or 51 percent or more of the managing member interests in a limited liability company with all powers of the general partner or managing member, (3) owns a lesser percentage of the general partner or managing member interests and holds control rights, or (4) owns 51 percent or more of all ownership interests in a limited partnership or limited liability company and holds certain control rights.

''Control rights,'' as referenced above, include control over leasing of the project (*e.g.,* exclusively maintaining and administering the waiting list, performing eligibility determinations) and consent rights over certain areas, such as changing the number of affordable housing units, setting utility allowances, selecting the management agent, or setting the operating budget. FTA will treat a Special Purpose Entity as a nonprofit entity under this asset disposition provision if they meet the above requirements.

### III. Interim Guidance

FTA has reviewed and deliberated over the public comments received for the Proposed Asset Disposition Guidance. All feedback was appreciated and informative for further shaping this guidance. FTA makes made the following amendments in the Interim Asset Disposition Guidance:

The Interim Asset Disposition Guidance is amended to provide a response to comments requesting that Special Purpose Entities using Low Income Housing Tax Credits (LIHTC) are treated as a nonprofit entity under this provision. FTA will allow Special Purpose Entities using LIHTCs to be treated as nonprofits if the nonprofit entity retains control over the project, as detailed above.

Additionally, FTA amends the guidance to provide additional clarity on the area median income (AMI) percentage requirements. Some commenters voiced confusion over the statutory requirements that 40 percent of the housing units offered must be legally binding affordability restricted to tenants and owners at or below 60 percent AMI, which shall include at least 20 percent offered to tenants and owners at or below 30 percent AMI. FTA will clarify that this is 20 percent out of the 40 percent, not 20 percent out of the totality of the project.

On the eligibility requirements to use this provision, FTA amends the guidance to clarify that this provision applies to assets that have been acquired or improved with FTA assistance, including FTA-administered Federal funds that have been flexed over from other Operating Administrations, such as Federal Highway Administration (FHWA). However, this provision does not apply to assets acquired or improved with FTA-administered RAISE grants, as discussed above.

FTA amends the guidance to provide additional clarifying language on the options available for compliance monitoring during the 30-year term, to include third party oversight.

**Nuria I. Fernandez,**

*Administrator.*

[FR Doc. 2023–23946 Filed 10–30–23; 8:45 am]

**BILLING CODE 4910–57–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0661]**

## Agency Information Collection Activity Under OMB Review: State Veterans Homes Construction & Acquisition Grant Program (SVHCGP)

**AGENCY:** Veterans Health Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Health Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

**DATES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Refer to ''OMB Control No. 2900–0661.''

**FOR FURTHER INFORMATION CONTACT:** Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Avenue NW, Washington, DC 20420, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0661'' in any correspondence.

**SUPPLEMENTARY INFORMATION:**

*Authority:* 44 U.S.C. 3501–3521.

*Title:* State Veterans Homes Construction & Acquisition Grant Program (SVHCGP), VA Forms 10–0388–1, 10–0388–2, 10–0388–3, 10–0388–4, 10–0388–5, 10–0388–6, 10–0388–7, 10–0388–8, 10–0388–9, 10–0388–10, 10–0388–12, 10–0388–13.

*OMB Control Number:* 2900–0661.

*Type of Review:* Reinstatement of a previously approved collection.

*Abstract:* 38 U.S.C. 8133(a) and 8135(a) authorize and appropriate expenditure of funds for State Home Domiciliary, Nursing Home, and Hospital Care. These portions of the U.S.C. require, among other things, that the State applicant provide the Department of Veterans Affairs (VA) with an application. Only State governments and recognized federal tribes (their governments) will submit the information to complete an application for the State Veterans Homes Construction Grant Program (SVHCGP); private groups or citizens are not eligible. Applicants will complete VA Forms 10–0388–1, 10–0388–2, 10–0388–3, 10–0388–4, 10–0388–5, 10–0388–6, 10–0388–7, 10–0388–8, 10–0388–9, 10–0388–10, 10–0388–12, and 10–0388–13 to apply for the SVHCGP and to certify compliance with VA requirements. VA uses this information, along with other documents submitted to evaluate the feasibility of the projects

for VA participation, to determine eligibility for a grant awards.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 88 FR 39 on February 28, 2023, page 12721.

*Affected Public:* State, local, or Tribal governments.

*Estimated Annual Burden:* 1,200 hours.

*Estimated Average Burden per Respondent:* 24 hours.

*Frequency of Response:* On occasion.

*Estimated Number of Respondents:* 50.

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. 2023–23928 Filed 10–30–23; 8:45 am]

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Part II

## Department of Education

34 CFR Part 668
Financial Responsibility, Administrative Capability, Certification Procedures, Ability To Benefit (ATB); Final Regulations

**DEPARTMENT OF EDUCATION**

**34 CFR Part 668**

**[Docket ID ED–2023–OPE–0089]**

**RIN 1840–AD51, 1840–AD65, 1840–AD67, and 1840–AD80**

## Financial Responsibility, Administrative Capability, Certification Procedures, Ability To Benefit (ATB)

**AGENCY:** Office of Postsecondary Education, Department of Education.

**ACTION:** Final regulations.

**SUMMARY:** The Secretary amends the regulations implementing title IV of the Higher Education Act of 1965, as amended (HEA), related to financial responsibility, administrative capability, certification procedures, and ATB. We amend the financial responsibility regulations to increase the Department of Education's (Department) ability to identify high-risk events at institutions of higher education and require financial protection as needed. We amend and add administrative capability provisions to enhance the capacity for institutions to demonstrate their ability to continue to participate in the financial assistance programs authorized under title IV of the HEA (title IV, HEA programs). Additionally, we amend the certification procedures to create a more rigorous process for certifying institutional eligibility to participate in the title IV, HEA programs. Finally, we amend the ATB regulations related to student eligibility for non-high school graduates.

**DATES:** These regulations are effective July 1, 2024. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of July 1, 2024.

**FOR FURTHER INFORMATION CONTACT:** For financial responsibility: Kevin Campbell. Telephone: (214) 661–9488. Email: *Kevin.Campbell@ed.gov.* For administrative capability: Andrea Drew. Telephone: (202) 987–1309. Email: *Andrea.Drew@ed.gov.* For certification procedures: Vanessa Gomez. Telephone: (202) 987–0378. Email: *Vanessa.Gomez@ed.gov.* For ATB: Aaron Washington. Telephone: (202) 987–0911. Email: *Aaron.Washington@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:**

**Executive Summary**

*Incorporation by Reference*

In § 668.175(d)(2), we reference the following accounting standard: Accounting Standards Codification (ASC) 850. ASC 850 provides for accounting and reporting issues concerning related party transactions and relationships. It is already approved for incorporation by reference in § 668.23.

This standard is available at *www.fasb.org*, registration required.

*Purpose of This Regulatory Action*

These final regulations address four areas: financial responsibility, administrative capability, certification procedures, and ATB. The Institutional and Programmatic Eligibility Committee (Committee) reached consensus on ATB at its final session on March 18, 2022.

The financial responsibility regulations at §§ 668.15 668.23, 668.171, and 668.174 through 668.177 will increase our ability to identify high-risk events and require the financial protection we believe is needed to protect students and taxpayers.

We strengthened institutional requirements in the administrative capability regulations at § 668.16 to improve the administration of the title IV, HEA programs and address concerning practices that were previously unregulated.

The certification procedures regulations in §§ 668.13, 668.14, and 668.43 will create a more rigorous process for certifying institutions to participate in the title IV, HEA programs. We expect these regulations to better protect students and taxpayers through the Program Participation Agreement (PPA), our written agreement with institutions.

Finally, we amend the regulations for ATB at §§ 668.156 and 668.157 to clarify the requirements for the State process to determine eligibility for programs serving non-high school graduates and the documentation requirements for eligible career pathway programs.

Financial Responsibility

The Department amends §§ 668.15 and 668.23 and subpart L of part 668. We are removing all regulations under § 668.15 and reserving that section. We have revised the financial responsibility factors applicable to institutional changes in ownership, currently in § 668.15, and moved them to § 668.176. As a result, all financial responsibility requirements are located in subpart L.

The Department also amends § 668.23 to update references to the Office of Management and Budget's (OMB) Circular A–133, Audits of States, Local Governments, and Non-Profit Organizations. As this circular is no longer used, we update the reference to 2 CFR part 200, subpart F. Further, we establish the submission deadline for an institution to submit its compliance audit and audited financial statements as the earlier of six months after the last day of the institution's fiscal year or 30 days after the date of the later auditor's report. This new submission deadline will not impact submission deadlines established by the Single Audit Act.

Finally, we amend regulations under subpart L of part 668 to improve our ability to assess whether institutions are able to meet their financial obligations. We establish new mandatory and discretionary triggers that will provide the Department earlier notice that an institution may not be able to meet its financial responsibilities. We revise the regulations governing our assessment of financial responsibility for institutions undergoing a change in ownership to better align with current Departmental practices and consolidate all related regulations in § 668.176.

Administrative Capability

The Department amends § 668.16 to improve our ability to evaluate the capability of institutions to participate in the title IV, HEA programs. The changes will benefit students by strengthening financial aid communications to include the institution's cost of attendance, the source and type of aid offered, whether aid must be earned or repaid, the net price, and deadlines for accepting, declining, or adjusting award amounts.

The regulations also state that administrative capability means that an institution is providing students adequate career services and clinical or externship opportunities, as applicable. Under the final regulations, administrative capability also means that an institution is making timely disbursements of funds to students and that less than half of an institution's total title IV, HEA revenue in the most recent award year comes from programs that fail to meet gainful employment (GE) requirements under the GE program accountability framework. Being administratively capable also means not: engaging in aggressive recruitment, making misrepresentations, being subject to negative action by a State or Federal agency, or losing eligibility to participate in another Federal educational assistance program due to an administrative action against the institution.

Additionally, under the final regulations, institutions must certify

when they sign the PPA that no principal or affiliate has been convicted of or committed fraud. Finally, institutions must have adequate procedures to evaluate the validity of a student's high school diploma and outline criteria to identify an invalid high school diploma.

Certification Procedures

The Department amends §§ 668.13 and 668.14 so that certification is not automatically renewed after 12 months without a decision from the Department and adds new events that cause an institution to become provisionally certified and new requirements for provisionally certified institutions. We also expand the entities that must sign a PPA to include higher level owners of institutions. Institutions must also certify that they meet additional requirements when signing the PPA, as applicable. For example, institutions must certify that their gainful employment programs are not longer than 100 percent of the length required for licensure in a recognized occupation in either the State where the institution is located or another State if the institution establishes that certain criteria apply.

Institutions must also certify that, in each State where they are located or where they enroll students through distance education, they meet applicable programmatic accreditation and licensure requirements and comply with all State laws related to closure. We also amend § 668.43 to clarify how provisions in the certification procedures section interact with existing institutional disclosure requirements related to informing students about the States in which a given program meets the educational requirements for licensure or certification.

In addition, institutions must certify that they will not withhold transcripts or take other negative actions against a student due to an error on the school's part, and that upon a student's request, they will provide an official transcript that includes all the credit or clock hours for payment periods in which the student received title IV, HEA funds and for which all institutional charges were paid at the time the request is made. Institutions must also certify that they will not maintain policies and procedures that condition institutional aid or other student benefits in a manner that induces a student to limit the amount of Federal student loans that the student receives. We also add conditions for institutions initially certified as a nonprofit or that seek to become one following a change in ownership. These additional conditions will help address the consumer protection concerns that have occurred when some for-profit institutions converted to nonprofit status for improper benefit.

Ability To Benefit (ATB)

In §§ 668.2, 668.32, 668.156, and 668.157, the Department amends the student eligibility requirements for individuals who do not have a high school diploma or a recognized equivalent.

Specifically, in these regulations, we (1) codify the definition of an ''eligible career pathway program,'' which largely mirrors the statutory definition, (2) make technical updates to the student eligibility regulations, (3) amend the State ATB process (''State process'') to allow time for participating institutions to collect outcomes data while establishing new safeguards, (4) establish documentation requirements for institutions that want to begin or maintain eligible career pathway programs for ATB use, and (5) establish that the Secretary will verify at least one career pathway program at each postsecondary institution intending to use ATB to increase regulatory compliance.

*Summary of the Major Provisions of This Regulatory Action*

The final regulations make the following changes.

**Financial Responsibility (§§ 668.15, 668.23, 668.171, and 668.174 Through 668.177)**

- Remove and reserve § 668.15 and consolidate all financial responsibility factors, including those dealing with changes in ownership, under subpart L of part 668.
- Amend § 668.23 to require that audit reports are timely submitted, by the earlier of 30 days after the completion of the report or six months after the end of the institution's fiscal year.
- Amend § 668.23 to require that, for any domestic or foreign institution that is owned directly or indirectly by any foreign entity holding at least a 50 percent voting or equity interest in the institution, the institution must provide documentation of the entity's status under the law of the jurisdiction under which the entity is organized.
- Amend § 668.171, which requires institutions to demonstrate that they are able to meet their financial obligations, by adding events that constitute a failure to do so, including failure to make debt payments for more than 90 days, failure to make payroll obligations, or borrowing from employee retirement plans without authorization.
- Amend in § 668.171 the set of conditions that require an institution to post financial protection if certain events occur. These mandatory triggers are certain external events, financial circumstances that may not be reflected in the institution's regular financial statements, and financial circumstances that are not yet reflected in the institution's composite score.
- Amend in § 668.171 the set of conditions that may, at the discretion of the Department, require an institution to post financial protection. These discretionary triggers are external events or financial circumstances that may not appear in the institution's regular financial statements and are not yet reflected in the institution's calculated composite score.
- In § 668.174, clarify the language related to compliance audit or program review findings that lead to a liability of at least 5 percent of title IV, HEA volume at the institution, to more clearly state that the relevant reports are those issued in the two most recent years, rather than reviews conducted in the two most recent years.
- Add a new § 668.176 to consolidate the financial responsibility requirements for institutions undergoing a change in ownership in subpart L of part 668.
- Redesignate the existing § 668.176, establishing severability, as § 668.177.

**Administrative Capability (§ 668.16)**

- Amend § 668.16(h) to require institutions to provide adequate financial aid counseling to enrolled students that includes more information about the cost of attendance, sources and amounts of each type of aid separated by the type of aid, the net price, and instructions and applicable deadlines for accepting, declining, or adjusting award amounts.
- Amend § 668.16(k) to require that an institution not have any principal or affiliate that has been subject to specified negative actions, including being convicted of or pleading nolo contendere or guilty to a crime involving governmental funds.
- Add § 668.16(n) to require that an institution has not been subject to a significant negative action by a State or Federal agency, a court, or an accrediting agency and has not lost eligibility to participate in another Federal educational assistance program due to an administrative action against the institution.
- Amend § 668.16(p) to strengthen the requirement that institutions must

develop and follow adequate procedures to evaluate the validity of a student's high school diploma.

• Add § 668.16(q) to require that institutions provide adequate career services to eligible students who receive title IV, HEA program assistance.

• Add § 668.16(r) to require institutions to provide students with geographically accessible clinical or externship opportunities related to and required for completion of the credential or licensure in a recognized occupation, within 45 days of the completion of other required coursework.

• Add § 668.16(s) to require institutions to disburse funds to students in a timely manner consistent with the students' needs.

• Add § 668.16(t) to require that, for institutions that offer GE programs, less than half of their total title IV, HEA revenue comes from programs that are ''failing'' under subpart S.

• Add § 668.16(u) to require that an institution does not engage in misrepresentations or aggressive recruitment.

**Certification Procedures (§§ 668.13, 668.14, and 668.43)**

• Amend § 668.13(b)(3) to eliminate the requirement that the Department approve participation for an institution if the Department has not acted on a certification application within 12 months.

• Amend § 668.13(c)(1) to include additional events that lead to provisional certification.

• Amend § 668.13(c)(2) to require provisionally certified schools that have major consumer protection issues to recertify after three years.

• Add § 668.13(e) to establish supplementary performance measures the Secretary may consider in determining whether to certify or condition the participation of the institution.

• Amend § 668.14 to establish, in new paragraph (a)(3), the requirement for an authorized representative of any entity with direct or indirect ownership of a private institution to sign a PPA.

• Amend § 668.14(b)(17) to include all Federal agencies and State attorneys general on the list of entities that have the authority to share with each other and the Department any information pertaining to an institution's eligibility for or participation in the title IV, HEA programs or any information on fraud, abuse, or other violations of law.

• Amend § 668.14(b)(26)(ii) to limit the number of hours in a GE program to the greater of the required minimum number of clock hours, credit hours, or the equivalent required for training in the recognized occupation for which the program prepares the student, as established by the State in which the institution is located, or the required minimum number of hours required for training in another State, if the institution provides documentation of that State meeting one of three qualifying requirements to use a State in which the institution is not located that is substantiated by the certified public accountant who prepares the institution's compliance audit report as required under § 668.23. This provision does not apply to fully online programs or where the State entry level requirements include the completion of an associate or higher-level degree.

• Add § 668.14(b)(32)(i) and (ii) to require all programs that prepare students for occupations requiring programmatic accreditation or State licensure to meet those requirements.

• Add § 668.14(b)(32)(iii) to require all programs to comply with all State laws related to closure of postsecondary institutions, including record retention, teach-out plans or agreements, and tuition recovery funds or surety bonds.

• Add § 668.14(b)(33) to provide that an institution may not withhold official transcripts or take any other negative action against a student related to a balance owed by the student that resulted from an error in the institution's administration of the title IV, HEA programs, or any fraud or misconduct by the institution or its personnel.

• Add § 668.14(b)(34) to require an institution to provide an official transcript that includes all the credit or clock hours for payment periods in which a student received title IV, HEA funds and for which all institutional charges were paid at the time the request is made.

• Add § 668.14(b)(35) to prohibit institutions from maintaining policies and procedures to encourage, or that condition institutional aid or other student benefits in a manner that induces, a student to limit the amount of Federal student aid, including Federal loan funds, that the student receives, except that the institution may provide a scholarship on the condition that a student forego borrowing if the amount of the scholarship provided is equal to or greater than the amount of Federal loan funds that the student agrees not to borrow.

• Amend § 668.14 to establish, in new paragraph (e), a non-exhaustive list of conditions that the Secretary may apply to provisionally certified institutions.

• Amend § 668.14 to establish, in new paragraph (f), conditions that may apply to institutions seeking to convert from a for-profit institution to a nonprofit institution following a change in ownership.

• Amend § 668.14 to establish, in new paragraph (g), conditions that apply to any nonprofit institution or other institution seeking to convert to a nonprofit institution.

• Amend § 668.43(a)(5) to require all programs that prepare students for occupations requiring State licensure or certification to list all the States where the institution has determined, including as part of the institution's obligation under § 668.14(b)(32), that the program does and does not meet such requirements.

**Ability-To-Benefit (§§ 668.2, 668.32, 668.156, and 668.157)**

• Amend § 668.2 to codify the definition of ''eligible career pathway program.''

• Amend § 668.32 to differentiate between the title IV, HEA aid eligibility of non-high school graduates who enrolled in an eligible program prior to July 1, 2012, and those who enrolled after July 1, 2012.

• Amend § 668.156 to separate the State process into an initial two-year period and a subsequent period for which the State may be approved for up to five years.

• Amend § 668.156 to require, with respect to the State process, that: (1) The application contain a certification that each eligible career pathway program intended for use through the State process meets the definition of an ''eligible career pathway program.'' (2) The application describes the criteria used to determine student eligibility for participation in the State process. (3) The withdrawal rate for a postsecondary institution listed for the first time on a State's application does not exceed 33 percent. (4) Upon initial application the State will enroll no more than the greater of 25 students or one percent of enrollment of each participating institution.

• Amend § 668.156 to remove the support services requirements from the State process, including orientation, assessment of a student's existing capabilities, tutoring, assistance in developing educational goals, counseling, and follow up by teachers and counselors, which duplicate the requirements in the definition of ''eligible career pathway program.''

• Amend the monitoring requirement in § 668.156 to provide a participating institution that has failed to achieve the 85 percent success rate up to three years to achieve compliance.

• Amend § 668.156 to require that the State prohibit an institution from participating in the State process for at least five years if the State terminates its participation.

• Amend § 668.156 to: clarify that the State is not subject to the success rate requirement at the time of the initial application but is subject to the requirement for the subsequent period; reduce the required success rate from 95 percent to 85 percent; require the success rate to be calculated for each participating institution; and amend the comparison groups to include the concept of ''eligible career pathway programs.''

• Amend § 668.156 to require that States report information on race, gender, age, economic circumstances, education attainment, and such other information that the Secretary specifies in a notice published in the **Federal Register**.

• Amend § 668.156, with respect to the Secretary's ability to revise or terminate a State's participation in the State process, by providing that the Secretary may (1) approve a State process once for a two-year period if the State is not in compliance with the regulations, and (2) lower the success rate to 75 percent if 50 percent of the participating institutions across the State do not meet the 85 percent success rate.

• Add a new § 668.157 to clarify the documentation requirements for eligible career pathway programs.

*Costs and Benefits*

As further detailed in the Regulatory Impact Analysis (RIA), this final rule provides significant benefits for the Department and students and some lesser benefits for institutions of higher education. It will create costs for institutions and some smaller costs for the Department and students.

Benefits for the Department include significantly stronger oversight tools that could help reduce the costs of discharges associated with closed schools or borrower defense to repayment. The Department will also benefit from funding fewer postsecondary credits that cannot be applied toward students' educational goals.

Benefits for students include: a greater likelihood that institutions will act more responsibly and not close or will conduct orderly closures when they occur; improved access to transcripts; greater assurances that their programs will prepare them for licensure or certification; and better information about their financial aid packages.

Benefits for institutions include a more even playing field for institutions that do not engage in risky behavior, which may assist with student recruitment.

Institutions will largely bear the costs of these regulations. The most significant cost will be to provide additional financial protection, especially if the Department collects on that protection. Institutions not currently in compliance with these rules will also have costs to come into compliance. This could include verifying that their online programs meet educational requirements for State licensure or certification, financial aid communications are clear, and they offer sufficient career services.

The Department will also have increased oversight costs. There may also be a decrease in transfers between the Federal Government and students because their prospective career pathway program may have lost or been denied title IV, HEA program eligibility based on the new documentation standards.

*Public comments:* On May 19, 2023, the Secretary published a notice of proposed rulemaking (NPRM) for these regulations in the **Federal Register.**[1] These final regulations contain changes from the NPRM, which we explain in the *Analysis of Comments and Changes* section of this document. The NPRM included proposed regulations on five topics: financial value transparency and gainful employment (GE), financial responsibility, administrative capability, certification procedures, and ATB. The Department has already published a final rule for financial value transparency and GE. This final rule contains the remaining four topics.

In response to our invitation in the NPRM, 7,583 parties submitted comments. We discuss substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address technical or other minor changes (such as renumbering paragraphs or correcting typographical errors) or recommendations that are out of the scope of this regulatory action or that would require statutory changes. We also do not address comments related to GE and financial value transparency (§§ 600.10, 600.21, 668.43, and 668.98 and subparts Q and S of part 668), which were included in the NPRM but are not included in this final rule. Comments and responses related to those topics are in the final rule published in the **Federal Register** on October 10, 2023 (88 FR 70004).

[1] 88 FR 32300.

*Analysis of Public Comment and Changes*

Analysis of the comments and of any changes in the regulations since publication of the NPRM follows.

Public Comment Period

*Comments:* Several commenters asked the Department to extend the public comment period and argued that 30 days was insufficient time to properly analyze the NPRM. Commenters asked for between 15 and 60 additional days, for a total comment period between 45 and 90 days. These commenters pointed out that the length of the proposed rule required more time to review it if they were to provide an informed comment. The commenters also observed that Executive Orders 12866 and 13563 cite 60 days as the recommended length for public comment.

*Discussion:* The Department believes the public comment period was sufficient for commenters to review and provide meaningful feedback on the NPRM. In response to the NPRM we received comments from more than 7,500 individuals and entities, including many detailed and lengthy comments. Those comments have helped the Department identify many areas for improvements and clarification that result in an improved final rule.

Moreover, the negotiated rulemaking process provided significantly more opportunity for public engagement and feedback than notice-and-comment rulemaking without multiple negotiation sessions. The Department began the rulemaking process by inviting public input through a series of public hearings in June 2021. We received more than 5,300 public comments as part of the public hearing process. After the hearings, the Department sought non-Federal negotiators for the negotiated rulemaking committee who represented constituencies that would be affected by our rules. As part of these non-Federal negotiators' work on the rulemaking committee, the Department asked that they reach out to the broader constituencies for feedback during the negotiation process. During each of the three negotiated rulemaking sessions, we provided opportunities for the public to comment, including after seeing draft regulatory text, which was available prior to the second and third sessions. The Department and the non-Federal negotiators considered those comments to inform further discussion at the negotiating sessions, and we used the information to create our proposed rule. Additionally, the proposed regulations for ATB were the regulations

agreed to by consensus on March 18, 2022, providing the public with additional time to review the Department's proposed regulations. The Executive orders recommend an appropriate time for public comment, but they do not require more than 30 days, nor do they consider the Department's process for regulating under the HEA.

*Changes:* None.

General Opposition

*Comments:* Some commenters said we should withdraw the entire NPRM.

*Discussion:* We disagree with the commenters. As we discuss in further detail in the sections related to the specific provisions, we believe these regulations are important for many reasons, including to protect students and taxpayers from institutions at risk of closure and other instances where there are financial risks to students and taxpayers.

*Comments:* A few commenters expressed concern that the proposed rules would create additional delays in Federal Student Aid's program review and institutional eligibility actions. They noted that the proposed rules added additional duties and review for the Department's School Eligibility and Oversight Service Group within Federal Student Aid (FSA), but there is not a prospect for additional funding necessary to expand the team and streamline the operations of the review process to offset the additional labor.

*Discussion:* We appreciate the commenters' concern. However, the Department believes that the changes in these final regulations are critical to ensure that the Department can act as a proper steward of Federal funds. Budgetary resources for the Department are a function of the annual appropriations process. The Department makes requests for additional resources through the normal budget process and has accounted for these changes in its most recent requests.

*Changes:* None.

*Comments:* Some commenters worried that the cost of the regulations would result in a need for additional staffing and resources for schools which would mean an increase in the cost of the degree for students.

*Discussion:* The regulatory impact analysis (RIA) of this final rule discusses the costs and benefits of these changes. The Department feels that any additional costs to institutions are justified by the benefits, particularly for increased protection of taxpayer funds and reduced number of students exposed to sudden closures or who are experiencing negative outcomes. The Department also provides estimates of the additional paperwork costs from some provisions of these rules in the RIA.

*Changes:* None.

General Support

*Comments:* A few commenters pointed out that the proposed rules will strengthen our higher education system. They said these rules will also safeguard taxpayer money that goes into the title IV, HEA programs by ensuring those Federal dollars only go to schools that demonstrate positive outcomes for their students.

A few additional commenters applauded the Department for writing an NPRM that will significantly improve the outcomes for veterans and military-connected students.

*Discussion:* We thank the commenters for their support.

*Changes:* None.

Legal Authority

*Comments:* Several commenters stated broadly that the NPRM failed to address the ''major questions doctrine'' and, relatedly, did not establish clear congressional authority for the proposed rules. Most of those commenters focused on the GE rules, particularly the GE accountability framework in subpart S.[2]

*Discussion:* We disagree with the commenters. For these rules, commenters did not attempt to establish the extraordinary circumstances under which courts have used the major questions doctrine to raise doubts about agency statutory authority. Commenters did not, for example, explain how any one of the regulations constitutes agency action of such exceptional economic and political significance that the doctrine should apply. Although these final rules are significant to implementing the title IV, HEA programs, none of them is a topic of widespread controversy or transforms the field of higher education. Nor did commenters show that these rules are beyond the Department's expertise, or that the relevant statutory provisions are somehow ancillary to the statutory scheme. The statutory bases for these final rules are not subtle. As we discuss elsewhere, title IV of the HEA is quite clear that, to participate in the relevant student aid programs and among other demands, institutions must complete a certification process, must meet certain standards of administrative capability, and must meet certain standards of financial responsibility; the ATB rules likewise are grounded in the HEA provisions on that subject.[3]

Furthermore, the statutes plainly authorize the Secretary to adopt regulations pertaining to those provisions, and these rules build on the Department's experience and previous initiatives in these fields.[4] Some commenters do disagree with various details in these rules, and any set of final rules will add something to preexisting regulations. But the presence of commenter disagreement over new rules is insufficient to trigger the major questions doctrine.

*Changes:* None.

Negotiated Rulemaking

*Comments:* Several commenters expressed a concern about the lack of representation from the beauty and wellness industry during the negotiated rulemaking process which raises doubts about the adequate consideration of industry-specific interests and concerns. They stated that the proposed regulations could be potentially debilitating for the beauty and wellness industry.

Similarly, a few commenters argued that the negotiated rulemaking committee was not representative of all the stakeholders who would be impacted by the proposed rule, and it therefore violated both the Administrative Procedure Act (APA) and the Negotiated Rulemaking Act of 1996. Specifically, several commenters pointed to the fact that there were no representatives from cosmetology schools or small proprietary schools.

*Discussion:* The negotiated rulemaking committee that the Department convened represented a broad range of constituencies, including proprietary institutions, which encompasses most cosmetology institutions. Negotiators were expected to consult with members of their constituency to represent the views of a range of the stakeholders they represent. The Department's regulations must

[2] The Department addresses comments on the major questions doctrine related to its proposed GE regulations in a separate GE final rule published in the **Federal Register** on October 10, 2023 (88 FR 70004). By this cross-reference, we adopt that discussion here.

[3] *See, e.g.,* 20 U.S.C. 1091(d); 20 U.S.C 1094; 20 U.S.C. 1099c.

[4] We address the specific provisions of the rule elsewhere in this document. To the extent that other commenters suggest that they may combine all rules in a rulemaking proceeding, or combine rules of their choosing, and then base a major questions determination on a holistic evaluation of that package, we disagree. The Department is unaware of any authority for that position, which would treat the major questions doctrine regarding statutory authority for a given agency action in this manner. Among other problems, that position offers no apparent method for selecting the appropriate bundle of rules or for analyzing agency statutory authority at an undifferentiated, wholesale level.

consider the effects on institutions and recipients of title IV, HEA aid, as well as other members of the regulatory triad (States and accreditation agencies) with whom we interact on these issues. We have no authority to regulate private employers and do not believe that would have been appropriate to include representation from the beauty and wellness industry on this negotiated rulemaking committee. In response to commenters that claimed that the Department violated the APA and the Negotiated Rulemaking Act of 1996, the Department notes that the HEA is the applicable law governing our negotiated rulemaking process. As such, under the HEA we are not required to include representatives from every conceivable type of trade school.

*Changes:* None.

*Comments:* Several commenters stated that the regulation did not include State authorization experts and argued that the issue of State authorization was embedded within the Certification Procedures discussion. They felt that the State authorization reciprocity should have been discussed as its own section in the negotiated rulemaking process. Some commenters were concerned about the language that was used in the NPRM. They urged the Department to delay any regulatory changes related to State authorization so that revisions could be addressed in the next round of negotiated rulemaking.

*Discussion:* The Department disagrees with the commenters. The provisions in question are not a negotiation around the regulatory sections that include State authorization or distance education. We did not regulate the conditions, structure, or other elements of State reciprocity agreements or the organizations that operate them, nor did we set requirements that States must follow to oversee institutions enrolling students in a State where they have no physical presence. Rather, we addressed two narrow issues related to frequently observed problems and are requiring institutions to address them.

One issue of concern for the Department is the continued challenge of sudden closures that leave students without a plan for how to continue their education. To that end, we are requiring institutions to certify that they are complying with State laws specific to issues related to closure: teach-out requirements, record retention policies, and tuition recovery funds or surety bonds, as applicable. The extent to which States have these laws, what they require, and to whom they apply them to is up to the States.

A second area of concern is that students are using Federal money to pay for credits that they cannot use because the program lacks necessary State approval for licensure or certification. To that end, we are requiring that, for each academic program that an institution offers that is designed to meet educational requirements for a specific professional license or certification that is required for employment in an occupation, institutions must provide a list of all States where it has determined that the program does and does not meet such requirements.

The Department will consider broader issues related to distance education and State authorization in future rulemaking efforts, during which we will consider the need for representation such as what the commenters requested.

*Changes:* None.

*Comments:* Several commenters expressed concern that the negotiated rulemaking session was conducted remotely, despite a lack of public health justifications for this style of session.

*Discussion:* The HEA does not require that negotiated rulemaking sessions be held in person, and we have received compliments on our use of technology and the efficiency of the virtual sessions. The sessions encompassed all necessary components of negotiated rulemaking. We considered different perspectives and received comparable or more input than during in-person sessions. The virtual sessions were much more accessible to people with disabilities and people who could not afford to or were unable to travel. The virtual sessions have also allowed a far greater number of members from the public to participate than would be possible if they had to travel to a physical location. Interested parties can more easily follow the sessions online as each speaker occupies their own space on the screen compared to a static image of a table. We display documents discussed on the screen and make them available on our website.

*Changes:* None.

*Comments:* A few commenters pointed out that the negotiated rulemaking process did not allow sufficient time for research, impact analysis, and thoughtful discussion. The commenters stated that one contributing factor was the NPRM combining negotiations for GE with six other major topics, which they deemed to be too much.

*Discussion:* The Department conducted 3 negotiated rulemaking sessions over a total of 14 days. We believe that was sufficient time for robust and thoughtful discussion. This was the fourth time we negotiated the topic of GE and the third for financial responsibility triggers in the last few years, so two of these issues were already known to the higher education community.

*Changes:* None.

*Comments:* One commenter argued that the NPRM rule should be rescinded in favor of a more open and transparent rulemaking process that includes all key stakeholders.

*Discussion:* The Department feels that the rulemaking process was quite open and transparent. It involved many key stakeholders and allowed room for public comment during multiple steps in the process.

*Changes:* None.

Need for Regulation

*Comments:* One commenter pointed out that oversight is important to protect student interests, but it is equally important to strike a balance with giving autonomy to schools and institutions. They stated that too much oversight can hurt an institution's ability to respond to the needs of the labor market.

*Discussion:* The Department agrees that it is important to strike a balance between oversight and giving autonomy to schools. However, the Department feels that this NPRM protects students, which is a worthwhile component of oversight.

*Changes:* None.

Impact on Students

*Comments:* Several commenters stated that they believe this regulation will impact students at career schools who are likely to be from underserved communities.

*Discussion:* The Department believes that the NPRM regulations will help protect all individuals including students at career colleges. Most provisions of this final rule do not distinguish between private for-profit and private nonprofit institutions. Several provisions do not distinguish between institution types at all.

*Changes:* None.

*Comments:* Among the many commenters who suggested the Department move the discussion of State consumer laws and licensure and certification requirements to the next round of rulemaking, two of them suggested a few topics to include in the future rulemaking. Specifically, these commenters encouraged the Department to include the issue of professionals obtaining their original license due to severe shortages of qualified and licensed professionals in service professions and mobility and regional workforce concerns. These commenters contended that the next round of rulemaking could include discussion of

paths to State licensure that would include licensure compacts, State license portability, universal licensing, licensure by reciprocity or endorsement, and specialized or programmatic accreditation and its impact on meeting State licensure requirements. According to these commenters, institutions require the flexibility to properly educate students about these expanding licensure pathways, and regulators should collaborate with the different licensing boards to learn the various processes for professions.

*Discussion:* The Department has already held public hearings on other topics for negotiated rulemaking, which include distance education. We can consider these ideas during that regulatory process.

*Changes:* None.

**Financial Responsibility (§§ 668.15 and 668.23 and Subpart L (§§ 668.171, 668.174, 668.175, 668.176, and 668.177)) (Section 498(c) of the HEA)**

*General Support*

*Comments:* Several commenters expressed support for the Department's proposal to establish more safeguards in the audit submission and financial responsibility standards. These commenters asserted that the proposed regulations would provide the necessary accountability in the system to ensure the Department becomes aware of institutions suffering from financial situations that may inhibit their ability to maintain financial stability and to adequately administer the Federal student aid programs.

One commenter stated that the proposed regulations would strengthen the Department's ability to monitor institutions and protect students against precipitous school closures. Another commenter opined that the proposal would implement much stronger taxpayer protections, which are needed to prevent losses from high-risk institutions that suddenly close and incur liabilities they cannot, or will not, repay.

One commenter supported the enhanced list of financial responsibility triggering events and associated reporting requirements. That commenter believed the changes will help protect student veterans, military-connected students, and their family members from high-risk institutions.

*Discussion:* We thank these commenters for their support.

*Changes:* None.

*General Opposition*

*Comments:* Many commenters opposed the overall financial responsibility regulations stating that the entire framework is unclear and should be simplified. Some of those commenters went so far as to say that institutions would need to retain legal counsel to understand the financial responsibility requirements. Those commenters also opined that the entire set of financial responsibility regulations is unworkable, and compliance would be difficult or even impossible. Along similar lines, many commenters criticized the financial responsibility regulatory package due to what they believe to be an unbearable burden to postsecondary institutions. One commenter suggested that the Department would be better served by pursuing a more discretionary approach to determining institutions' financial responsibility by evaluating the unique circumstances faced by any one institution. Other commenters pointed out that the burden on the Department, as it sought to ensure compliance with the financial responsibility regulations, would be such that the Department would not be able to fulfill its compliance obligation. Other commenters believed that this increased Department oversight would yield no positive impact on the financial health of participating institutions and that the cost incurred by the Department would waste taxpayer funds.

*Discussion:* We disagree with the commenters. We believe the financial responsibility regulations are important so that the Department can act to minimize the impact of an institution's financial decline or sudden closure, which protects students and taxpayers. We further believe that the mandatory and discretionary triggers are very clear in describing what action or event has to happen for the trigger to activate. We explain the reasons for the triggers' necessity in greater detail in response to more specific comments.

*Changes:* None.

*Comments:* Several commenters recommended that we delay implementation or withdraw the proposed financial responsibility regulations.

*Discussion:* We disagree with these commenters. The financial responsibility regulations are a critical set of changes that enable the Department to more closely monitor institutions who may be moving toward a level of financial instability or precipitous closure. We have seen numerous examples of institutional closures that harmed students, their families, and taxpayers. In many of those instances, we were hampered in our efforts to obtain information and financial protection from the impacted institution in a timely manner which would have softened the impact on students. The inability to act also has financial consequences for the Department and taxpayers, as we are often unable to offset the cost of loan discharges for closed schools or borrower defense.

*Changes:* None.

*Comments:* Individual commenters expressed a variety of concerns with the financial responsibility regulatory package. One commenter criticized the regulations as an attempt by the Department to secure the maximum number of letters of credit from institutions rather than an attempt to increase awareness of potential financial instability. Another lamented that the regulations did not address the financial scoring formula, which the commenter saw as flawed. One commenter criticized the general financial responsibility process since there is not a mechanism for an institution to provide a response before the Department determines that an institution is not financially responsible.

*Discussion:* The Department's goal is to obtain the amount of financial protection necessary to safeguard taxpayer investments and discourage risky behavior, not simply maximize letters of credit from institutions. We seek to have the tools necessary to identify at the earliest point that is reasonably possible when an institution is financially unstable or moving toward closure. Our interest is in protecting the impacted students and the taxpayers who fund the title IV, HEA programs.

Regarding the decision not to address the rules governing how to calculate the composite score, this issue was not included in the topics that were negotiated and therefore is not included in these regulations.

We disagree with the commenter who contended there was no mechanism for an institution to respond to the Department prior to a determination that the institution was not financially responsible. The Department believes that the provisions in § 668.171(f)(3) strike the balance between giving an institution an opportunity to provide additional information to the Department without creating a process where risky institutions avoid providing financial protection due to extended discussions. First, § 668.171(f)(3)(i)(A) allows the institution to show that the discretionary trigger related to creditor events need not apply if it has been waived by the creditor. Section 668.171(f)(3)(i)(B) allows the institution to show that when it reports the triggering event, it has been resolved.

Coupled with changes discussed later that give institutions 21 days to report triggering events instead of 10 days, we believe this will give institutions a larger window to show that the triggering event is no longer a concern. Finally, § 668.171(f)(3)(i)(C) notes that the institution can provide additional information for the discretionary triggers to determine if they represent a significant negative financial event. As discussed later in this final rule, we changed this language to only reference discretionary triggers.

The result of this language is that institutions will have an opportunity to show that the trigger is resolved and for discretionary triggers to provide more information to show why the situation is not of sufficient concern to merit financial protection. For mandatory triggers, institutions will have the opportunity to share additional information when they provide notification that the trigger occurred in order for the Department to determine if the triggering event has been resolved.

The Department believes this situation gives institutions the ability to swiftly raise concerns about triggers but allows the Department to act quickly if the situation warrants it. This is particularly important as several of the triggering conditions could indicate a fast and significant degradation of a school's financial situation, such as the declaration of receivership. Preserving the Department's ability to act rapidly is, therefore, critical to protecting taxpayers from potential losses.

*Changes:* None.

*Comments:* One commenter said the Department should maintain important provisions required by statute which would not be reflected if § 668.15 is removed and reserved.

*Discussion:* The Department disagrees with the commenter. This change was an effort to streamline the text and amended § 668.14(b)(5) will now refer to all factors of financial responsibility in an expanded subpart L.

*Changes:* None.

Legal Authority

*Comments:* Several commenters expressed that the Department does not have statutory authority to enact these regulations. Commenters cited 20 U.S.C. 1099c(c) (HEA section 498(c)) to support their position that the Department, in determining an institution's financial responsibility, is limited to the methods prescribed in the HEA. Commenters also asserted that the Department does not have authority under 20 U.S.C. 1099c(c) (HEA section 498(c)) or its regulations (§ 668.171(f)) to establish triggers.

*Discussion:* We disagree with the commenters. HEA section 498(c)(1) provides the authority for the Secretary to establish standards for financial responsibility. HEA section 498(c)(3) authorizes the Secretary to determine an institution to be financially responsible in certain situations if the institution has met standards of financial responsibility, prescribed by the Secretary by regulation, that indicate a level of financial strength not less than those required in paragraph (2) of the same section. It is this provision of the statute that directs the Secretary to ensure through regulation that an institution is financially responsible to protect the students attending the institution and the taxpayers who have made the funding possible for the title IV, HEA programs. Additionally, 20 U.S.C. 1099c(c)(1)(C) provides that an institution is financially responsible if it is able to meet all of its financial obligations. The mandatory triggers we have laid out are all situations that represent considerable risk to an institution's operations that might not be reported to the Department in an annual audit for over a year. These risks require financial protections and constructive engagement with an institution about plans to address and mitigate that risk. The same could potentially be true of discretionary triggers, which is why they are reviewed on a case-by-case basis. The triggers, in fact, fill an important gap that exists in the current financial responsibility regulations, which are heavily reliant upon the composite score to assess an institution's financial health. While the score provides useful information, it also inherently lags. New composite scores are only produced after a fiscal year ends and the audit finishes, and the due dates are six months (proprietary) or nine months (non-profit) after the end of the institution's fiscal year. That means the annual composite score is not adequate to provide a real-time analysis of an institution's health. The triggers, meanwhile, provide a more immediate way to assess whether something has occurred that could threaten an institution's financial viability without waiting for the next composite score calculation when it may be too late to seek financial protection.

Furthermore, HEA section 487(c)(1)(B)[5] authorizes the Secretary to issue necessary regulations to provide reasonable standards of financial responsibility for the administration of title IV, HEA programs in matters not governed by specific program provisions. The provision in the HEA also recognizes the Secretary's authority to set financial responsibility standards that include ''any matter the Secretary deems necessary to the sound administration of the financial aid programs, such as the pertinent actions of any owner, shareholder, or person exercising control over an eligible institution.'' As discussed above, these triggers are providing clarity to institutions about how the Department will assess whether an institution is meeting the requirements spelled out in 20 U.S.C. 1099c(c)(1). This provides protection to the Federal Government against unpaid financial liabilities. These triggers are not addressing matters that are governed by existing statutory program provisions, which is how we interpret the language in 20 U.S.C. 1094(c)(1)(B). For instance, the matter addressed by the program provisions for the 90/10 rule is the maximum share of revenue a proprietary institution may receive from Federal educational assistance programs. The matter addressed by cohort default rates is the percentage of borrowers who default on their loans. The matter addressed by institutional refunds in 20 U.S.C. 1091 is how an institution calculates amounts to be returned. None of those program provisions address the overall threat to an institution's financial health and the prospect that it cannot fulfill the provisions in 20 U.S.C. 1099c(c)(1) due to the program non-compliance. The program provisions referenced in in 20 U.S.C. 1094(c)(1)(B) do not limit the Department from addressing risks to the overall financial health of the institution that are not directly dealt with in the statutory program requirements.

By contrast, we view the language in 20 U.S.C. 1094(c)(1)(B) as preventing the Department from creating provisions that duplicate or contradict statutory program provisions. This would include changes such as establishing a maximum threshold for the share of revenue coming from Federal educational assistance programs that is lower than the 90/10 test, or a cohort default rate threshold that is below the 30 percent one established in the HEA.

*Changes:* None.

*Comments:* Commenters argued that the concept of a trigger that immediately results in the request for financial protection is contradicted by 20 U.S.C. 1099c(c)(3), which lays out four conditions in which an institution may still show that it is financially responsible even if it does not meet the requirements in subsection (c)(1) of that same section. They argued that at the very least an institution that shows it meets one of the criteria in 20 U.S.C.

[5] 20 U.S.C. 1094(c)(1)(B).

1099c(c)(3) should not be subject to a trigger.

*Discussion:* The Department believes the structure of the triggers in this final rule comports with the requirements in 20 U.S.C. 1099c(c)(3). For one, institutions that are subject to a trigger still have the option under 20 U.S.C. 1099c(c)(3)(A) to demonstrate that they meet the financial responsibility standards by providing a larger letter of credit. Those that provide such a letter of credit would not be subject to the trigger but instead would have to provide a larger amount of financial protection to mitigate the risks associated with the reported activity. Second, as discussed elsewhere in this final rule, we are not applying the financial protection requirements stemming from a trigger for institutions that have full faith and credit backing as described in 20 U.S.C. 1099c(c)(3)(B). Third, the provision in 20 U.S.C. 1099c(c)(3)(C) is one of the issues the Department is seeking to address. The triggers allow us to capture situations that occur in between the submission of such financial statements. The Department does not believe it is acceptable to wait the potentially extended period in between an event that could put an institution out of business and the submission of another round of financial statements. For instance, if an institution enters receivership two months after the submission of its financial statements, then it could be a year or more before the Department receives financial statements that would meet the requirements of this paragraph. Other reporting directly addresses instances where funds may have been temporarily held by an entity to bolster its composite ratio for the annual financial statement audit but subsequently removed. Similarly, an institution that is at risk of losing access to financial aid due to high default rates or a high 90/10 ratio or that has significant revenue tied to failing GE programs could lose eligibility for those programs before it submits another financial statement. These time lags are also why the Department believes it is appropriate to maintain the financial protection from a trigger for at least two years, so it is possible to ensure we receive updated financial statements to assess the institution's situation. The reporting includes significant financial events that may happen during the two-year window following a change in ownership for an institution where additional financial protections can mitigate risks from unforeseen events during that period. The reporting provisions and accompanying requirements also constitute an alternative standard of financial responsibility under 20 U.S.C. 1099(c)(2)(D) that considers information that will in most cases be reported more promptly than available under the financial statement audits that are submitted at least half a year after the end of the fiscal year being used for the institution.

*Changes:* None.

*Comments:* Several commenters argued that HEA section 487 (20 U.S.C. 1094(c)(1)(B)), must be considered alongside section 498 of the HEA and that this former section prohibits the use of triggers. Paragraph (c) of that section states ''[n]otwithstanding any other provisions of this subchapter, the Secretary shall prescribe such regulations as may be necessary to provide for . . . ''(B) in matters not governed by specific program provisions, the establishment of reasonable standards of financial responsibility and appropriate institutional capability for the administration by an eligible institution of a program of student financial aid under this subchapter, including any matter the Secretary deems necessary to the sound administration of the financial aid programs.'' The commenters argued that there are specific program provisions for the elements of the composite score, cash reserves, institutional refunds and return of title IV funds, borrower defense claims, change in ownership, gainful employment, teach-out plans, State actions/citations, the 90/10 rule, the cohort default rate, fluctuations in title IV volume, high annual dropout rates, discontinuation of programs, closure of programs, and program eligibility. Commenters argued that because there are existing program provisions for those items, the Department may not prescribe regulations establishing reasonable standards of financial responsibility based upon whether institutions meet those program requirements. In a footnote to this comment, the commenters also noted that ''a more logical reading'' of what the term ''specific program provision'' means would only affect institutional refunds and return of title IV funds, teach-outs, State actions, accrediting agency actions, and gainful employment.

*Discussion:* As discussed above, we disagree with the commenters' interpretation of the interplay with section 487 and section 498 and have explained how the Department views those two items interacting.

The commenters seem to argue that any matter touched on in the HEA is precluded from use in any other form as a financial responsibility trigger. But this reading is so broad as to be nonsensical, and inconsistent with the statutory text itself. As discussed above, section 487 specifically ensures that the Department does not impose financial responsibility provisions that are inconsistent with or contradict statutory program provisions. Other program provisions that are not inconsistent with the financial responsibility triggers in the Department's regulations are not implicated.

But even under the commenters' line of argumentation, the items they claim are existing program requirements that prevent the use of a mandatory trigger are not in fact program requirements that govern the matter addressed by the trigger. The triggers relate to how the Department can assess the requirements that exist in 20 U.S.C. 1099c(c)(1). That section mentions the need for the Secretary to determine if the institution has the financial responsibility based upon the institution's ability to do three things. First, to provide the services described in its official publications and statements. Second, to provide the administrative resources necessary to comply with the requirements of title IV of the HEA. And third, for the institution to ''meet all of its financial obligations, including (but not limited to) refunds of institutional charges and repayments to the Secretary for liabilities and debts incurred in programs administered by the Secretary.'' The triggers are thus not regulating on those specific program provisions; rather, we are including them as the Department considers the holistic picture of an institution's financial health and compliance with financial responsibility requirements.

Several examples under the commenters' initial interpretation of section 487 show that even what they identify as program requirements is incorrect. For instance, the commenters cite 20 U.S.C. 1094(a)(21) as proof there are program requirements for State citations or actions as well as accrediting agency actions. That paragraph says institutions will meet requirements related to accrediting agencies or associations and that the institution has authority to operate within a State. Those are basic elements of institutional eligibility and participation. However, that does not prohibit the Department from considering the impact of accreditor or State agency actions on the participating institution's financial health. For example, a program that represented a

substantial portion of an institution's enrollment could lose State authorization and the related loss of Federal student aid revenue could imperil the institution's overall financial strength. Similarly, facing actions from accrediting agencies also could threaten an agency's financial health, as they would lose access to eligibility for the title IV, HEA programs and risk having their degrees viewed as illegitimate, making it harder to attract students. The citation provided for teach-outs is 20 U.S.C. 1094(f), which applies to a very specific circumstance where the Secretary must seek a teach-out upon initiation of an emergency action or a limitation, suspension, or termination action. That is a much narrower situation than the reporting trigger for the teach-out provision in this final rule and encompasses teach-outs that could also be sought by States or accreditation agencies. Those matters are not governed by the provision cited by the commenters. The commenters point to 20 U.S.C. 1099c–1 for fluctuations in title IV volume and high annual dropout rates, where the HEA lists indicators the Department should use to prioritize program reviews. Identifying items that may warrant program reviews is distinct from establishing financial protection triggers for those items. It is not the same thing as a program requirement.

Accepting some of the program specific rules cited by the commenter would create paradoxes. For example, commenters point to § 668.172 to say there are already program requirements for equity, primary reserve ratio, and income ratios. But those are regulations established by the Department to determine if an institution has a failing composite score, which is only one part of determining financial responsibility under section 498(c) of the HEA.

The commenters' argument based upon what they identify as ''a more logical reading'' that limits their critique to institutional refunds and return of title IV funds, teach-outs, State actions, accrediting agency actions, and gainful employment is also flawed. We have already discussed the citation related to teach-out plans, State actions, and accrediting agency actions so we turn to the other triggers mentioned. The commenters cite 20 U.S.C. 1091b and 1094(a)(24) as program provisions that prevent the presence of triggers related to institutional refunds and return of title IV funds. The former establishes requirements for how institutions are to calculate refunds and return of title IV, while the latter is a program participation requirement saying that the institution will abide by the refunds requirements in 20 U.S.C. 1091b. Neither of those is a program requirement in the manner that the trigger is operating. The Department's concern with the trigger is that failure to pay refunds is a sign that the institution may not meet the standards of 20 U.S.C. 1099c(c)(1)(C), related to meeting all of its obligations, which includes an explicit mention of refunds. The trigger is thus directly connected to the Department's way of assessing if an institution meets that statutory requirement.

The commenters cite 20 U.S.C. 1094(a)(24) as the program requirement related to the 90/10 rule. That is the section that spells out the 90/10 rule's requirements. But this financial responsibility trigger does not address how schools must calculate their Federal and non-Federal revenue. Instead, this rule addresses the potential effects of failing this provision on the financial health of the institution.

The commenters cite § 668.14(b)(26) as the program requirement that prevents a trigger related to gainful employment. Those provisions are related to limiting the maximum length of such a program and establishing the need for the training. As with the statutory requirements discussed above, the regulatory requirements relating to gainful employment set forth conditions of participation. They do not address the potential financial risk—the risk of closure—if the regulatory requirements are not met. The trigger is intended to address the financial risk. Though not cited by commenters, the same would be true of the gainful employment program accountability framework in part 668, subpart S. Those items are concerned with whether programs are able to maintain access to title IV, HEA programs. The purpose of the trigger is to provide a way to for the Department to assess whether the institution is at risk of not being able to meet the requirements of 20 U.S.C. 1099c(c)(1).

*Changes:* None.

*Comments:* Commenters argued that because 20 U.S.C. 1094(c)(1)(B) says the Secretary should establish reasonable standards of financial responsibility that means any financial responsibility requirements must meet the ''substantial evidence'' standard under the Administrative Procedure Act (APA). The commenter reached this conclusion by pointing to *Dickinson* v. *Zurko,* 527 U.S. 150, 162 (1999) to argue that the best corollary to a reasonableness standard in administrative law is the concept of ''substantial evidence'' because that is considered to be a degree of evidence that a reasonable person would accept as adequate. The commenter argued the substantial evidence standard is a higher bar than arbitrary and capricious. Commenters then proceeded to assert that many elements of the financial responsibility requirements are unreasonable, such as the triggers related to lawsuits, changes in ownership, Securities and Exchange Commission (SEC) events, and creditor events. Commenters also used the word unreasonable to describe the reporting requirements associated with the triggers, though this framing appeared to use the word differently as a stand in for excessive in terms of the amount of burden.

*Discussion:* The Department disagrees with the commenters' legal arguments. The ''substantial evidence'' standard of the APA applies only to record-based factual findings resulting from formal rulemaking under sections 556 and 557. *Dickinson* v. *Zurko,* 527 U.S. 150, 164 (1999). For informal rulemakings, which the Department conducted here, the arbitrary and capricious standard of review applies when determining whether the resulting regulation is lawful. There is no evidentiary threshold with respect to what regulations the Department may propose during the negotiated rulemaking process and publication of the proposed and final regulations. We also disagree with the argument that triggers such as lawsuits, changes in ownership, SEC events, and creditor events are unreasonable either in the manner of the legal standard the commenters argued or as excessive. We therefore disagree with the argument that the triggers are unreasonable based on the comments about there being a legal standard of reasonableness. Nor do we think those triggers are unreasonable in terms of being excessive. The triggers laid out here are all areas that indicate substantial risk to an institution's financial health. They are easily ascertainable and the events that do not require a recalculation of the composite score are not particularly common. We thus believe they are appropriate triggers to adopt.

*Changes:* None.

*Comments:* One commenter argued that the Department's regulatory language around letters of credit amounts resulted in requesting insufficient levels of financial protection. They argued that § 668.175(b) is contrary to the statutory requirements, because it says that an institution must provide financial protection equal to at least 50 percent of title IV, HEA funds received in a year, whereas section 498(c)(3)(A) of the HEA says that the Secretary must receive one-half of the annual financial liabilities

from the institution. The commenter argued that the amount of liability could be much greater than the amount of aid received, meaning that the amount of financial protection received by calculating based on title IV, HEA aid received would be insufficient.

The same commenter similarly argued that the Department has not sufficiently explained why 10 percent is the appropriate minimum amount for financial protection instead of using a higher amount to cover potential losses.

*Discussion:* We disagree with the commenter. The 50 percent and 10 percent figures are minimum amounts. The Department always has the ability to request a higher amount if we believe that is necessary. However, we believe setting minimum amounts based upon annual title IV, HEA volume creates a simple and straightforward way for the Department to determine the amount and the institution to know the minimum amount of financial protection that might be needed. Setting the amount of financial protection based on ''annual potential liabilities'' is difficult because the Department may not be able to predict future liabilities at the time financial protection is required. The Department believes that using annual title IV, HEA funding, as it has historically done, provides a more straightforward formula for setting the amount of financial protection. With respect to the 10 percent amount, we similarly note that the Department can and does request higher amounts when we believe it is warranted. As we noted in the 2016 final rule that also addressed financial triggers (81 FR 75926), the 10 percent minimum is rooted in the 1994 regulations regarding provisional certification of institutions that did not meet generally applicable financial responsibility standards (34 CFR 668.13(d)(1)(ii) (1994)).

*Changes:* None.

*Comments:* Commenters argued that the language in § 668.171(b) appears to create a new form of financial responsibility standards that are distinct from the statutory framework and are unclear how they would be applied.

*Discussion:* The provisions in § 668.171(b)(3) lay out the situations in which an institution is not able to meet its financial obligations. These lay out additional detail for how the Department implements the statutory requirement in 20 U.S.C. 1099c(c)(1)(C) that says one factor the Secretary uses when determining if an institution is financially responsible is its ability to meet all of its financial obligations. The items in § 668.171(b)(3) are all key indicators of an institution that is not meeting its financial obligations. These are all critical types of financial obligations where the Department is concerned that past instances of these situations are strongly associated with massive financial challenges.

We also disagree that the standards of these provisions are unclear. All the items in paragraphs (b)(3)(i) through (v) are laid out clearly. The only one that has perhaps the most area of variability is paragraph (b)(3)(i), where the Department would not consider a single incorrect refund as evidence of a lack of financial responsibility but would instead be considering patterns of this behavior. Paragraph (b)(3)(vi), meanwhile, is a reference to the triggers in § 668.171(c) and (d), which we describe in detail throughout this final rule as connecting to concerns about financial responsibility.

*Changes:* None.

*Comments:* Commenters argued that the potential for stacking letters of credit from triggering conditions violates section 498(e) of the HEA, which only requires financial guarantees sufficient to protect against the potential liability.

*Discussion:* We disagree with the commenters. We view each of these triggers as representing risks to an institution through different channels. As we note elsewhere in this final rule, if multiple triggers occur as a result of the same underlying event, we could consider that situation and choose to request a lower level of financial protection. However, an institution that is truly facing multiple independent triggers is going to be in precarious financial shape. For instance, an institution that has entered into a receivership, declared financial exigency, and is being required to make a significant debt payment that results in a failed composite score recalculation is exhibiting multiple warning signs that it could be headed toward a closure. In such situations, the institution could incur liabilities equal to or even more than 30 percent of one year of title IV, HEA volume just from closed school discharges. In other situations, it is possible that the associated liabilities could easily exceed a single year of title IV, HEA funds received. For example, an institution that is now subject to a recoupment action under borrower defense because it engaged in substantial misrepresentations for a decade could be looking at a liability that is equal to what they received for years.

*Changes:* None.

*Compliance Audits and Audited Financial Statements (§ 668.23)*

*Comments:* A few commenters opposed the Department's proposal in § 668.23(a)(4) that the submission deadline for compliance audits and audited financial statements be modified to the earlier of six months after the institution's fiscal year end or 30 days after the completion of the audit. These commenters pointed out that this change would increase the burden on schools and auditors.

Some of the commenters believed that the benefit of early identification of financial concerns would be far offset with the administrative burden and possible missed deadlines that many schools would encounter.

A few commenters expressed opposition to the modified deadline, saying it was unfair to proprietary institutions as the modified requirement has no impact on institutions subject to the Single Audit Act.

Some commenters opined that the deadline of 30 days after the completion of the audit was not a clearly defined date. The reason cited by the commenters was that accounting firms differ on how they define completion of the audit. This would result in different deadlines being established depending on what firm calculated the date. The commenters also stated that the review and finalization of a final audit report by the accounting firm occurs after the audit work has been completed thereby using part of the institution's period for submission. The commenters believed that the 30-day deadline had too many variables outside of the audited institution's control to be able to submit a timely audit to the Department.

One commenter expressed the opinion that the issue was more about how quickly the Department processes the audits it receives and suggested that a collaborative relationship between the Department and institutions would be a better way to achieve the desired outcome rather than a more restrictive deadline.

*Discussion:* The Department declines to adopt the changes suggested by the commenters. This provision aligns the treatment of audit submission deadlines for all institutions regardless of whether they are public, private nonprofit, or proprietary. In particular, public and private nonprofit institutions have already been complying with this requirement under deadlines that exist for institutions subject to the Single Audit Act. Under 2 CFR 200.512(a)(1), audits must be submitted at the earlier of 30 calendar days after receipt of the audit report, or nine months after the end of the audit period (plus extension). This provision thus creates equitable treatment across institution types. When there are separate auditor signature dates on the audited financial

statements and the compliance audit, the relevant date is the later of those two dates.

Providing 30 days for the submission of these statements is sufficient time. At this point, the auditor is doing limited further work on the audit. This change gives institutions approximately 30 days to complete the simple task of uploading the finished document. That can easily be completed in this window.

Overall, the Department maintains the importance of this provision. Having up-to-date financial information is critical for properly enforcing financial responsibility requirements needed to conduct proper oversight of institutions participating in the title IV, HEA programs. Allowing institutions to wait months after an audit is completed to submit it would delay the Department learning critical information, particularly if an institution is exhibiting signs of financial distress. This provision does not change the overall deadlines that affect the latest point an audit can be submitted. It simply ensures that audits must be sent to the Department shortly after completion.

*Changes:* None.

*Comments:* Several commenters objected to the proposed requirement in § 668.23(d)(1) that an institution's fiscal year, used for its compliance audit and audited financial statements, match the year used for its U.S. Internal Revenue Service (IRS) tax returns. One of those commenters expressed the concern that the IRS does not permit changes in tax years or will only permit such a change after a long approval process. Another of those commenters stated that it was common for one entity to have a particular fiscal year for tax purposes and a corporate parent may have a different tax fiscal year. Another commenter suggested that this change was an attempt to force all institutions to use a December 31 fiscal year end date.

*Discussion:* Requiring the institution to match its fiscal year to its owner's tax year (the entity at which the institution submits its audited financial statements) allows the Department to conduct consistent oversight. Some of the Department's requirements (for financial protection or following changes of ownership, for example) are based on one or two complete years of audited financial statements. Requiring the institution's fiscal year end to match the owner's tax filing deadline prevents institutions from manipulating the required timelines, and it relieves the Department from having to make case by case determinations. The practice of determining if the use of different fiscal years for Departmental and IRS purposes is done for manipulative reasons also takes time and resources from the Department's ability to review other institutions. We believe that the occurrence is common enough to warrant this change. This rule is not dictating to institutions which date they must use but is just requiring institutions to be consistent and align the end dates for fiscal and tax years. This rule applies to fiscal years that begin after the effective date of these regulations and we believe that institutions will have sufficient time to comply.

*Changes:* None.

*Comments:* Several commenters objected to the proposal in § 668.23(d)(1) to require the reporting of all related-party transactions. One of those commenters believed that with no limitation on the size of the transactions to be reported, such a provision would be problematic because accounting processes would have to change to capture and report such de minimis expenses as lunches for board members. The commenter went on to suggest that the Department use the publicly available IRS form 990 that nonprofits must already complete annually to address this concern, rather than creating a regulatory requirement. Another commenter inquired as to how a related party disclosure, required in the annual audited financial statements, would be reported if no transactions occurred during the current year. The commenter stated that related parties may exist due to ownership affiliations while no transactions between the companies may be occurring in the current year. The commenter wondered if such a relationship still needed to be disclosed. One of these commenters objected to requiring auditors to disclose related parties since that is not required in generally accepted accounting principles (GAAP) and goes beyond the level of assurance provided by audited financial statements.

*Discussion:* The requirement that an institution must report its related party disclosures is not a new proposal in this regulation. Rather, the NPRM clarified that the items currently listed as possible to include when disclosing related party transactions must be included. That means including identifying information about the related party and the nature and amount of any transactions. The existing reference to related entities in § 668.23(d)(1) requires the institution to submit a detailed description of related entities based on the definition of a related entity set forth in Accounting Standards Codification (ASC) 850. However, the disclosures under the existing regulations require a broader set of disclosures than those in ASC 850. Those broader disclosure requirements include the identification of all related parties and a level of detail that would enable the Secretary to readily identify the related party, such as the name, location and a description of the related entity, the nature and amount of any transactions between the related party and the institution, financial or otherwise, regardless of when they occurred and regardless of amount. To the commenter concerned with disclosing de minimis transactions, such as meals for a board member, we do not intend to require reporting on such transactions. Routine items such as meals provided to all board members during a working lunch would not be a related party transaction since the meals would be incidental to supporting a board meeting. Transactions with individual board members for other services provided to the institution or a related entity would be reportable. We agree with the commenter that the existing regulatory text was unclear about what an institution should do if they do not have any related party transactions for that year. To clarify this issue, we have added an additional sentence to the end of paragraph (d)(1) noting ''If there are no related party transactions during the audited fiscal year or related party outstanding balances reported in the financial statements, then management must add a note to the financial statements to disclose this fact.''

We are adding this provision as well as adopting the changes already mentioned in the NPRM because it is critical that the Department receive accurate and identifiable information about related party transactions, including by an affirmative confirmation when no related party transactions exist. These transactions are relevant to whether audited financial statements should be submitted on a consolidated or combined basis. Related party transactions may also require adjustments to the calculation of an institution's composite score. In addition, when a school is participating as a nonprofit institution, or seeks to participate as a nonprofit institution, related party disclosures help the Department identify financial relationships that could be an impediment to nonprofit status for title IV, HEA purposes.

The Department does not believe the information provided on a Form 990 is sufficient for this purpose. In fact, we have seen situations where the

Department uncovered related party transactions existed, but they had not been reported on the entity's 990s.

If no transactions occurred during the year, and no current receivable or liability is included in the financial statements then institutions would not need to include anything related to this relationship in the financial statements for that year.

*Changes:* We have added a requirement in § 668.23(d)(1) for management to add a note to the financial statements if there are no related party transactions for this year.

*Comments:* A few commenters expressed that changes to § 668.23(d)(1) say that financial statements must now be ''acceptable'' and sought clarification on what the Department means by acceptable.

Two commenters sought assurance that financial statements completed in accordance with GAAP and generally accepted government auditing standards (GAGAS) were acceptable and that there was not some additional requirement.

Another commenter suggested that we remove any requirement beyond GAAP and GAGAS from these final regulations and negotiate it separately.

*Discussion:* To adequately evaluate the financial position of an institution, not only must the financial statements meet the requirements of GAAP and GAGAS, but they must be at the level of the correct entity and show actual operations to be acceptable. As already discussed, the Department strongly believes the triggers and other provisions in these final regulations related to financial responsibility that go beyond GAAP and GAGAS are necessary to carry out the statutory requirement that institutions are financially responsible and do not have to be negotiated separately. These provisions were negotiated, albeit without consensus, in the negotiated rulemaking process leading to the proposal of these regulations.

*Changes:* None.

*Comments:* One commenter stated that the NPRM violates the OMB Memorandum M–17–12 which discourages making personally identifiable information (PII) publicly available. The commenter referred in part to the requirement that institutions disclose related party transactions under § 668.23(d)(1).

*Discussion:* The Department disagrees. The requirement to disclose related party transactions is already in existing regulations. No provision of these final regulations involves releasing PII nor requiring institutions to disclose PII to parties other than the Department.

*Changes:* None.

*Comments:* Many commenters supported the Department's proposed requirement in § 668.23(d)(5) that institutions disclose amounts spent on recruiting, advertising, and pre-enrollment activities. Relatedly, other commenters said the Department should require institutions to disclose in their financial statements the amounts spent on instruction and instructional activities at the program level. One of those commenters further believed that the disclosure should include amounts spent by the institution on academic support and support services.

Many other commenters, however, objected to this proposal. Several commenters said these items are not linked to the institution's actual financial stability. Many of the commenters stated that the Department did not define these terms and sought clarification on exactly what activities would be included in recruiting, advertising, and pre-enrollment activities. Commenters also raised concerns about auditors attesting to these items for the year prior to the one being audited.

*Discussion:* We appreciate the commenters' input. After careful consideration of the comments received, we removed the provision in § 668.23(d)(5) that required a footnote in an institution's audited financial statements that stated the amounts spent on recruiting activities, advertising, and other pre-enrollment expenditures. We also removed the cross-reference to this audited financial statement requirement in the certification requirements in proposed § 668.13(e)(iv). However, we will retain the language in proposed § 668.13(e)(iv), now renumbered as § 668.13(e)(2) in the final rule, stating that the Department may consider these items in its determination whether to certify, or condition the participation of, an institution. We discuss the reason for continuing to include that provision in greater detail in that section of the preamble to this final rule.

The Department is removing the provision in § 668.23 because we are persuaded by the concerns raised by commenters about the lack of clear standards for what auditors would need to attest to as well as the timing of the periods covered by audits versus this requirement. Moreover, the requirement in § 668.23 was added to provide a data source for the supplementary performance measures in § 668.13(e), which are designed to lay out indicators the Department could consider on a case-by-case basis. Since that issue would be considered for individual institutions, the Department believes it would be better to request these data when deemed necessary for a given institution rather than requiring all institutions to disclose them.

The Department declines to adopt the additional disclosures on amounts spent on instruction for similar reasons. We believe this issue is better considered on a case-by-case basis in § 668.13(e) as concerns about excessive spending on marketing or recruitment compared to instruction have in the past been limited to a minority of institutions.

*Changes:* We have omitted proposed § 668.23(d)(5) as well as the reference to that proposed paragraph in proposed § 668.13(e)(iv), now renumbered as § 668.13(e)(2) in the final rule.

*Comments:* One commenter objected to the Department's requirements that financial statements be audited using GAAP and GAGAS. The commenter pointed out that a number of institutions have one or more upper-level foreign owners who may have financial statements prepared in accordance with International Financial Reporting Standards (IFRS) and are audited in accordance with the European Union (EU) Audit Regulations. As an example, the commenter stated that the SEC has accepted from foreign private issuers audited financial statements prepared in accordance with IFRS without reconciliation to U.S. GAAP. The commenter questioned the Department's authority for requiring upper-level owners' financial statements be prepared in accordance with GAAP/GAGAS and requested that we provide in the final rule that we permit IFRS/EU standards with respect to financial statements of upper-level foreign owners.

*Discussion:* The Department's regulations maintain different financial statement requirements for foreign and domestic institutions. For foreign institutions, we spell out when financial statements may be prepared and audited under different standards in § 668.23(h). However, for domestic U.S. institutions we believe GAAP or GAGAS is appropriate for ensuring we are reviewing all domestic institutions consistently. The Department's longstanding policy is not to accept IFRS/EU standards for domestic U.S. institutions, and we think the loss of comparability that would occur from starting to do so would make it hard to apply the financial responsibility requirements consistently.

*Changes:* None.

**Financial Responsibility—General Requirements (§ 668.171(b))**

*Comments:* One commenter opined that the requirements proposed in paragraph (b) appeared to occupy a category of financial responsibility separate from the other requirements proposed in § 668.171. The commenter said there was little explanation of how the general requirements in paragraph (b) would be applied to institutions and what the consequences for noncompliance would be.

*Discussion:* The consequences for non-compliance under § 668.171(b) are the same as any other failure of the financial responsibility standards, including the composite score. That is how this provision has always been applied. Institutions would be given the options as outlined under § 668.175.

*Changes:* None.

*Comments:* One commenter expressed support for the provision in § 668.171(b)(3)(i) that an institution is not financially responsible if it has failed to pay title IV, HEA credit balances to students who are owed those funds. Another commenter, however, requested the Department to confirm that minor infractions of the credit balance rule would not result in an institution being deemed financially irresponsible. The commenter pointed that student credit balance deficiencies has been a top program review and audit finding for some years. The commenter believed that this finding alone did not and should not subject institutions with this finding as automatically not financially responsible. The commenter concluded with supporting language for this provision when it is determined that an institution is withholding title IV, HEA credit balances to utilize those funds for purposes other than paying them to the students owed those funds.

*Discussion:* An institution's failure to pay necessary refunds or credit balances of title IV, HEA funds to students has been a strong sign in the past of institutional financial distress. The Department has seen institutions hold onto these funds to keep themselves in better financial shape, even as it harms students. As it reviews instances that fall under this category the Department will consider if it is an isolated instance or evidence of a larger pattern and consider that in making determinations of financial responsibility.

*Changes:* None.

*Comments:* Several commenters took issue with the provision stating that an institution is not financially responsible if it fails to make debt payments for 90 days. These commenters were concerned that in some instances delayed payments were the result of external factors and did not indicate that the institution was financially irresponsible. The commenters stated that the proposed regulation lacks clarity and does not distinguish between intentional non-payment and instances where the delay is linked to some administrative or logistical challenge. For example, commenters believed that in certain cases, delayed debt payments could arise from factors beyond an institution's control, such as delays in invoice processing or delivery, and this could place an institution in the status of being not financially responsible.

On a similar note, one commenter raised a concern over the provision whereby an institution would be financially irresponsible if it failed to satisfy its payroll obligations in accordance with its published payroll schedule. The commenter suggests that the Department add language to the final regulation establishing a grace period of 10 calendar days so that if an institution resolved its payroll obligations during the grace period, it would remain financially responsible.

*Discussion:* Since participating institutions typically have title IV, HEA funding as their primary revenue source, ''external factors'' should not negatively impact the institution or owner entity's obligation to make a required debt payment within 90 days. As to the other comment, the failure to satisfy payroll obligations in accordance with a published schedule is an early and very significant indicator of financial instability. To that end, we do not believe a 10-day grace period as suggested by the commenter would be appropriate as that could simply result in the institution moving money across accounts to hide issues.

*Changes:* None.

*Comments:* Many commenters requested clarification on whether there was a materiality threshold for any provision in § 668.171 and what we meant when we used the term ''material'' in the proposed regulatory text.

*Discussion:* It would be inappropriate to adopt a materiality standard for § 668.171. A materiality threshold commonly depends upon determinations made by auditors, often in response to information provided by management. Adopting a materiality standard would move the discretion away from the Department to the auditor and the institution's management. Doing so would undercut our ability to quickly seek financial protection when needed. However, we agree with the commenters that use of the word material in the NPRM implies a materiality threshold is in place when it is not. Therefore, we will replace ''material'' with ''significant'' in describing ''adverse effect'' or ''change in the financial condition'' in § 668.171. A significant adverse effect is an event or events impacting the financial stability of an institution that the Department has determined poses a risk to the title IV, HEA programs.

*Changes:* We have replaced ''material'' with ''significant'' in §§ 668.171(b), (d), and (f) and 668.175(f), where we refer to adverse effects or changes in financial condition.

**Financial Responsibility—Triggering Events (§ 668.171(c) and (d))**

*Comments:* Several commenters supported the Department's proposed financial triggers, believing that they allow us to swiftly act to protect students when a postsecondary institution's financial stability is called into question. Another commenter expressed that taxpayers would be better protected by the proposed financial triggers in that liabilities arising from school closures would be partially or wholly offset with the financial protection obtained due to the financial trigger regulations.

*Discussion:* We thank the commenters for their support.

*Changes:* None.

*Comments:* Many commenters objected to the proposed financial triggers for a variety of reasons. Several of those comments raised the objection that the financial triggers, as proposed, exceed the Department's statutory authority to ensure an institution participating in the Federal student aid programs is financially responsible.

*Discussion:* We disagree with the commenters and explain our rationale in greater detail in response to summaries of more specific comments. But overall, we believe the financial responsibility regulations are a proper exercise of the Department's authority under the HEA to protect taxpayers from potential losses from closures or other actions that create a liability owed to the Department.

*Changes:* None.

*Comments:* Many commenters objected to the mandatory financial triggers due to their belief that the triggers exceed the authority granted the Department by statute. Some of these commenters cited 20 U.S.C. 1099c(c) (HEA section 498(c)) to support their position that the Department is limited to the prescribed methods in determining an institution's financial responsibility. Commenters also stated that the proposed trigger events are not

related to financial responsibility. Several commenters also argued that mandatory triggers go against Congress's directions that the Secretary determine an institution is not financially responsible.

*Discussion:* As discussed previously, HEA section 498(c)(1) provides the Department with the authority to establish standards for financial responsibility, and that authority goes beyond ''ratios'' in section 498(c)(2) of the HEA. Our determination that an institution is or is not financially responsible is not solely about composite scores. That is only one component of it. Another important factor in our determination is whether an institution participating in the title IV, HEA programs is financially unstable beyond, and since, what its most recent composite score revealed. HEA section 498(c)(3) authorizes the Secretary to determine an institution to be financially responsible in certain situations if the institution has met standards of financial responsibility, prescribed by the Secretary by regulation, that indicate a level of financial strength not less than those required in paragraph (2) of the same section. It is this provision of the statute that directs the Secretary to ensure through regulation that an institution is financially responsible sufficient to protect the students attending the institution and the taxpayers who have made the funding possible for the title IV, HEA programs. The financial triggers are examples of just such requirements.

Financial instability may be caused by an event that occurs after the most recent composite score, and the purpose of the triggers is to identify those events which might impact the viability of the institution. For example, an event that could lead to closure or serious financial instability may not have occurred during the fiscal year upon which the most recent composite score is based. The inability of the composite score to be predictive in this regard also results from the fact that the due date for audited financial statements is up to 6 or 9 months, depending on the type of institution, after the close of the fiscal year.

Overall, we believe all the mandatory triggers have a clear nexus to financial risk. The financial triggers represent several circumstances of obvious concern. There are some, such as 90/10, cohort default rates (CDR), and gainful employment, where the institution could be at imminent risk of loss of title IV, HEA funds from compliance factors administered by the Department. While that does not guarantee a closure, loss of title IV, HEA funding often does relate to closure. The declaration of financial exigency and receivership are also signs of significant financial distress and possible closure. Lawsuits and debt payments involve composite score recalculations that could cause an institution to subsequently fail the composite score. The State actions and teach-out requirements are again proof that there are imminent concerns about financial impairment if not outright closure. Finally, there are several triggers that are designed to support the integrity of the Department's financial responsibility composite score methodology, such as triggers related to financial contributions followed by a financial distribution as well as creditor events.

We also note that each of these triggers operate independently of each other. They have their own reporting requirements, and it is possible for an institution to activate a single trigger without activating others. As a result, they each provide a unique and separate value in assessing financial health. This is even the case when the single underlying event activates multiple triggers. In such situations, the event is activating triggers for different reasons.

*Changes:* None.

*Comments:* Many commenters said the Department should adopt a materiality threshold in the triggering conditions. One commenter used an example of a triggering event representing $1 requiring the imposition of a financial protection instrument and felt that result was unreasonable.

Several of the commenters felt the lack of a materiality threshold would result in determinations that an institution was not financially responsible when the causal factor was not one that had a material adverse effect on the institution's ability to meet its financial obligations. The commenters further stated that the Department should be required to use clear criteria to determine that an institution's action or event would, in fact, negatively impact the institution's ability to meet its financial obligations.

Commenters similarly argued that the lack of a materiality requirement was unreasonable. This was incorporated in a larger argument about how a reasonableness standard is akin to the concept of substantial evidence under the APA.

*Discussion:* We disagree with commenters that it would be appropriate to adopt a materiality standard for the triggering events for several reasons. A materiality threshold commonly depends upon determinations made by auditors, often in response to information provided by management. The goal of the triggers is to identify situations that occur between financial audits that could represent a significant adverse financial effect on an institution. Adopting a materiality standard would move the discretion away from the Department to the auditor and the institution's management. Doing so would undercut our ability to quickly step in and seek financial protection when needed. While commenters have presented hypothetical examples of an unidentified triggering event tied to $1, they have not outlined a concrete example of how that would occur. While it is possible that settlements or judgments could result in $1 payments, those triggers involve a recalculation of the composite score, and it is unlikely that $1 would cause a score to fail. However, as discussed previously, we will replace ''material'' with ''significant'' in describing adverse effect and the financial condition of an institution. We crafted the mandatory triggers to identify situations that would represent significant financial threats to an institution's overall health, while the discretionary triggers leave room for us to consider whether the situation poses a significant adverse financial effect. While Departmental consideration is not a materiality threshold, which was suggested by some commenters, it does provide institutions an opportunity in § 668.171(f) to explain why they think the discretionary trigger should not result in a request for financial protection. One example of such an explanation might be that the financial impact upon the institution is negligible or nonexistent. We believe that process addresses the commenters' concerns.

Each of the mandatory triggers has a clear connection to significant financial concerns. The triggers related to receivership and financial exigency capture situations where an institution has declared that it is at risk of being unable to afford its financial obligations. The GE, 90/10, and CDR triggers indicate situations where an institution might lose some or all access to title IV, HEA funds in a year.

The triggers for SEC actions and teach-out plans represent situations where there are serious concerns about either an institution's financial health or it is at risk of losing its public listing, which is often a sign of weak finances.

The triggers around distributions followed by a contribution and creditor conditions address a different type of financial risk. In those situations, we are concerned an institution is manipulating its composite score to hide what might otherwise be a failure. We treat the distribution following the

contribution as a failure because we do not have an accurate picture of an institution's finances and this information will allow us to assess the effects of these transactions on an institution's financial health. For the creditor actions, we take the fact that they are worried enough about the institution to insert such a condition as evidence that the Department should also be concerned about institutional financial health.

Finally, the triggers related to legal and administrative actions allow us to recalculate the composite score to determine if the monetary consequences of the actions negatively impacted the institution. This recognizes that there could be gradations within those events that have greater or less financial implications.

As discussed later in the mandatory triggers section, we have also altered some mandatory triggers to make them more clearly connected to financial concerns or shifted them to discretionary triggers if we are concerned that they may not result in a significant adverse financial effect. We believe the result is that the mandatory triggers capture the most concerning financial events, and the discretionary triggers result in a request for protection if they show a negative effect. That will address concerns about institutions being subject to letters of credit for immaterial events.

We also object to the commenters' argument that the lack of a materiality threshold is unreasonable. We have addressed the arguments about reasonableness and substantial evidence in the legal authority section of this preamble related to financial responsibility. In terms of unreasonableness as a general concept, as explained above, we believe the mandatory triggers all represent either common sense areas that can indicate an institution is facing significant financial problems or more complicated ways that an institution is trying to manipulate its results. The greater variability in the discretionary triggers is why they involve a case-by-case determination. But we believe the items identified for discretionary triggers represent obvious and sensible indications that an institution could be seeing negative effects on its finances, which leads to relevant questions about how large the negative effect might be.

*Changes:* As discussed previously, we have changed ''material'' to ''significant'' in §§ 668.171(b), (d), and (f) and 668.175(f) where we refer to adverse effects or changes in financial condition.

*Comments:* Many commenters said the Department must provide a process by which institutions would have the opportunity to provide input for the Department to evaluate before making any determination affecting the institution's financial responsibility status. Some of those commenters included said the ''automatic'' aspect of the financial triggers was inconsistent with the statutory requirements in HEA section 498(c)(3). Several of these commenters elaborated on their concerns by noting that the lack of any interim decision and challenge process means institutions will be required to immediately provide financial protection until the institution continues to pursue dismissal of the cause of the trigger even though the Department may make a final determination that financial protection is not necessary. They contended that some of the mandatory financial triggers were not automatically reflective of an institution's financial stability but if it found itself in violation of one or more of the mandatory triggers would automatically be deemed to be not financially responsible. The commenters asserted that the following triggers did not reflect financial instability: (1) A suit by a Federal or State agency, or a qui tam lawsuit in which the Federal Government has intervened; (2) The institution received at least 50 percent of its title IV, HEA funding in its most recently completed fiscal year from GE programs that are failing the GE program accountability framework: (3) Failing the threshold for non-Federal educational assistance funds; and (4) High CDRs.

*Discussion:* Section 498(c)(1) of the HEA provides the authority for the Secretary to establish standards for financial responsibility, and it is not limited by the reference to ''ratios'' in section 498(c)(2). Our determination that an institution is or is not financially responsible is not solely about a formula with a composite score. That is only one piece of it. Another important piece factoring into our determination is whether an institution participating in the title IV, HEA programs is financially unstable beyond, and since, what its most recent composite score revealed. Financial instability may be caused by an event that occurs after the most recent composite score, and the purpose of the triggers is to identify those events which might impact the viability of the institution. The Department believes that the provisions in § 668.171(f)(3) strike the balance between giving an institution an opportunity to provide additional information to the Department without creating a process where risky institutions avoid providing financial protection due to extended discussions. First, § 668.171(f)(3)(i)(A) allows the institution to show that the discretionary trigger related to creditor events need not apply if it has been waived by the creditor. Section 668.171(f)(3)(i)(B) allows the institution to show that when it reports the triggering event, it has been resolved. Coupled with changes discussed later that give institutions 21 days to report triggering events instead of 10 days, we believe this will give institutions a larger window to show that the triggering event is no longer a concern. Finally, § 668.171(f)(3)(i)(C) notes that the institution can provide additional information for the discretionary triggers to determine if they represent a significant negative financial event. As discussed later in this final rule, we changed this language to only reference discretionary triggers.

The result of this language is that institutions will have an opportunity to show that the trigger had been quickly resolved and for discretionary triggers provide more information to show why the situation is not of sufficient concern to merit financial protection. For mandatory triggers, institutions will have the opportunity to share additional information when they provide notification that the trigger occurred in order for the Department to determine if the triggering event has been resolved.

The Department believes this situation gives institutions the ability to swiftly raise concerns about triggers but allow the Department to act quickly if the situation warrants it. This is particularly important as several of the triggering conditions could indicate a fast and significant degradation of a school's financial situation, such as the declaration of receivership. Preserving the Department's ability to act rapidly is, therefore, critical to protecting taxpayers from potential losses.

*Changes:* We changed § 668.171(f)(3)(i)(C) to clarify that the provisions contained therein apply to the discretionary triggers contained in § 668.171(d) and not the mandatory triggers contained in § 668.171(c).

*Comments:* Several commenters said the financial triggers do not appear to result from complete and careful Departmental analysis and expressed concerns about unintended consequences as a result of the financial triggers. Some commenters thought that an unintended consequence would be that some institutions would be thrust into a status of financial instability, including possible closure, due to the burden of complying with these

financial responsibility regulations when they would not have been so categorized under existing rules. Some of those comments opined that the triggers would especially impact private nonprofit and private for-profit institutions. Another commenter maintained that the Department performed no analysis to identify unintended consequences of these regulations. Another commenter was concerned that the Department did not share its analysis on the necessity of these regulatory changes and additions. Commenters called upon the Department to provide the data used to determine that the existence of these proposed financial triggers would put an institution at a higher risk of closure as stated in the NPRM.

*Discussion:* The Department disagrees with the commenters. Institutions act in a fiduciary capacity on behalf of the Department when they administer the title IV, HEA programs, and they must meet the Department's financial responsibility requirements to perform that role. As discussed in the sections of this document related to the mandatory and discretionary triggers, based on the Department's experience, we have concluded that the mandatory triggering events represent situations of significant financial concern, including the potential for either immediate closure, loss of access to aid after another year of performance results on certain measures, or other sufficient warning signs. Seeking financial protection in these situations represents the Department exercising its proper responsibility for overseeing taxpayer investments in the title IV, HEA programs. Mandatory triggers represent events where there are negative financial effects to an institution's financial health and therefore warrant financial protection while further review of an institution's financial condition can take place. Moreover, discretionary triggers will only result in Department requests for financial protection after a determination by the Department that they represent a significant negative financial effect. As such, we are not persuaded that the triggers will cause the kinds of unintended consequences discussed by commenters. The point of exercising the triggers is to protect taxpayers and ensure that the institutions that students choose to attend are financially responsible. As discussed in the RIA, we recognize that seeking financial protection creates costs for institutions, but we believe those costs are necessary and justified. As further discussed in the RIA, we provided information on the scope of effect for every trigger where we currently collect the data and addressed which elements related to costs we are and are not able to model. Insofar as commenters suggest that the Department must have perfect data and certainty as to consequences before adopting these protective measures, we disagree. At the same time, having reviewed commenters' predictions regarding unintended consequences, we cannot conclude that those predictions are supported by reasonable judgments and available evidence.

We also disagree with the commenters who argue that the Department should not pursue financial responsibility due to concerns about closure. Section 498(c) of the HEA [6] outlines financial responsibility standards, and the language around the Secretary's determination in section 498(c)(3)(C) requires an institution prove that it has sufficient resources to ensure against the precipitous closure of the institution and to provide the services it has promised its students. Furthermore, the Department has an obligation to safeguard taxpayers' investments including by efforts to minimize costs to taxpayers from student loan discharges and from having to seek repayment from the institutions that generated those costs. Historically, the Department has struggled to secure funds from institutions before they closed, which has left many discharges unreimbursed. For instance, FSA data show that closures of for-profit institutions that occurred between January 2, 2014, to June 30, 2021, resulted in $550 million in closed school discharges. This figure excludes the additional $1.1 billion in closed school discharges related to ITT Technical Institute that was announced in August 2021. Of that $550 million amount, the Department recouped just over $10.4 million from institutions.[7] The Department also included data in the NPRM that are repeated in the RIA of this final rule showing that from 2013 to 2022 the Department assessed $1.6 billion in liabilities against institutions. During that same period, the Department collected just $344 million from institutions. These amounts do not include any unestablished liabilities, such as those from closed school discharges that are not established against an institution. The approach in these rules will generate more financial protection upfront to increase the likelihood that the Department is reimbursed for liabilities assessed against institutions.

*Changes:* None.

*Comments:* Several commenters raised concerns about the financial triggers generally saying they were broad, unclear, required definitions, and were subjective. The broadness, in the view of the commenters, allowed for an institution violating numerous triggering events simultaneously leading to the imposition of multiple instruments of financial protection, *e.g.,* letters of credit. Another commenter criticized the financial triggers due to a belief that the triggers delegated the role of determining an institution's financial responsibility to third parties, including States.

*Discussion:* We disagree with the commenters. The mandatory triggers all represent clear situations that an institution will be able to know if they have met a triggering condition. The discretionary triggers are intentionally crafted to be broader so that they provide flexibility for consideration with input from the institution to determine whether the situation does in fact represent a significant negative financial situation for the school. For instance, that is why there is not a single standard for withdrawal rates or change in title IV, HEA volume. When these discretionary triggers may apply, the institution will have an opportunity to discuss why they think the triggering event should not merit financial protection.

We also disagree that the triggers are delegating oversight to the States or other third parties. Successful oversight of postsecondary institutions requires coordination among the States and accreditation agencies that make up other components of the regulatory triad. The triggers that relate to their actions ensure that the Department is able to respond swiftly to actions by other regulators, because those actions could either cause, or be predictive of, financial risk.

*Changes:* None.

*Comments:* A few commenters opined that the proposed financial triggers have no bearing on financial responsibility. They stated that the entire concept of a trigger granted the Department the authority to require unreasonable, even impossible, financial restrictions be placed on an institution.

*Discussion:* We disagree with the commenters. All mandatory triggers have explicit linkages to financial concerns. The discretionary triggers are structured so that they could in certain situations have financial implications, which is why we would review them on a case-by-case basis to determine

[6] 20 U.S.C. 1099c(c).

[7] The budgetary cost of these discharges is not the same as the amount forgiven.

whether to seek financial protection or not. Below we discuss each trigger in turn and how they connect to financial responsibility.

Legal and administrative actions are intrinsically related to an institution's financial health. These represent situations that can be a sudden financial impairment to an institution or change its financial position significantly. An institution with a low composite score that has to pay an additional debt or liability from a legal or administrative action may not be able to afford those added expenses. Costs from judgments or lawsuits may be significant and may place institutions in an impaired financial condition. As could the act of seeking repayment of borrower defense to repayment discharges, given that most approvals to date have been in the tens of millions of dollars. We are also concerned about how added costs from a final monetary judgment or award, or from a monetary settlement which results from a legal proceeding, including from a lawsuit, arbitration, or mediation, might make a change in ownership financially riskier than it seemed at first.

The withdrawal of owner's equity and the distribution following a contribution both are potentially destabilizing transactions initiated by a school's owner when they pay themselves. The withdrawal of equity causes a score recalculation, whereas the concern with a distribution following a contribution is a school attempting to manipulate its composite score.

The revisions to teach-out plans will capture situations where there are concerns about an institution's finances meriting a teach-out plan for the entire institution. That suggests a risk of closure and the need to plan for it. Just as we want to make sure schools plan for students, we must also plan for the possibility of taxpayer liabilities.

The triggers for publicly listed entities represent situations where they could lose access to public markets by having their stocks being delisted, having their registration being revoked, or being taken to court. All those situations could place the institution at risk of losing the benefits that come from being publicly traded and make it much harder for them to raise the funds necessary to stay in business. This is even the case for failing to provide quarterly or annual reporting, including considering an extended deadline. This is not a common occurrence for large and healthy companies and research shows that shareholders punish this occurrence significantly.[8] Shareholders react negatively when publicly traded companies miss filing deadlines for quarterly and annual reports. The Department should react negatively in this circumstance too, given that participating institutions act in the nature of a fiduciary in administering the title IV, HEA programs. The provisions related to foreign exchanges are similar.

The triggers related to a school failing 90/10, having high CDRs, or at least 50 percent of an institution's title IV, HEA volume coming from failing GE programs represent situations where an institution will lose access to title IV, HEA assistance the next time we generate those numbers unless they can improve. While institutions can and do survive without access to those funds, many institutions do close when they lose access to such aid. Protecting taxpayers when there is a possibility of aid loss is thus the responsible course of action.

The declaration of financial exigency and receivership are inherently worrisome financial situations. They are strong statements that an institution will not be able to continue in its current state and will need significant changes. These two are reasonable situations to be worried about that directly connect to finances.

Finally, the trigger related to creditor events ensures that institutions cannot leverage their financial agreements to try and dissuade the Department from its financial monitoring. We are concerned about past situations where institutions have conditions in their agreements with creditors that make debts fully payable if the Department were to take steps like require a letter of credit of a certain size or place the institution on heightened cash monitoring 2. We are concerned that the presence of such conditions is designed to place private creditors ahead of the Department and to also dissuade us from engaging in proper oversight and monitoring. The Department is thus treating the presence of those types of conditions as if they will occur and signal from the private market that there are financial concerns. We are thus seeking financial protection when such creditor conditions are present to ensure that we have the funds we need to safeguard taxpayers' investments.

We do not discuss the discretionary triggers in the same level of detail because as we have noted these all have the requirement that they show a significant financial effect.

*Changes:* None.

*Comments:* A few commenters raised concerns about the language in § 668.171(c) noting that the Department would request separate financial protection for each trigger if an institution ends up with multiple trigger events. Commenters questioned why this was necessary since the Department already has authority under the regulations to require letters of credit for institutions that fail the general standards of financial responsibility or that have a failing composite financial ratio score. These commenters thought that in those circumstances the Department has the ability to set the financial protection amount to be greater than the minimum levels established in the regulations. Some commenters suggested that the proposal to seek multiple financial protection requests would limit the Department's discretion to determine the amount of financial protection needed to deal with one or more triggering events without regard to whether asking for multiple instances of financial protection would overstate the amount of financial protection warranted for many situations. One commenter reviewed prior letters of credit required by the Department and noted that there were very few instances where the Department required institutions to provide letters of credit in amounts greater than 50 percent of an institution's annual Federal student aid funding and expressed concern about the significant financial burdens could be imposed on institutions requiring to provide much larger letters of credit under the proposed regulations.

Commenters also raised concerns about the possibility that multiple triggering events could be the result of one underlying action and that such situations should be viewed as only a single request for financial protection.

*Discussion:* The Department acknowledges that the current regulations do not place limits on the amounts of financial protection that may be required. The revised regulation will provide more notifications to the Department about significant developments relevant to an institution's financial responsibility since the period covered by the last annual audited financial statement submitted to the Department. These notifications will in many instances require the institution to provide financial protections or increase financial protections already in place.

With regard to the frequency with which the Department requests financial

[8] *clsbluesky.law.columbia.edu/2017/11/27/how-missing-sec-filing-deadlines-affects-a-companys-stock-value.*

protection in excess of 50 percent of an institution's annual title IV, HEA funding, we note that is an option for institutions that are not financially responsible to continue participating in the Federal student aid programs without becoming provisionally certified. We also remind commenters that part of the impetus for this final rule is the Department is concerned about having insufficient amounts of financial protection to offset liabilities incurred. With regard to the comments about one event causing multiple triggers, the Department's intent is not to make multiple financial protection requests for triggering events that all stem from the same event. We would thus review the triggering events when they occur to determine whether they are all tied to one event.

*Changes:* None.

*Comments:* Many commenters pointed out that in the 2019 Borrower Defense Regulations,[9] the Department stated that financial triggers that are speculative, abstract, and unquantifiable, are not reliable indicators of an institution's financial condition. Some of those commenters called upon the Department to eliminate any proposed financial trigger from the final rule that was speculative, abstract, or unquantifiable.

*Discussion:* The Department addressed these concerns from the commenters in the NPRM.[10] As we noted there, since the elimination of those mandatory triggers we have repeatedly encountered institutions that appear to be at significant risk of closure where we lacked the ability to obtain financial protection due to the more limited nature of triggers that are still in regulation. We also noted that the items that were proposed as mandatory triggers were situations that were clear to identify and represent significant financial risk. We have further refined that standard in this final rule by converting several mandatory triggers into discretionary ones. We also disagree with the implication by the commenters that triggers must be quantifiable so that they fit within the construct of the composite score. The composite score is not designed to be the only way to judge an institution's financial responsibility. It is one measure that captures some issues. But the presence of the triggers, as well as other items in § 668.171(b) that speak to issues like missing payroll obligations or failing to pay refunds, show there are other critical indicators of financial responsibility that the Department should consider while performing its statutorily mandated function to oversee the Federal student financial aid programs.

*Changes:* None.

*Comments:* Several commenters suggested that all mandatory financial triggers be made discretionary and that a specific determination be made by the Department with an explanation of how the triggering event has a material impact on the financial responsibility of the institution.

*Discussion:* The Department disagrees with the commenters. As discussed, the mandatory triggers are situations that we believe represent the most significant threats to an institution's financial circumstances. As such, we believe it is prudent as part of overseeing the Federal student financial aid programs to seek additional protection when those events occur. As already noted above, we do not think it would be appropriate to adopt a materiality standard for these triggers and believe they represent significant negative financial situations.

*Changes:* None.

*Comments:* Some commenters raised questions around the requirements for financial protection, *e.g.,* letters of credit, remaining in place for two full fiscal years. For example, one commenter requested clarification on whether this would be applicable in a situation where the institution has resolved the action or event that associated with the financial trigger. Another commenter stated that the Department should have the discretion to continue requiring financial protection even if the triggering event has been resolved because the existence of a triggering event that results in the Department requesting financial protection could also highlight other areas of concern.

*Discussion:* Under final § 668.171(c), the Department will consider whether the financial protection can be released after two fiscal years' worth of audited financial statements following the notice of the requirement for financial protection. The Department's goal with the two fiscal year requirement is to give us enough time to have confidence that the institution has demonstrated that the event has ceased or been resolved. We believe two years is more appropriate than only requiring it for a year because that allows us to reduce the likelihood that the events recur. For instance, an institution may have failing 90/10 rates for a year, pass for a year, and then fail again. Or a school could be asked to submit a teach-out agreement, then improve its finances and suddenly see them deteriorate again. Maintaining financial protection for two years strikes the balance between determining if the triggering event has been truly corrected with not keeping financial protection for unnecessarily long periods.

It is possible that financial protection will need to continue after the two years. That would be the case if the triggering event has still not been resolved.

To the commenter requesting the Department to require financial protection beyond the two-year requirement after a triggering event has been resolved, we do not believe we can do that based on the potential for a triggering event. If the Department identifies another triggering event, we would still be able to require financial protection related to that event.

**Financial Responsibility—Mandatory Triggering Events (§ 668.171(c))**

*General*

*Comments:* Several commenters strongly recommended that some or all of the mandatory financial triggers be eliminated from the final rule and short of that, some or all should be made discretionary. While some commenters addressed this critique to all of the mandatory triggers, some limited their recommendation to the following proposed financial triggers: (1) the trigger concerning lawsuits in proposed § 668.171(c)(2)(i)(B), (2) the trigger addressing change in ownership in proposed § 668.171(c)(2)(i)(D), (3) the trigger applicable to GE programs in proposed § 668.171(c)(2)(iii), (4) the trigger dealing with teach-out plans in proposed § 668.171(c)(2)(iv), (5) the triggering event describing State actions in proposed § 668.171(c)(2)(v), and (6) the trigger concerning publicly listed entities in proposed § 668.171(c)(2)(vi).

*Discussion:* We disagree with the commenters, in part. As discussed in greater detail under the subheading that applies to that trigger, we have elected to make State actions a discretionary trigger and clarify that teach-outs must be related to the whole institution and for financial reasons. We also have determined that an institution that loses eligibility to participate in another Federal educational assistance program will not be subject to a mandatory trigger. Instead, the discretionary trigger addressing a program that loses eligibility to participate in another Federal educational assistance program will be expanded to include when the institution, itself, loses that eligibility. We believe that making this a discretionary trigger will remove the burden of a mandatory trigger when the

[9] 84 FR 49861.

[10] 88 FR 32300.

loss to the institution is minimal and gives the Department the ability to make a determination if the loss of another Federal educational program will have a financial impact on the institution. We elected to move the State action and loss of eligibility provisions due to concerns about the varied effect of events that would cause those triggers. Some of those events were presented by commenters and included examples of a State taking a minor action for collection of a small sum of money or to rectify a minor health related infraction. Regarding the loss of another Federal educational program, examples were provided by commenters where a school may lose eligibility for a program with no enrollees or a very small number of enrollees and the loss of that program had little or no negative impact on the financial condition of the institution. Meanwhile, we think the narrower focus of the revised teach-out trigger will capture the most serious situations. We will also have the change in ownership trigger require a recalculation of the composite score that results in a failure. This aligns § 668.171(c)(2)(i)(D) with the triggers in § 668.171(c)(2)(i)(A) and (C).

We, however, disagree with the other changes recommended by commenters. As also discussed in greater detail throughout this section, we are concerned that institutions that have half their revenue in failing GE programs could face significant financial challenges if they lose half or more of their title IV, HEA revenue. The lawsuit trigger represents serious legal actions taken by government actors, which are not common and can result in very serious judgments against institutions. Similarly, the triggers related to publicly traded entities represent situations where those companies can face the possible loss of access to financial markets or other forms of serious financial consequences that could be a sign of a lack of stability. We believe those items are all serious enough to merit keeping them as mandatory triggers.

*Changes:* We have removed the mandatory triggers that were proposed in § 668.171(c)(2)(v) and (ix) and have moved the provision in proposed § 668.171(c)(2)(v) to the discretionary trigger in § 668.171(d)(9) and have moved the provision in proposed § 668.171(c)(2)(ix) to the discretionary trigger in § 668.171(d)(10). We reserved § 668.171(c)(2)(v) and (ix). We have narrowed the scope of the teach-out trigger in § 668.171(c)(2)(iv) and we will recalculate the composite score for the trigger under § 668.171(c)(2)(i)(D) related to institutions that have undergone a recent change in ownership and have monetary obligations arising from certain legal and administrative actions.

*Comments:* Many commenters expressed the view that some of the mandatory triggers were duplicative of other areas which the Department monitors for compliance. Some examples put forth by the commenters to justify their view included the financial triggers concerning GE programs, high CDRs, and the 90/10 rule. The commenters believed that the imposition of a potentially debilitating mandatory letter of credit in these situations, without a determination by the Department that the institution is unable to rectify the triggering event, or that the triggering event will have an immediate impact on the institution's financial responsibility, could cause a precipitous financial crisis at the institution when one would have otherwise not been present.

*Discussion:* The Department disagrees with the commenters. The goal of the mandatory triggers is to identify situations where the institution is facing a significant negative threat to its financial health, which puts the institution at an elevated risk of closure or a higher likelihood of generating liabilities such as through approved borrower defense to repayment claims. To that end, the examples highlighted by commenters show that the Department is aligning its financial accountability policies with other oversight and monitoring. For instance, an institution with high CDRs, failing 90/10 results, or at least half of its title IV, HEA funds coming from failing GE programs is a year away from losing access, in whole or in part, to the Federal student aid programs. While institutions can and do stay in business after leaving the Federal student aid programs, losing access to such a large stream of revenue represents an inarguable major financial risk to the institution. Ensuring that taxpayers are protected when the Department knows such a risk could occur is prudent oversight.

The Department also disagrees with the commenters about the effects of seeking financial protection. The Department's job is to safeguard taxpayer funds, minimize losses for discharges such as those tied to closed schools, and protect students. These triggering situations indicate events where the warning signs are significant enough that they immediately impact the institution's financial responsibility, regardless of any mitigating circumstances. In these situations, the Department must immediately exercise greater oversight to ensure it is carrying out its mission.

*Changes:* None.

*Comments:* One commenter recommended that the Department align financial trigger reporting with accreditors which, in the commenter's opinion, were monitoring the same financial factors for accreditation purposes.

*Discussion:* The Department disagrees with the commenter. Postsecondary oversight is predicated on the idea of the regulatory triad of States, accreditation agencies, and the Federal Government. Having complementary but distinct efforts is useful for ensuring that each party is holding up its part of that accountability relationship. To that end, it is important for the Department to have its own set of financial standards that are particularly concerned with the title IV, HEA programs. Accreditors, by contrast, can and do have varying standards for financial oversight that reflect what each deems important. We do not think ceding that financial oversight work to accreditors would be appropriate, nor would it be allowed under the HEA.

*Changes:* None.

*Comments:* One commenter pointed out that some mandatory triggers are applicable only to institutions with a composite score of less than 1.5 while others are applicable to all institutions. The commenter recommended that all of the mandatory triggers only be applicable to institutions with a composite score of less than 1.5.

*Discussion:* We disagree with the commenter. Composite scores are only one element of financial responsibility analysis. In this situation we are concerned that events occur after the composite scores are calculated and, therefore, they need to be considered immediately so we can obtain financial protection when necessary. Moreover, there are many triggering situations where the threat to the institution is so great that the last completed composite score is not appropriate to consider for the trigger. For instance, if an institution has a composite score of 3.0, the highest available, but still declares financial exigency or is poised to lose access to aid unless it improves its CDRs, the Department should step in and act in response to those warning signs.

*Changes:* None.

*Legal and Administrative Actions (§ 668.171(c)(2)(i))*

*Comments:* Section 668.171(c)(2)(i) specifies four mandatory triggers related to legal and administrative actions, designated as paragraphs (c)(2)(i)(A) through (D). For the purpose of this

discussion, we refer to the four separate financial triggers by those letters. A few commenters objected to paragraphs (c)(2)(i)(A) and (B), both of which address possible legal proceedings. The commenters suggested that these two triggers discouraged institutions from reaching settlements with the parties, be they private or governmental, because such a settlement may be a financial trigger, itself. The commenters opined that discouraging parties from resolving legal issues with an agreed upon settlement was bad public policy.

*Discussion:* We disagree with the commenters. The mere presence of a settlement does not result in a trigger. Rather, a settlement that results in a recalculated composite score that is less than 1.0 results in a trigger. Moreover, settlements arise as an alternative to litigating a case, which has the risk of ending in a judgment against the institution, which would also be captured as a trigger if a recalculation produces a composite score of less than 1.0. Settlements are generally designed to benefit both parties and avoid further litigation, which carries its own costs and risks, including the possibility of judgments against the institution that are larger than amounts paid in the settlement. Accordingly, we see no reason to think this trigger discourages institutions working to resolve litigation in the manner that works best for them.

We note that the reference to debts, liabilities, and losses may have contributed to some confusion about what causes the triggers described in this section. Accordingly, we have changed the heading of this paragraph to ''Legal and administrative actions'' which more accurately describes the actions described. We have also modified the regulatory text in paragraphs (c)(2)(i)(A) and (D) to describe more accurately the actions and resulting monetary judgments or awards, or monetary settlements which result from a legal proceeding that will result in a financial trigger. Those changes are explained in detail below.

*Changes:* We have changed the heading of § 668.171(c)(2)(i) to ''Legal and administrative actions.'' We have changed the text in § 668.171(c)(2)(i)(A) to more accurately state the types of monetary actions that are linked to this financial trigger. They are when an institution has entered against it a final monetary judgment or award or enters into a monetary settlement which results from a legal proceeding, including from a lawsuit, arbitration, or mediation, whether or not the judgment, award or settlement has been paid. In addition, we have modified paragraph (c)(2)(i)(D) of this section which describes a financial trigger applicable to institutions that have recently undergone a change in ownership. The revised language more accurately describes the monetary actions that will lead to the financial trigger and those actions are when the institution has entered against it a final monetary judgment or award or enters into a monetary settlement which results from a legal proceeding, including from a lawsuit, arbitration, or mediation whether or not the obligation has been paid.

*Comments:* A few commenters argued that paragraphs (c)(2)(i)(A), (B), and (D) gave too much leverage to claimants and government agencies in that they could use the threat of a financial trigger being imposed as part of resolving their grievance with the institution.

*Discussion:* We disagree with the commenters. With respect to the provisions in paragraphs (c)(2)(i)(A) and (D), these are elements that result in the composite score being recalculated and which has to result in a failure. The events that are described in paragraphs (c)(2)(i)(A) and (D) result from an actual adjudication of a monetary judgment or award, or the institution's agreement to be bound by a monetary settlement. That means there has been some process in which an institution would have had an opportunity to defend themselves and they are still being asked to pay some kind of amount. With a settlement, that represents a negotiated situation in which an institution has decided it is in its benefit to reach that agreement.

With respect to the government enforcement actions in paragraph (c)(2)(i)(B), the provision does not, as commenters claim, create risks of regulators wielding baseless and frivolous enforcement actions to extort participating institutions. The risks commenters invoke more accurately describe the incentives of lawsuits by private litigants—which are not covered—rather than government enforcement actions. Unlike private litigants, government enforcement actions are tools for enforcing laws and regulations. They lack the incentives associated with lawsuits that can result in private financial gain. Likewise, the government can employ investigative tools of compulsory process to gather evidence and has options outside of civil discovery for obtaining relevant information. Similarly, government regulators' decisions to pursue enforcement are ordinarily informed by considerations in statute, rules, or agency guidance and based on the probability of ultimate success and efforts at resolution without litigation.[11] Those considerations and the practicalities of allocating limited resources make commenters' fears unlikely. Indeed, neither commenters' submissions nor the Department's experience suggest any examples of frivolous enforcement actions against title IV, HEA participants. And in the unlikely event of one, the provision's triggers may be avoided through filing a motion to dismiss—which provides ample opportunity to filter out actions that are frivolous or facially deficient. Contrary to commenters' speculative fears, the presence of this trigger ensures the Department is acting when there are warning signs about potential negative effects to the financial health of institutions.

*Changes:* None.

*Comments:* A few commenters took issue with the provision in paragraph (c)(2)(i)(B) that includes as a trigger a qui tam lawsuit, in which the Federal Government has intervened, and which has been pending for 120 days, that would constitute a mandatory trigger. They opined that the mere filing of a qui tam lawsuit, regardless of government intervention, should not be a financial trigger. Those commenters went on to object to the 120-day period proposed in the regulation that says that the mandatory trigger applies if there has been no motion to dismiss within 120 days of government intervention or if there was such a motion and it was denied. The commenters stated that 120 days was insufficient in addressing the deprivation of the institution's due process and believed that motions to dismiss at such early stages of a lawsuit are limited to the face of the pleadings without consideration of the factual merits of the claims. They believed the trigger would be activated without due regard to the merits of the claims or the institution's defenses to those claims.

*Discussion:* The commenters misinterpret the standards by which a qui tam lawsuit would become a triggering condition under this paragraph. The mere filing of a qui tam

[11] *See, e.g.,* 15 U.S.C. 53(a) (enforcement actions predicated on Federal Trade Commission having a ''reason to believe'' there is an existing or impending violation of relevant law and that the remedy sought ''would be in the interest of the public''); U.S. Dep't of Just., Just. Manual sec. 9–27.220 (2018) (Federal prosecutions informed by a determination that the conduct violates Federal law, that admissible evidence that is probably ''sufficient to obtain and sustain a conviction,'' that action is in the public interest, and that there alternatives remedies are inadequate); E.O. 12988, 61 FR 4729 (Feb. 5, 1996) (civil litigation must be preceded by pre-suit notice, settlement efforts, and attempts at alternative dispute resolution in order to, among other factors, limit suits to ''only meritorious civil claims'').

does not result in a trigger. It is only if the government intervenes that a qui tam could be considered under paragraph (c)(2)(i)(B). According to the U.S. Department of Justice, such interventions only occur in about one-quarter of qui tam cases,[12] and intervention decisions are informed by an express determination of the case's merits.[13] These are not steps that are taken lightly or that occur commonly in the postsecondary education space. Indeed, actions involving institutions of higher education represent only a small fraction of qui tam lawsuits, most of which relate to programs like those administered by the U.S. Department of Health and Human Services (HHS). Statistics from the U.S. Department of Justice show that 61 percent of the 15,246 qui tam lawsuits brought from 1987 to 2022 were related to HHS.[14] Another 12 percent were related to the U.S. Department of Defense.

The Department believes the 120 days are appropriate because it gives sufficient time for a defendant to file a motion to dismiss. At the same time, this captures potential lawsuits early enough in progress that the Department would not be seeking financial protection at the same time an institution has lost a case, which could be the case if we were to instead consider timing related to motions for summary judgment.

The Department does, however, recognize that the phrasing of the trigger related to lawsuits in the NPRM was confusing as it was not fully clear how the 120-day requirements applied to different types of lawsuits. Accordingly, we have clarified in the regulatory text that the trigger applies to lawsuits that have been pending for 120 days or qui tam lawsuits that have been pending for 120 days since U.S. intervention and there has been no motion to dismiss filed or such a motion was filed and denied within 120 days. This update clarifies that this trigger is predicated on the decision by a governmental official with regulatory or law enforcement authority that the school committed the conduct alleged in circumstances warranting an enforcement action and the case having proceeded past the motion-to-dismiss stage. We have also indicated that this would cover motions to dismiss or equivalent motions under State law, such as demurrers.

*Changes:* We have changed the text in § 668.171(c)(2)(i)(B) to more clearly convey how the 120-day requirements work for lawsuits as described above.

*Comments:* One commenter sought clarification regarding the financial trigger in paragraph (c)(2)(i)(B) that states that an institution that is sued by a Federal or State authority to impose an injunction, establish fines or penalties, or to obtain financial relief such as damages would have the mandatory trigger implemented. The commenter inquired if more than one entity is suing the institution for the same act or event, would that generate one requirement for financial protection or multiple requirements due to there being multiple agencies involved in the proceedings. The commenter supported treating such a circumstance as a single event with a single requirement for financial protection.

*Discussion:* As discussed earlier, the Department will review the triggering conditions to determine if what appears to be multiple triggering situations is attributed to a single instance, such as multiple States suing one institution. We will consider whether to treat multiple triggering situations as a single requirement for financial protection on a case-by-case basis as we examine the specific facts.

*Changes:* None.

*Comments:* One commenter recommended that the trigger described in paragraph (c)(2)(i)(B) be modified to be based on summary judgment. The commenter urged the Department to modify the trigger so that it is premised on the agency surviving a motion for summary judgment rather than a motion to dismiss, as proposed. The commenter posited that a motion to dismiss is too low a bar and does not reflect judicial consideration of the merits of the claim. The commenter contends that an agency surviving a summary judgment motion is a better indicator that the agency has a viable claim and that the subject institution is at some financial risk. The commenter acknowledged that premising this trigger on a summary judgment would extend the timeframe somewhat, but nevertheless would occur well before a trial or any appeals.

*Discussion:* The Department disagrees with the commenter. Refraining from any trigger until after the point at which the institution is facing trial makes the Department likely to face circumstances in which much-needed financial protections are not available until it is too late. Similarly, in cases where both parties file cross-motions for summary judgment, and summary judgment on liability is granted to the agency, it may be too late to obtain financial protection. Instead, the regulations strike the appropriate balance by providing the needed financial protections after a government official with regulatory or law enforcement authority decides, often after an investigation, that the circumstances warrant an enforcement action and, furthermore, after that action has proceeded past the motion-to-dismiss stage.

*Changes:* None.

*Comments:* One commenter suggested that we limit paragraph (c)(2)(i)(B) to Federal and State agencies with specific oversight of postsecondary institutions rather than the proposed language that simply says, ''sued by a Federal or State authority.'' The commenter gave an example of the IRS or a state taxing authority suing the institution, thereby initiating the mandatory trigger, even though these agencies have no particular oversight of the educational operations of the institution.

*Discussion:* The purpose of the mandatory trigger is to identify situations where the financial health of an institution is at risk. For example, any action lawsuit from the Federal or State government based upon that alleges significant liabilities due to unpaid back taxes could represent just as great a risk to an institution's finances as a lawsuit that is specific to Federal financial aid. We, therefore, decline to adopt the commenter's suggestion.

*Changes:* None.

*Comments:* A number of commenters objected to the triggers related to lawsuits. They argued that the requirement that an institution's unfounded lawsuit that fails on the merits might require the institution to post substantial financial protection. One commenter opined that this established a situation where the institution was ''guilty until proven innocent.'' Other commenters believed that the elimination of arbitration agreements and the class action lawsuits in the Borrower Defense regulations creates an environment where frivolous lawsuits against institution will be encouraged with needless financial triggers being activated.

*Discussion:* We disagree with the commenters whose arguments do not accurately capture the nature of the trigger related to lawsuits in § 668.171(c)(2)(i)(A) and (B). For the situations in paragraph (c)(2)(i)(A) of this section, financial protection requirements only occur if the institution is required to pay a debt or incurs a liability from a settlement, arbitration proceeding or a final judgment in a judicial proceeding. Moreover, this trigger is only activated

[12] *www.justice.gov/sites/default/files/usao-edpa/legacy/2012/06/13/internetWhistleblower%20update.pdf.*

[13] *See* U.S. Dep't of Just., Just. Manual sec. 4–4.110 (2018).

[14] *www.justice.gov/d9/press-releases/attachments/2023/02/07/fy2022_statistics_0.pdf.*

if the legal determination results in the impacted institution having a recalculated composite score of less than 1.0, the failing threshold. The focus of this trigger is on the financial consequences to the institution originating from those legal or administrative actions.

The triggering event described in paragraph (c)(2)(i)(B), meanwhile, does not include just any lawsuit filed. It only occurs if the institution is sued by a Federal or State authority to impose an injunction, establish fines or penalties or to obtain financial relief or if the Federal Government decides to intervene in a qui tam lawsuit. Government lawsuits against institutions of higher education are not common events and are not actions undertaken lightly. While qui tam lawsuits are brought by private individuals, they are only a triggering event if joined by the Federal Government, which is also a rare occurrence. None of these are frivolous actions. It is incorrect to claim that the elimination of mandatory arbitration agreements and preventing institutions from forcing students to waive their right to participate in a class action lawsuit create an environment supporting frivolous lawsuits would lead to an increase in the number of mandatory triggering events tied to lawsuits. The mere filing of a class action or other private litigation (other than a qui tam where the government has intervened) are not captured under the mandatory trigger.

The provisions related to borrower defense are also not triggered by the mere presence of claims. They are related to recovery efforts for approved claims as a mandatory trigger or the formation of a group process by the Department for a discretionary trigger. For the discretionary trigger related to borrower defense, the Department must determine that the circumstances create a significant adverse effect on the institution. These are standards that depend upon actions by the Department that are informed by either the approval of claims, which follows a determination based upon a preponderance of the evidence that the institution engaged in conduct that merits a borrower defense approval, or signs that it may have engaged in such conduct for the formation of a group.

*Changes:* None.

*Comments:* One commenter sought clarification on paragraph (c)(2)(i)(C) which describes a trigger that is activated if the Department initiates an action against an institution to recover the costs of adjudicated claims in favor of borrowers under the loan discharge provisions in 34 CFR part 685. The commenter wanted to ensure that this trigger applied to borrower defense loan discharges and not to other loan discharges like a closed school discharge.

*Discussion:* We agree with the commenter that the trigger described in § 668.171(c)(2)(i)(C) is applicable to borrower defense loan discharges, as we conveyed in the preamble discussion of the NPRM.

*Changes:* We modified the regulatory language in § 668.171(c)(2)(i)(C) to clarify that this trigger is initiated by the Department initiating an action to recover the cost of adjudicated claims in favor of borrowers under the borrower defense to repayment provisions.

*Comments:* A few commenters objected to the provision in paragraph (c)(2)(i)(D) by which institutions undergoing a change in ownership would be subject to a mandatory trigger if the institution is required to pay a debt or incurs a liability from a settlement, arbitration proceeding, final judgment in a judicial proceeding, or an administrative proceeding determination. They also voiced an objection based on the process of a change in ownership being closely monitored and strictly controlled by the Department and therefore the Department can quantify the exact impact of any debt or liability as part of the Department's process. The commenter believed that this ability rendered the financial trigger unnecessary.

*Discussion:* We disagree with the commenters, in part. Each of the actions in paragraphs (c)(2)(i)(A) through (C) of § 668.171 show that an institution is facing a serious legal and administrative action that can result in financial instability of an institution. These events are more concerning after a change in ownership and creates uncertainty around the new owner's ability to operate the institution in a financially responsible way.

Moreover, although the Department reviews the same day balance sheet and financial statements for the new owner and institutions in the course of its review of changes in ownership, those financial statements reflect specific points in time (the day of the transaction and the two fiscal years prior to the transaction). As a result, those financial statements do not capture litigation outcomes that occur subsequently, but which could have a significant negative impact on the institution's finances. Therefore, we do believe that it would be appropriate to also treat this trigger as one that requires a recalculation of the composite score. This aligns the change in ownership requirements with § 668.171(c)(2)(i)(A), except in paragraph (c)(2)(i)(D) we would perform the recalculation for all situations that are captured in paragraph (c)(2)(i)(D) and not limit it just to those with a composite score of less than 1.5. We think that is appropriate given the concerns about changes in ownership. This means that every action under § 668.171(c)(2)(i) except for paragraph (c)(2)(i)(B) results in a recalculation. We do not recalculate paragraph (c)(2)(i)(B) because the litigation may not indicate a specific dollar amount that would form the basis of a recalculation.

*Changes:* We have indicated in the regulation that institutions subject to paragraph (c)(2)(i)(D) of § 668.171 will have their composite score recalculated.

*Withdrawal of Owner's Equity (§ 668.171(c)(2)(ii))*

*Comments:* One commenter posited that an institution with a score of less than 1.5 that paid a dividend or engaged in a stock buyback which resulted in a recalculated score of less than 1.0 should not be automatically subject to a financial protection requirement. The commenter stated that institutions in this situation should be evaluated to determine if the activity poses financial risk to the institution.

*Discussion:* We disagree with the commenter. In the situation presented as an example, the institution, after engaging in the financial activity, has a failing composite score of less than 1.0. By that measure, the institution is not financially responsible and that results in the need for financial protection, *e.g.,* a letter of credit.

*Changes:* None.

*Comments:* Some commenters objected to the provision in § 668.171(c)(2)(ii) where a proprietary institution with a composite score of less than 1.5 or any proprietary institution through the end of its first full fiscal year following a change in ownership would be subject to the financial trigger. That trigger occurs when an applicable institution has a withdrawal of owner's equity by any means, including a dividend, unless the withdrawal is a transfer to an entity included in the affiliated entity group or is the equivalent of wages in a sole proprietorship or general partnership or a required dividend or return of capital. The requirement for financial protection would only be initiated if the institution, as a result the withdrawal of equity, has a recalculated composite score of less than 1.0, the threshold for failure. The commenters opined that this regulation would create a burden for the Department in that it would be

reviewing many institutions which fall subject to this trigger, but it is then determined that the financial event did not drive the institution's composite score to below 1.0. The commenters further stated that current regulations governing this matter were sufficient and did not require modification.

*Discussion:* We disagree with the commenters. We believe the administrative burden placed on the Department is acceptable because of the significant risk faced by taxpayers when institutions now have a failing composite score as a result of the owner's equity withdrawal. As noted in paragraph (c)(2)(ii)(B) of this section, these institutions would now have a failing composite score and that necessitates obtaining financial protection.

*Changes:* None.

*Significant Share of Federal Aid in Failing GE Programs (§ 668.171(c)(2)(iii))*

*Comments:* Several commenters opposed the financial trigger in § 668.171(c)(2)(iii) for institutions that receive at least 50 percent of their title IV, HEA funds from GE programs that are failing under subpart S of part 668. The commenters stated that this trigger did not correlate to the financial stability of the institution. One of those commenters believed that this trigger would be an extraordinary burden to an institution that offered a limited number of programs. Another stated that the GE calculation has a look back period of several years and that data are not indicative of the institution's current financial status. Some of the commenters believed that the GE provisions in subpart S are sufficient in themselves for Departmental monitoring without adding an additional financial trigger linked to GE.

*Discussion:* We disagree with the commenters. The purpose of the financial triggers is to alert the Department of an institution's financial instability as soon as it is reasonable to know of that situation. An institution with at least half of its title IV, HEA funds coming from failing programs is at risk of a significant loss of revenue if those programs continue to fail and lose title IV eligibility. The projected cessation of these funds creates a situation where the institution's financial health could be negatively impacted. Such a situation is exactly what the financial triggers, as opposed to the GE regulations, are designed to counteract so that financial protection can be obtained to protect current and prospective students at the institution as well as protecting taxpayers' interests. The issues about the age of the data and the number of programs offered are not relevant for these concerns. The focus of this trigger is about the potential for the effect on the revenue. Whether half of the title IV, HEA revenue comes from one, 10, or 100 programs is not relevant since the overall threat to revenue in percentage terms is the same. Similarly, the Department's concern is about how a program failing the gainful employment requirements could lead to the loss of Federal aid and what that means for the institution's ability to meet its financial obligations. We are worried about the forward-looking implications of that provision, and issues related to the age of the data are addressed by the Department in the separate final rule related to gainful employment.

*Changes:* None.

*Teach-Out Plans (§ 668.171(c)(2)(iv))*

*Comments:* Several commenters expressed concerns around the mandatory trigger in § 668.171(c)(2)(iv) tied to when an institution is required to submit a teach-out plan or agreement required by a State or Federal agency, an accreditor, or any other oversight entity. The commenters expressed the view that institutions are sometimes required to submit a teach-out plan as a normal course of business and not due to any fear of closure, institutional misconduct, or financial instability. A few of the commenters observed that teach-out plans can increase the financial strength of the institution rather than decrease it. A few commenters observed that some institutions may be reluctant to enter a teach-out so that they would not bear the burden of the financial trigger. One of the commenters asserted that the Department could be the Federal agency requiring the teach-out plan, which then in turn would initiate the mandatory trigger associated with submitting a teach-out plan due to changes being made in the certification procedures part of this rule to request a teach-out for a provisionally certified institution deemed at risk of closure. Some commenters argued that mandatory triggers should only be applied to teach-out agreements requested for financial reasons.

Other commenters raised concerns that the trigger as written could require a school to provide financial protection if it voluntarily chose to discontinue a program and was asked by the accreditor to create a teach-out as part of that process.

*Discussion:* The Department agrees with the commenters, in part, that the teach-out trigger as included in the NPRM may capture instances that are not sufficiently concerning enough to merit a mandatory trigger. However, we maintain that circumstances may exist where a teach-out request is a sign of financial instability that merits the Department's action. These required submissions are often associated with institutions facing imminent closure or other financial catastrophe where students are negatively impacted.

Therefore, the Department is clarifying the scope of the mandatory teach-out trigger in paragraph (c) of this section and adding a separate discretionary trigger in paragraph (d) of this section. We are modifying the mandatory trigger to include teach-outs that are requested due, in whole or in part, to financial concerns and that cover the entire institution. This could include situations where the institution is requested to provide separate teach-outs for all its programs. This will capture the most serious situations in which teach-outs are requested and will exclude situations where the teach-out requirement is part of a routine matter.

Given the narrower scope of this mandatory trigger, we have added a separate discretionary trigger in § 668.171(d)(13) to capture other types of teach-out requests. This trigger is important because there may be other types of teach-outs that still represent significant negative financial consequences. For instance, an institution that is required to submit a teach-out agreement to cover a program that enrolls half its students because of concerns about misrepresentations may merit a financial protection request because of the extent of possible revenue loss. By contrast, a teach-out request for a single small program being phased out by the institution would not merit a financial protection request.

*Changes:* We changed § 668.171(c)(2)(iv) to clarify that the mandatory trigger is initiated when the institution is required to submit a teach-out plan or agreement, for reasons related to, in whole or in part, financial concerns. We have also added new § 668.171(d)(13) that establishes a discretionary trigger which applies to institutions required to submit other teach-out plans or agreements, including programmatic teach-outs, by a State, the Department or another Federal agency, an accrediting agency, or other oversight body that are not covered by the mandatory trigger in paragraph (c) of this section.

*State Actions (§ 668.171(c)(2)(v))*

*Comments:* A few commenters objected to the mandatory trigger in proposed § 668.171(c)(2)(v) tied to when a State licensing or authorizing agency

notifies an institution that it must comply with some requirement, or its licensure or authorization will be terminated. The commenters argued that this trigger was too far reaching and would be unnecessarily activated when an institution had the most minor infraction with a State oversight agency. A few of the commenters pointed out that some State oversight agencies include in all compliance related correspondence pro forma language that authorization can be revoked. Some of the commenters believed that this trigger gave too much leverage to State agencies in that those agencies could use the threat of the Departmental trigger in their interactions with institutions. Two commenters believed that institutions offering instruction in multiple States were particularly burdened by this regulation. One of those commenters believed that any State citation should be a discretionary trigger and not a mandatory one. The other commenter believed that a State action initiated by a State that was not the institution's home State did not present a financial concern to the institution. That commenter suggested that a State action from the institution's home State be a mandatory trigger but a State action by another State be a discretionary trigger.

*Discussion:* We agree with the commenters, in part, and have combined this triggering event with the discretionary trigger in § 668.171(d)(9) that is also related to State citations. We believe that State authorization or licensure for an institution is a fundamental factor of eligibility for institutions seeking to participate or participating in the title IV, HEA programs and that the threat of removal of a State's authorization or licensure poses a financial risk to the institution participating in the title IV, HEA programs. However, we are persuaded by the commenters that States may express these concerns with varying levels of severity and that connecting these actions to a mandatory trigger would risk being over inclusive. Therefore, we made this a discretionary trigger to account for the issues raised by the commenters. Making this a discretionary trigger means that issues raised by commenters about whether the State action is the institution's home State or not can be considered in reviewing the event.

*Changes:* We have removed the mandatory trigger at § 668.171(c)(2)(v) and instead modified the discretionary trigger at § 668.171(d)(9) to include situations where the State licensing or authorizing agency has given notice that it will withdraw or terminate the institution's licensure or authorization if the institution does not take the steps necessary to come into compliance with that requirement. We have reserved § 668.171(c)(2)(v).

*Publicly Listed Entities (§ 668.171(c)(2)(vi))*

*Comments:* Many commenters objected to the mandatory trigger detailed in proposed § 668.171(c)(2)(vi)(D) whereby a late annual or quarterly report required by the SEC activates the mandatory trigger. Some of the commenters opined that there was not meaningful rationale that a late submission of an SEC report indicated any lack of financial stability by the institution or any necessity for financial protection being obtained. One commenter stated that the proposed trigger was speculative, abstract, and unqualifiable and should be eliminated.

*Discussion:* We disagree with the commenters. Submissions of SEC reports are a requirement with a well-known and anticipated deadline so when an entity is late to comply with this requirement, it could be an indicator of the entity's impaired financial stability. We do agree, however, that a minor infraction is not necessarily indicative of financial instability. Such a minor infraction can be easily resolved when the institution reports the late submission of the SEC report to the Department, assuming it has submitted the report in the 21-day period following the SEC due date. Notably, as explained in our discussion of changes to § 668.171(f), we changed the reporting requirements in § 668.171(f) to allow 21 days to report the required events to the Department (rather than 10 as originally proposed) and § 668.171(f)(3)(i)(B) allows the institution to show that the triggering event has been resolved.

*Changes:* None.

*Non-Federal Educational Assistance Funds (§ 668.171(c)(2)(vii))*

*Comments:* Several commenters opined that the mandatory trigger in proposed § 668.171(c)(2)(vii) is unreasonable and unnecessary. This trigger is linked to an institution that did not receive at least 10 percent of its revenue from sources other than Federal educational assistance as provided in § 668.28(c), often referred to as the 90/10 rule. The commenters believed that since this is a regulated event under § 668.28 with sanctions for non-compliance, that there is no need for inclusion in § 668.171(c) as a mandatory trigger. One commenter thought that this trigger was particularly burdensome on distance education providers since they are prevented from including funds generated through non-eligible distance education programs as part of their non-Federal revenue.

*Discussion:* We disagree with the commenters. Failure of the 90/10 rule is a serious issue of non-compliance with statutory and regulatory requirements. Failing this requirement twice in consecutive years results in an institution losing access to Federal student financial aid for two years. That risk of Federal student aid loss can have an immediate negative impact on the financial stability of the affected institution. This trigger allows us to seek financial protection as far in advance of the potential second failure as we can.

We also disagree with the comment about the burden on distance education providers. The exclusion of non-eligible distance education courses is part of the requirements for 90/10 compliance. Institutions should be able to meet this requirement without counting that revenue, which many distance education providers do. Compliance with the 90/10 rule is important for proprietary institutions to maintain access to title IV student aid. If an institution fails to comply with the rule, there can be serious implications for the institution's financial stability.

*Changes:* None.

*Cohort Default Rates (§ 668.171(c)(2)(viii))*

*Comments:* Many commenters expressed concerns over the mandatory trigger proposed in § 668.171(c)(2)(viii) where an institution is at risk of losing access to Federal aid due to high cohort default rates (CDRs). Many of these commenters believed it is unfair to hold institutions accountable for students' inability to repay their student loans. One commenter posited that the return to normalized student loan repayments, following the COVID–19 national emergency pause in repayments, may not be a smooth transition and that should be factored into any financial trigger linked to CDRs. One commenter stated that this was another example of information that the institution was required to report to the Department when it was already aware of the information.

*Discussion:* We disagree with the commenters. An institution subject to this trigger will lose access to Pell Grants and Direct Loans the next time CDRs are calculated unless they can lower their rates or successfully appeal their results. It is that threat of pending loss of financial aid that merits the inclusion of a mandatory trigger, regardless of the reason why an

institution has a high CDR. While it is true that institutions can and do continue operating without access to Federal student aid, it is also the case that many institutions are heavily dependent on Federal student aid and close when they lose access to it. This trigger is thus a prudent step to protect the taxpayers from potential losses that could occur if the CDR issue is not resolved by the institution.

Regarding the transition to a return to normal repayments following the COVID–19 national emergency, the Department notes that the effects of the pause will continue to keep default rates low for several years. The Department has also implemented multiple policy solutions to help students avoid default during the return to repayment. This includes a temporary 12-month ''on ramp'' where students who are unable to make payments will not go into default. We have also implemented a new income-driven repayment plan that is more affordable, including the automatic enrollment of delinquent borrowers if we have their approval for the disclosure of the information needed to calculate their payment on income-driven repayment. We agree with the commenter who pointed out that the Department is aware of CDRs as it is the Department that calculates them. We point out that § 668.171(f) does not require institutions to report their CDRs to the Department.

*Changes:* None.

*Loss of Eligibility (§ 668.171(c)(2)(ix))*

*Comments:* We received a few comments objecting to the mandatory trigger proposed in § 668.171(c)(2)(ix) when an institution loses eligibility to participate in a Federal educational assistance program other than those administered by the Department. The commenters believed that the trigger would encourage institutions to not participate in programs that would otherwise assist students. One of the commenters posited that the trigger should be made discretionary and only result in financial protection if the loss or revenue from losing the program's eligibility be determined to be material to the institution.

*Discussion:* We are concerned that an institution's loss of eligibility to participate in another Federal agency's educational assistance program could be a significant indicator that an institution will face financial instability. For instance, an institution that receives significant revenue from serving veterans could be financially destabilized by losing access to a U.S. Department of Veterans Affairs educational assistance program (*e.g.,* the GI Bill). However, we are persuaded by commenters that some losses of eligibility for other Federal programs could be from programs that represent a small amount of revenue or that only persist for a couple of weeks. Accordingly, we believe making this a discretionary trigger will allow the Department to consider the magnitude of the effect from a loss of eligibility. Therefore, we have modified the discretionary trigger in § 668.171(d)(10) to include loss of institutional eligibility as well as loss of program eligibility related to participation in another Federal educational assistance program.

*Changes:* We removed the mandatory trigger in § 668.171(c)(2)(ix), and we broadened the discretionary trigger in § 668.171(d)(10) to include loss of institutional eligibility to participate in another Federal educational assistance program. Proposed § 668.171(c)(2)(ix) applied only to loss of program eligibility. We reserved § 668.171(c)(2)(ix).

*Contributions and Distributions (§ 668.171(c)(2)(x))*

*Comments:* Some commenters supported making the trigger in § 668.171(c)(2)(x) discretionary instead of mandatory. This trigger occurs when an institution's financial statements reflect a contribution in the last quarter of its fiscal year, and then an entity that is part of the financial statements makes a financial distribution during the first two quarters of the next fiscal year, which would not be captured in the current financial statements.

One commenter believed the trigger should be discretionary because the described action is not always manipulative or results in a lack of financial responsibility. Another commenter stated he or she realizes that the Department's goal is to prevent manipulation of composite scores and to ensure the composite score is demonstrating an accurate level of institutional financial resources available to the institution. The commenter opined that the trigger does not achieve that goal because the Department's recalculation of the composite score would only adjust it downward based on the distribution without consideration of other financial factors that impact the score. The commenter provided an example where an institution has an infusion of capital in the fourth quarter which it used to purchase equipment for a new program. The example continued with the school enjoying a full cohort of students in the new program with the institution achieving an increase in revenues in the first two quarters of the institution's next fiscal year during which time the institution generated a distribution. According to the proposed trigger, the Department would only consider the contribution in the last quarter of the first fiscal year and the distribution in the first two quarters of the second fiscal year with no consideration of the increase in revenue which may keep their composite score at a passing level. For this reason, the commenter urged that this trigger be discretionary.

*Discussion:* The Department disagrees with the commenters and will keep this as a mandatory trigger. Integrity in the financial responsibility composite score is a key component in ensuring the Department conducts accurate oversight of institutions of higher education. We have seen entities engage in a practice of intentionally increasing their assets at the end of their fiscal year to make an institution's composite score look better and then withdrawing those funds within the first two quarters of the next fiscal year. Doing so presents a misleading picture of financial health and undermines integrity in the composite score process. As such, we believe it is critical to treat such behavior as a form of composite score manipulation that indicates a lack of financial responsibility.

While we understand the hypothetical example provided by commenters, we do not find it persuasive. The recalculated score would have to be a failure. An institution in that situation that made a small distribution would likely not fail the composite score if the school was as financially healthy as the commenter purports. Secondly, two quarters of a fiscal year is just six months. It is reasonable to ask institutions that receive contributions late in the year to simply wait a few months before providing a distribution. Finally, this provision is forward looking. Institutions would not be retroactively subjected to this requirement so they would know going forward that contributions at the end of the year will come with this requirement. Accordingly, we will keep this requirement as a mandatory trigger.

Upon further review, we noted that the second use of the word ''institution'' in this trigger in the NPRM was not the correct term when it should be ''entity'' as it relates to the audited financial statements that were submitted to the Department. We have therefore fixed this terminology in the final rule text to adopt the more accurate terminology.

*Changes:* We made a clarifying change to refer to the entity that is part of the financial statements rather than the institution. We also clarified that the associated reporting requirement in

§ 668.171(f)(1)(v) has a deadline of 21 days after the distribution.

*Creditor Events (§ 668.171(c)(2)(xi))*

*Comments:* Some commenters objected to the mandatory trigger dealing with creditor events in § 668.171(c)(2)(xi). One commenter asserted that a creditor may have waived the violation at issue and therefore the creditor event should not initiate the trigger. The commenter asked us to clarify whether the standard articulated at § 668.171(f)(3)(i)(A) would apply to this trigger. Another commenter believed that this trigger would hinder institutions' access to credit. The commenter continued by saying that anytime the Department took an action against a school, it would face both the impact of the action and then a subsequent requirement to post financial protection because creditors would be concerned with the possibility of an institutional default associated with the Departmental action and would be reluctant, or would refuse, to provide credit. One of the commenters opined that the trigger is written in a broad manner that would encompass minor technical violations that have little or no financial impact on the institution. One of these commenters suggested the trigger be made discretionary to give the Department the ability to weigh the impact of the creditor event and then determine the need for financial protection.

*Discussion:* The Department disagrees with the commenters and will keep this as a mandatory trigger. We are concerned that in the past institutions have had conditions inserted by creditors into financing agreements that are designed to dissuade the Department from taking action against an institution because it would make the entire amount come due or otherwise enter default and thus put the institution at risk of sudden closure. If a creditor is so concerned about an institution that it needs to attach significant conditions like automatic default in response to the Department placing conditions like heightened cash monitoring 1 or 2, then the Department believes that is an important sign that an institution is deemed financially risky enough that we should also secure upfront financial protection. It is for these same reasons that we are not persuaded by suggestions from commenters to not apply this trigger if the creditor waives the default. The Department is concerned by the signal sent by these conditions and would not have a way of knowing whether the creditor will or will not waive the default until it is too late.

We disagree with the commenters that this provision would result in the minor technical issues being captured. The regulatory language is clear that we are worried about defaults or adverse conditions. The commenter did not explain how something that is minor or technical could rise to the level of being adverse. Nor did they explain how something that is adverse, such as a default, could only be minor or technical.

This trigger is not covered by the standard articulated in § 668.171(f)(3)(i)(A). That provision is related to loan agreements under § 668.171(d)(2), a discretionary trigger. The concern with this trigger is around financing agreements that specifically implicate Department actions.

The Department's ultimate responsibility is to ensure that institutions are financially responsible, and the Department fulfills its role as a steward of the taxpayer investments in the Federal student financial aid programs. In this instance, we are concerned about efforts to discourage proper and necessary Department oversight actions.

*Changes:* None.

*Declaration of Financial Exigency (§ 668.171(c)(2)(xii))*

*Comments:* One commenter requested clarification on the trigger in § 668.171(c)(2)(xii), which is a mandatory trigger activated when an institution declares a state of financial exigency to a Federal, State, Tribal, or foreign governmental entity or its accrediting agency. The commenter asked the Department to define a ''declaration of financial exigency'' and clarify that it does not include a routine financial reporting letter.

*Discussion:* We defined ''financial exigency'' in § 668.2 in the NPRM and maintain that definition here. We confirm that, under the definition, routine financial reporting does not constitute a financial exigency.

*Changes:* None.

**Financial Responsibility—Discretionary Triggering Events (§ 668.171(d))**

*General*

*Comments:* Some commenters expressed support for the discretionary financial triggers. One of those commenters believed that the adoption of the discretionary financial triggers would enhance the financial stability of participating institutions.

*Discussion:* We thank the commenters for their support.

*Changes:* None.

*Comments:* One commenter expressed support for the discretionary triggers and also proposed adding a discretionary trigger reflecting a financial rating by a third party, such as a credit rating agency, would provide the most updated financial information available to the Department for its determination of the institution's financial responsibility.

Another commenter supporting the discretionary trigger format suggested an additional discretionary trigger linked to the presence of short-term and contingent liabilities. The commenter believes that such debts present greater risks of financial instability to the institution.

*Discussion:* We decline to accept the commenters' suggestion. The presence of short-term financing is not inherently a bad thing, and it cannot be used to help an institution's composite score. Contingent liabilities should be recorded in the financial statements if the amount can be reasonably estimated. If not, it might require a disclosure with a range. We believe other triggers would capture the most common contingent liabilities, such as lawsuits and settlements. If not, the contingent liabilities would be captured in the next audited financial statements.

With regard to the credit rating agency determination, we think that looking at the other actions that could likely affect that credit rating downgrade is a better approach. In other words, we anticipate that looking at specific triggers would allow us to consider the event that leads to the rating downgrade rather than the downgrade itself.

*Changes:* None.

*Comments:* We received a few comments that opposed the discretionary financial triggers in general. One of those commenters opined that the discretionary nature of the financial triggers introduced uncertainty and potential inconsistencies in how these triggers will be applied. This commenter thought it crucial that financial triggers be based on measurable factors and the idea the Department would use its discretion diluted the idea of measurable factors being what caused implementation of any required financial protection. Finally, one commenter stated that discretionary triggers will effectively supplant more reliable indications of an institution's financial status.

*Discussion:* We disagree with the commenters. The concept of the discretionary triggers is for the Department to be alerted to any financial event at a participating institution that may place that

institution in an infringed financial status or indicate the institution is about to close. These triggers, as opposed to the mandatory triggers, allow the Department more flexibility in determining whether the institution is in financial difficulty. That discretion allows the Department to evaluate the institution's situation, often with input by the institution, to decide if the trigger warrants further action, *e.g.,* requiring financial protection. One of the flexibilities of the discretionary financial triggers is the ability to disregard the trigger when the determination is made by the Department that there is no risk to the institution or its students. Conversely, when it is determined that there are reliable indicators of an apparent risk to students the Department can act in the timeliest way possible which is almost always more rapidly than other financial indicators might allow. Additionally, any Federal Government enforcement action that is inconsistent, including how the Department implements these discretionary triggers, is subject to challenge under the Administrative Procedure Act and any other applicable laws.

Contrary to the commenter's argument, we think these triggers do present reasonable conditions where looking at their potential effect is not overly complicated. For instance, the Department could see the type of action taken by the accreditor and look at why it had taken such an action. That could help us understand the possibility of a loss of accreditation for either the institution overall or a program and thus how much revenue from title IV, HEA aid might be lost. We can look at the amounts involved in the defaults, delinquencies, creditor amounts, and judgments as well as any terms of conditions attached to those events to see their effect. The fluctuations of title IV, HEA volume, closure of locations or programs can all be considered in terms of how much title IV aid is attached those programs or locations and what that looks like as a share of institutional revenue. Similarly, for the State citations, loss of program eligibility, teach-outs, and actions by other Federal agencies we can consider the number of students enrolled from that State, how much title IV, HEA aid an institution received from a program which is no longer eligible, and what portion of the institution is being required to put together a teach-out plan. The Department would similarly know the potential size of a group under consideration for a borrower defense discharge. With the high dropout rates the Department would know how much an institution is undergoing churn on an annual basis, which can be a sign of financial struggles given the high cost of student acquisition and the inability to have a stable and sustained revenue supply from enrollees. Finally, the Department could look at what is being investigated at an institution based upon the exchange disclosure. For all these items, there are reasonable ways for the Department to consider whether a given triggering event at a specific institution is likely to have a significant negative financial effect.

*Changes:* None.

*Comments:* A few commenters believed that the entire set of discretionary triggers were not well defined. Some indicated that the burden placed upon institutions by the discretionary triggers was unacceptable. Commenters also argued that the discretionary triggers did not give rise to issues with significant financial impact and that a process was required to determine if the discretionary trigger impacting an institution is valid and has the requisite financial impact.

*Discussion:* We disagree with the commenters. The goal of the discretionary triggers is to identify situations that could be a sign of financial weakness which merit financial protection. However, the discretionary triggers leave the Department some discretion to determine whether the circumstances are likely to have a significant adverse effect on the financial condition of the institution. This recognizes that the same discretionary triggering event may have different financial effects on an institution. For instance, an institution that closes a number of its locations, such as having a series of satellite locations that are essentially a single classroom for one course, to streamline its operations, while not losing substantial amounts of enrollment, would likely not need financial protection. On the other hand, an institution that closes all but a single location, while suffering massive enrollment losses, likely would. The measures thus do not include specific thresholds that would guarantee the imposition of financial protection, but rather lay out concerning situations that merit more extensive examination.

We also believe the burden placed upon the institution will be reasonable. Several of these triggers, such as fluctuations in title IV, HEA volume and pending borrower defense claims can be determined by the Department and do not require additional institutional reporting. The additional work to report a triggering event and then some back and forth with the institution if the Department deems the condition potentially worrisome enough to merit a closer look is a reasonable cost compared to the benefits that come to taxpayers in obtaining financial protection prior to sudden closures and the establishment of closed school discharge liabilities. If the institution is financially stable, the case can be easily made, and the trigger will not lead to any required financial protection. If the situation is such that financial protection is determined to be necessary, then we acknowledge that burden but see it as a necessity to protect the interests of students and taxpayers. The institution, in responding to a discretionary triggering event, has the opportunity to explain or provide information to the Department that demonstrates that the triggering event has not had or will not have a significant adverse effect on the institution's financial condition.

*Changes:* None.

*Comments:* A few commenters were concerned with the language that described the discretionary triggers as including those detailed in the regulations but not limited to them. The commenters believed that a list of financial triggers must be finite and not open ended. One of the commenters opined that adding a financial trigger at a later time after the publishing of these final rules would require that it be negotiated.

*Discussion:* We disagree with the commenters. Unlike the mandatory triggers, discretionary events are ones in which the Department will take a case-by-case look at the situation and determine whether it represents a significant negative financial risk. To that end, the list of discretionary triggers identifies the items that we think are most likely to result in such considerations. That is also why we have attached reporting requirements related to them in § 668.171(f). However, with thousands of institutions of higher education there are bound to be unique situations not contemplated in these regulations in which the Department needs to take a closer look at whether they might result in financial instability. As such, the Department believes it is critical to preserve that flexibility as those situations arise. Therefore, the triggers here provide clarity to the field about issues the Department is particularly worried about while ensuring that unanticipated issues can be investigated as needed.

We do not agree that rulemaking is required to consider other factors. In many parts of our existing regulations, we have inexhaustive lists of factors or

requirements that the Department may consider or require. For instance, § 600.31(d) provides a non-exhaustive list of what might be considered a change in control. Similarly, § 668.24(c) has a non-exhaustive list of the records that an institution must maintain, as does the list of items that an institution must provide to enrolled and perspective students in § 668.43(a). For this provision related to triggers, we note that the underlying language in section 498 of the HEA lays out the types of issues the Secretary should consider to determine whether an institution is financially responsible, such as meeting financial obligations as laid out in section 498(c)(C) but does not provide any constraint on how the Secretary should determine whether an institution is meeting that criteria. Given the varied nature in which an institution could fail to show they can meet their obligations, we believe a non-exhaustive list is appropriate.

However, upon reviewing the language further, we do agree that the non-exhaustive list did not provide sufficient clarity for the community of how other situations could end up being a discretionary trigger. To address this issue, we have added new trigger in § 668.171(d)(14), which includes any other event or action that the Department learns about and is determined to likely have a significant adverse effect on the institution. This is the same condition as laid out at the start of § 668.171(d) but clarifies that any other event captured as a trigger would need to rise to this level. As a result of adding the new trigger the Department has deleted the reference to ''including, but not limited to'' at the start of § 668.171(d). We have also added a corresponding reporting requirement to paragraph (f) of this section.

*Changes:* We have added § 668.171(d)(14) to include any other event or condition that the Department learns about from the institution or other parties, and the Department determines that the event or condition may cause a significant adverse effect on the financial condition or operations of the institution. We have also added § 668.171(f)(1)(xviii) which contains a corresponding reporting requirement for this discretionary trigger.

*Comments:* A few commenters suggested that the final rules allow a process by which institutions can provide input to the Department. The commenters felt that this input was essential to the Department making a correct determination about an institution's financial stability once it encountered a discretionary trigger.

*Discussion:* The Department notes that § 668.171(f)(3) has provisions explaining how institutions subject to financial triggers can provide input demonstrating that the triggering event has been resolved. For discretionary triggers, the provisions in paragraph (f) allow institutions to provide explanations of how the triggering event has not had or will not have a significant adverse effect on the financial condition of the institution.

*Changes:* None.

*Accrediting Agency, Federal, State, Local, or Tribal Actions (§ 668.171(d)(1))*

*Comments:* One commenter suggested that the final rule be modified to include accreditor findings of financial distress or significant risk of financial distress that would otherwise fall short of ''probation'' or ''show-cause order'' be considered as a discretionary trigger.

*Discussion:* We disagree with the commenter. We believe where the regulation discusses placing an institution in a comparable status to show cause or probation would capture something that was truly serious and that raised questions about an institution's financial health. We think this will capture the situations we are most worried about while not capturing every single accreditor or regulator action. Furthermore, in many instances in which an accrediting agency makes a finding of financial distress or there is significant risk of financial distress, the agency places an institution on probation or an equivalent status.

*Changes:* None.

*Comments:* One commenter objected to probation being the cause of a discretionary trigger since, in the commenter's view, institutions on probation routinely have their accreditation continued. Another commenter had a similar view regarding show-cause status as the commenter did not regard that status as a negative action but saw it as an opportunity for institutional improvement.

*Discussion:* We disagree with the commenters. In our experience, these statuses are employed by accreditors and State entities when an institution is in some degree of non-compliance with the entity's rules or standards. The Department's concern here is that an institution being placed in this status may be at risk of losing its accreditation, which could lead to negative financial consequences, such as the inability to award recognized credentials or receive Federal aid. It is also common for accreditors to use one of these statuses when they have concerns about an institution's financial health. As this is a discretionary trigger, the institution may provide information to the Department demonstrating that the triggering event was not related to an issue that negatively impacted the institution's financial condition.

*Changes:* None.

*Comments:* One commenter sought clarification on whether the discretionary trigger applied to programmatic accreditors and programmatic State licensing entities.

*Discussion:* The language in § 668.171(d)(1) speaks to actions imposed on an institution, not a program, so this applies to an institutional accreditor as we are concerned about an institution losing accreditation, authorization, or eligibility.

*Changes:* None.

*Other Defaults, Delinquencies, Creditor Events, and Judgments (§ 668.171(d)(2))*

*Comments:* Two commenters sought clarification whether this trigger would be activated if a creditor waived an event that would normally activate this trigger. One commenter was concerned that this trigger might be activated by an inconsequential event. The commenter suggested that this trigger be limited to those events where the institution's independent auditor states that the financial risk is significant in the annual audited financial statement.

*Discussion:* We disagree with the commenters. The purpose of the financial triggers, in most cases, is for the Department to be alerted to possible threats to the institution's financial stability between submissions of the audited financial statement. As this is a discretionary trigger, the Department has to determine that the event has a significant adverse effect on the financial condition of the institution before financial protection is required. The institution has the opportunity to provide information to the Department demonstrating that the event does not have a significant adverse effect on the institution's financial condition, or the event has been waived or resolved.

*Changes:* None.

*Comments:* One commenter was concerned that a financial trigger related to entering into a financing arrangement would introduce further strain on access to credit for postsecondary institutions.

*Discussion:* We disagree with the commenter. The provision in § 668.171(d)(2) is not simply about an institution entering into a financing arrangement. Rather, it is when an institution is subject to a default, the creditor calls due on a balance, or there are other conditions attached to default or other provisions under such arrangement that threaten the

institution's financial condition or the Department's ability to protect itself. Those include when a default, delinquency, or other event occurs that allows the creditor to require or impose an increase in collateral, a change in contractual obligations, an increase in interest rates or payments, or other sanctions, penalties, or fees; or when the institution can be subject to default or other adverse condition as a result of any action by the Department. We believe this discretionary trigger is important to provide us with the flexibility to protect the Department and monitor an institution with greater financial risk due to such arrangements.

*Changes:* None.

*Comments:* One commenter sought clarification on the word ''condition'' as it is used in describing this trigger. The commenter's concern was that all institutions are subject to ''conditions'' in financing arrangements and recommended that the Department clarify that it is only conditions that give rise to potential negative consequences.

*Discussion:* We agree with the commenter that the current language is not clear. To clarify the regulatory text, we have added the word ''adverse'' before ''condition'' to align with § 668.171(d)(2)(iv).

*Changes:* We have modified § 668.171(d)(2)(i) to apply when an institution enters into a line of credit, loan agreement, security agreement, or other financing arrangement whereby the institution or entity may be subject to a default or ''other adverse condition . . .'' to clarify the previous language that only said ''condition.''

*Fluctuation in Volume (§ 668.171(d)(3))*

*Comments:* One commenter noted that there have been formula changes for the Federal methodology calculation for title IV, HEA programs due to the Free Application for Federal Student Aid (FAFSA) Simplification Act and in case of other future changes due to Federal actions, they suggest adding the language ''or changes to the eligibility formula or student eligibility changes'' to account for any future legislative changes that could impact student eligibility and therefore impact fluctuation in volume. Another commenter believed that additions or eliminations of title IV, HEA programs would result in fluctuation.

*Discussion:* While we agree with the commenters concern, we believe our existing language is sufficient to address that concern. The rule says fluctuations in the amount of Direct Loan or Pell Grant funds ''that cannot be accounted for by changes in those programs.'' This would also account for any new programs that could be added under title IV of the HEA.

*Changes:* None.

*Comments:* One commenter suggested the Department include other changes in revenue particularly from online degree or non-degree programs. The commenter stated the Department should be committed to capturing revenue fluctuations outside of title IV, HEA-specific funding, which may provide a risk to an institution's financial stability. The commenter said the proposed change would allow the Department to identify instances when traditional institutions are addressing financial challenges by relying on expanding enrollment through online or non-degree programs. The proposed language should not prevent monitoring revenue changes in other areas.

*Discussion:* The Department disagrees with the commenters. We think it is most appropriate for the Department to focus on the connection to title IV for a trigger related to fluctuations since we are tasked with oversight of the title IV, HEA programs. The institution's overall revenues, expenses, assets, and liabilities are captured on annual audited financial statements and reflected on its composite score, which is where we would observe other fluctuations and identify potential risks.

*Changes:* None.

*Comments:* One commenter requested the Department publish standards for significant fluctuations to avoid inconsistencies in audit report disclosures. Another commenter agreed with the Department's changes but encouraged the Department to provide more explicit thresholds for title IV, HEA volume fluctuations.

*Discussion:* The Department believes that the reporting requirements in § 668.171(f) provide a way for the institution to document when they think significant fluctuations are not sufficiently concerning. We do not think a single standard would be appropriate, as the percentage or dollar amount of a fluctuation would look very different depending on the size of the institution. We think the approach of considering this issue through discussions with the institution is more appropriate.

*Changes:* None.

*Comments:* Some commenters inquired whether a fluctuation in title IV, HEA volume that was linked to an institutional structural change, such as a merger or reorganization, would be treated as a discretionary trigger.

*Discussion:* The commenters' use of the term ''merger'' needs some clarification. When one institution acquires an institution under different ownership, and the acquired institution is intended to become an additional location of the acquired institution, the transaction is often referred to as a merger. This type of ''merger'' is treated as a change in ownership in the first instance, and then the addition of an additional location. Fluctuations in title IV, HEA volume from this type of change would not be a trigger because the Department has other methods (through review of financial statements and potential provisional conditions) to exercise the appropriate oversight. The term merger is also used to refer to the situation where two schools under the same ownership are ''merged'' so that one institution becomes an additional location of the other institution. This type of ''merger'' is not treated as a change in ownership because the ownership stays the same. Fluctuations in title IV, HEA volume from this type of merger would not be a trigger so long as the title IV volume on a combined basis does not significantly fluctuate.

*Changes:* None.

*High Annual Dropout Rates (§ 668.171(d)(4))*

*Comments:* One commenter suggests the Department add language stating the high dropout rates should only be considered when they are not caused by external factors. The commenter provides examples of natural disasters and COVID–19 as reasons for high dropout rates that are not indicative of an institution's financial instability.

*Discussion:* The Department believes the reporting process in § 668.171(f) provides a way for the institution to raise these concerns and the Department to consider them without needing to write in specific ways to address these specific issues. However, we note that at a time when enrollment in postsecondary education is declining and the costs of convincing students to enroll is high, the signs of high rates of withdrawal can indicate very significant financial challenges for institutions.

*Changes:* None.

*Comments:* Several commenters called upon the Department to define ''high'' as it relates to this trigger. One of those commenters asked if the trigger would apply to all schools in the same way. One commenter opined that this trigger would have a disproportionately adverse effect on institutions with an open enrollment policy.

*Discussion:* We believe that the approach used by the Department in assessing discretionary triggers addresses the commenters' concerns. We will look at the dropout rate on a case-by-case basis to see if it indicates signs of financial concern. For instance,

we would look at the cost to the institution of needing to continue recruiting students to replace those who drop out and what that indicates about its financial health given both the cost of student acquisition and the loss of a more stable revenue stream that comes from someone who stays enrolled for longer periods. We would also consider issues, such as the size of the institution, as the number of students who drop out also matters for thinking about revenue in addition to the percentage that drop out.

*Changes:* None.

*Comments:* One commenter pointed out that the Department has long considered a withdrawal (or dropout) rate of less than 33 percent to be a minimum requirement for new institutions seeking participation in title IV, HEA programs for the first time. The commenter recommended that the Department evaluate all private institutions that had a dropout rate of greater than 33 percent and, on an institution-by-institution basis, determine if financial protection was required.

*Discussion:* These discretionary triggers are designed to be flexible and allow the Department to assess on a case-by-case basis whether financial protection is necessary. Thus, we are reluctant to establish a threshold for dropout rates for institutions currently participating in the title IV, HEA programs. The goal of this discretionary trigger is for the Department to evaluate whether the dropout rate of a given institution poses a threat to that institution's financial stability and ability to continue to offer services to its students.

*Changes:* None.

*Pending Borrower Defense Claims (§ 668.171(d)(6))*

*Comments:* Several commenters objected to this discretionary trigger due to an institution having the potential of providing financial protection when the Department forms a group process to consider borrower defense claims that are subject to recoupment. One of the commenters stated that this was essentially an action by the Department to recoup the funds prior to the conclusion of the adjudication of the borrower defense claims and before the institution can contest any of the claims.

*Discussion:* We disagree with the commenters. When there are enough pending borrower defense claims for the Department to form a group process, that could lead to substantial loan discharges from the Department. Therefore, it is appropriate for the Department to consider whether it needs to seek financial protection. We disagree with the commenters that it is an action to recoup the funds. Seeking financial protection in these instances only provides potential protection for the Department and taxpayers should discharges happen.

*Changes:* None.

*Discontinuation of Programs and Closure of Locations Discretionary Triggers (§ 668.171(d)(7)) and (8))*

*Comments:* Commenters stated the 25 percent threshold determined by the Department is arbitrary and that there is not a strong enough justification to show that a discontinuation of a program or closure of a location under these circumstances is indicative of an institution's financial stability. One commenter summarized the Department's position during negotiated rulemaking on closure of locations that enroll more than 25 percent of students as being that the threshold was determined for the same reason as closure of academic programs and if a location closure strengthens an institution's finances, and the institution was financially stable there would be no escalation. The commenters also stated that the 10 percent LOC provision exceeds the materiality of the closure. Some commenters stated that the trigger will have a large impact on cosmetology schools as they often only offer cosmetology programs, therefore a closure of one program could lead to the discretionary trigger even though it would not be indicative of the institution's financial stability.

*Discussion:* The commenters' concerns speak to some of the reasons why the Department elected to make program discontinuation and location closures discretionary triggers rather than mandatory triggers. Situations such as closures that put an institution in a stronger position could be explained as part of the reporting under § 668.171(f). The Department will thus be able to consider on a case-by-case basis whether to seek financial protection. That case-by-case assessment likewise will allow for consideration of the financial effect compared to the amount of financial protection sought.

With regard to the comments related to cosmetology, if the institution only has a single program and closes it then presumably the school is closed and thus there is no ongoing financial protection requirement. Instead, there would be consideration of whether there are liabilities for closed school discharges. If an institution only offers two programs, with one being very small, then the case-by-case review of the triggering event would allow the Department to consider whether that closure really does merit financial protection.

The thresholds in these discretionary triggers are not attached to automatic actions the way numerical thresholds are for provisions such as cohort default rates in part 668, subpart N. In those situations, institutions that exceed those thresholds face consequences unless they appeal the results. In this situation, the trigger still results in a case-by-case-case review and determination. To that end, the threshold keeps reporting for institutions prior to that case-by-case determination more manageable. Absent such a threshold, institutions would have to report every closure to the Department. We thus believe that 25 percent is reasonable to strike a balance between not making institutions report events that are unlikely to have a significant adverse effect on the financial condition of the institution, while not setting the threshold so high that we do miss instances of closure that would cause that result. We note this approach is not dissimilar to other areas, such as reporting requirements in § 600.21 where institutions must report changes in ownership at different percentages of ownership levels on different timeframes based upon our assumption of when a specific review of such reporting might result in a change in control.

In considering the concerns raised by commenters about the portion of this trigger related to enrollment, we also reviewed the part tied to the closure of more than 50 percent of the institution's locations. Upon further review, we think a focus on the number of locations is less useful than the emphasis on enrollment, as locations may vary greatly in size. An institution may close more than 50 percent of its locations and that action may impact only a small percentage of students. We also believe expressing these percentages, as a share of students at the institution who received title IV, HEA funds, is better than the way it was drafted in the NPRM. Focusing on title IV, HEA recipients align this trigger with programs the Department administers, and this will be data more readily apparent to us, which will simplify the burden on institutions for assessing whether this trigger should result in financial protection. We remain convinced that institutional closures of locations or programs that impact more than 25 percent of its enrolled students who received title IV, HEA funds may be an indicator of impaired financial stability. The loss of revenue represented by such a reduction in

enrollment may have an immediate impact on the institution's ability to continue to offer educational services. Additionally, this would capture most, if not all, of the instances where a closure of 50 percent of locations raises concerns for the Department. Therefore, we are modifying the regulation so that this discretionary trigger will be activated only when an institution closes locations that enroll more than 25 percent of its students who received title IV, HEA funds.

*Changes:* We revised § 668.171(d)(8) to reflect that the discretionary trigger described therein will be activated when an institution closes a location or locations that enroll more than 25 percent of the institution's students. We have removed the part of the proposed trigger in § 668.171(d)(8) for situations where an institution closes more than 50 percent of its locations. We have noted that the triggers in both paragraphs (d)(7) and (8) will be assessed as a percentage of students at the institution who received title IV, HEA program funds.

*State Actions and Citations (§ 668.171(d)(9))*

*Comments:* Two commenters expressed concern that State agencies can act in areas that have nothing to do with the institution's financial condition and their action will activate this trigger. One commenter recommended that a materiality threshold be established for this trigger. One commenter was concerned that State agencies can incorrectly cite institutions and that this trigger may be activated prior to the institution being able to refute the incorrect citation.

*Discussion:* We disagree with the commenters. This is a discretionary trigger, and the institution will be able to provide information to the Department indicating that the State's action is erroneous or addresses an issue with little or no impact on the institution's financial stability. As we have stated earlier, we do not agree that a materiality threshold should be established for any of the financial triggers. Such a threshold could effectively place the decision about whether an event or action is an indicator of impaired financial stability in the purview of the institution and its auditor. We maintain that this is the Department's purview in order to ascertain if an institution is, in fact, negatively impaired financially due to the actions of a State agency. However, as we noted the discretionary triggers would involve a case-by-case determination to see if the event had a significant adverse financial effect on the institution. That is not the same as materiality but captures a concept that the mere presence of the discretionary trigger alone is insufficient to lead to a request for financial protection. We note that we did eliminate the mandatory trigger dealing with State actions as explained under the discussion of § 668.171(c)(2)(v) above and moved that provision to be included here as part of the discretionary trigger.

*Changes:* Provisions in § 668.171(d)(9), dealing with State actions and citations has been expanded to include situations where a State licensing agency or authorizing agency provides notice that it will withdraw or terminate the institution's licensure or authorization, making those actions a discretionary trigger rather than a mandatory trigger as was proposed.

*Loss of Program Eligibility (§ 668.171(d)(10))*

*Comments:* Two commenters stated that the loss of eligibility for a non-title IV Federal education assistance program may be unrelated to administrative or financial abilities and may be immaterial to an institution's financial well-being. One of the commenters contended that this discretionary trigger would require a detailed financial analysis to determine the impact of losing other Federal education assistance programs and that the Department did not provide any reasoned justification for the trigger.

*Discussion:* We disagree with the commenters. Our concern about the loss of eligibility for another Federal assistance program is twofold. One, it indicates some degree of revenue loss for the institution. For instance, an institution that serves many veterans may face financial challenges if it loses access to the GI Bill. We recognize, however, that the amount of revenue that comes from a given Federal program can vary and thus think a discretionary trigger is best used to assess the extent of the effect.

Second, we are also concerned about what loss of eligibility for a program might indicate in terms of implication for title IV, HEA programs. It is possible that the reason for the ineligibility might indicate problems with Federal aid that need to be examined as well. This may not immediately result in a request for financial protection, but it could, if it indicates a widespread practice of substantial misrepresentations, or some other concern.

We also disagree with the commenter that this would be a challenging trigger to assess. We expect institutions know how many students are served by a given Federal program and how much money the institution receives from that program. They should be able to report that information to the Department. Where this information indicates that the loss of eligibility for another Federal education assistance program does not affect an institution's financial capability, this discretionary trigger would not lead to a requirement to provide financial protection. We note that we modified this discretionary trigger to also include loss of program eligibility related to participation in another Federal educational assistance program, which was a proposed mandatory trigger in § 668.171(c)(2)(ix) of the NPRM.

*Changes:* As mentioned previously, we removed the mandatory trigger in § 668.171(c)(2)(ix) and included the substance of that proposed mandatory trigger in the discretionary trigger in § 668.171(d)(10) to provide ''The institution or one or more of its programs has lost eligibility to participate in another Federal educational assistance program due to an administrative action against the institution or its programs.''

*Exchange Disclosures (§ 668.171(d)(11))*

*Comments:* One commenter requested the Department clarify that the discretionary trigger concerning exchange disclosures would activate only if the possible violation negatively impacted the financial condition of the institution.

*Discussion:* This is a discretionary trigger, and institutions would not be required to provide financial protection if they provide information to the Department indicating that the action is not likely to have a significant adverse effect on the financial condition of the institution.

*Changes:* None.

*Directed Question*

*Comments:* Several commenters responded to the Department's directed question about whether the Department should include a discretionary or mandatory trigger related to when an institution receives a civil investigative demand, subpoena, request for documents or information, or other formal or informal inquiry from any government entity (local, State, Tribal, Federal, or foreign). This would be tied to the reporting requirement in proposed § 668.171(f)(1)(iii).

Some commenters recommended that an investigation by a government entity be included as a discretionary trigger. The commenter believed that simply reporting the occurrence was insufficient and the Department should be empowered to obtain financial

protection if it determines that such protection is warranted.

Some commenters stated that an investigation itself should not be a trigger and there should not be a requirement to report investigations. Another commenter requested the Department clarify whether the trigger covers all third-party requests for information rather than only those from government agencies. Another commenter opined that establishing this factor as a trigger would place too much authority in the hands of a third party.

*Discussion:* The Department agrees with the commenters that it would not be appropriate to make these items a discretionary or mandatory trigger. We believe that the mandatory trigger related to lawsuits in § 668.171(c)(2)(i)(B) captures situations where such requests results in litigation. Other triggers, such as the ones related to SEC actions, State actions, or loss of eligibility for other Federal programs also capture events that may start with such information requests. We think those events are better suited to being triggers because they occur further along in the process whereas information requests are too early to be able to tell the potential effects on financial responsibility.

However, the Department believes that it is still critical to have information on these types of situations for riskier institutions. Knowing about ongoing investigations can help the Department assess whether it should be looking more carefully into an institution and allows us to know sooner if problems might be coming. Accordingly, we are not adopting any trigger language related to this provision in § 668.171(c) or (d). We are also removing the reporting requirement § 668.171(f) because it is not appropriate to ask institutions to report on this information for financial responsibility purposes if it is not being used as a listed discretionary trigger. Instead, we will move a version of this language into § 668.14(e)(10). That is a more appropriate spot for requesting such reporting from riskier institutions, as that section lists conditions that the Secretary may place into the PPA for a provisionally certified institution. In doing so, we also deleted the reference to ''informal'' information requests because we think that would be too unclear a standard for institutions to understand. This language thus only applies to formal requests, which include subpoenas, civil investigative demands, and requests for documents or information. We have also clarified that institutions would only need to report such requests that are related to areas of Department oversight, particularly those related to potential borrower defense claims and substantial misrepresentations. These areas are the marketing or recruiting of prospective students, the awarding of Federal financial aid for enrollment at the school, or the provision of educational services for which the Federal aid was provided.

*Changes:* We have removed language in § 668.171(f)(1)(iii) and relocated a modified version of it to § 668.14(e)(10).

**Financial Responsibility—Recalculating the Composite Score (§ 668.171(e))**

*Comments:* One commenter agreed with the Department's changes to § 668.171(e).

*Discussion:* We thank the commenter for their support.

*Changes:* None.

*Comments:* Some commenters suggested that under § 668.171(e)(3)(ii) and (e)(4)(ii), the equity ratio should be adjusted by decreasing both the modified total assets in addition to modified equity. If the Department is decreasing an institution's equity, its total assets should be decreased as well, the commenters argued. Another commenter suggested to make this change only under § 668.171(e)(3)(ii).

*Discussion:* The commenters are correct that both modified equity and modified assets should be reduced for § 668.171(e)(3)(ii), the withdrawal of equity, because for double entry accounting the adjustments would be to decrease the equity and the asset. However, we do not think the change is appropriate for § 668.171(e)(4)(ii), the reclassification of a contribution, because reclassifying a contribution to a short-term loan would be an increase in a liability and a decrease in equity. We have made that change in the regulatory text in the first identified place.

*Changes:* We have adjusted § 668.171(e)(3)(ii) to note that we will also reduce the modified assets.

**Financial Responsibility—Reporting Requirements (§ 668.171(f))**

*Comments:* One commenter offered general support for the enhanced reporting requirements and the associated timelines.

*Discussion:* We thank the commenter for their support.

*Changes:* None.

*Comments:* Several commenters stated that the reporting requirements are excessive and burdensome and will lead to institutions not submitting reports timely. One commenter stated that they will likely have to hire additional staff.

*Discussion:* The Department disagrees that the reporting requirements are as complicated as indicated by commenters. The mandatory triggers represent situations that would be easily identifiable by the institution. For instance, they would be well aware if they have been sued, would know if they declared financial exigency, or other similar circumstances. Several mandatory and discretionary triggers also rely upon data that the Department already has in its possession, such as default rates, 90/10 and GE results, and changes in aid volume. Other things are information that institutions have to report anyway, such as accreditor actions or closures of locations. The Department also expects institutions to maintain an adequate number of qualified persons to administer the title IV, HEA programs, as discussed elsewhere in this final rule pertaining to administrative capability. Therefore, we believe the information needed to be reported is manageable and consists of many things that are already covered by other reporting requirements.

*Changes:* None.

*Comments:* Several commenters said 10 days to report triggering events was too short. Some requested 30 days from when the institution had requisite knowledge to report the triggering event. One commenter suggested 21 days would be an appropriate amount of time to report, noting that would fit with the monthly accounting cycle and related financial reporting.

*Discussion:* The Department agrees with the commenters that it is reasonable to provide more than 10 days for reporting. We are particularly persuaded by the suggestion from the commenters to use 21 days as they tied that to existing accounting processes, while other commenters did not provide a specific basis for 30 days. We, however, are establishing that the 21 days be based upon when the event occurred since that is an objective date rather than attempting to ascertain when institutional leadership became aware of the situation. A determination based upon institutional knowledge and awareness would be harder for the Department to verify and could result in institutions intentionally delaying reporting and then claiming they were unaware of the issue. By contrast, the date of the event is going to be more easily known.

*Changes:* We have adjusted the reporting timeframes from 10 to 21 days for any provision in § 668.171(f) that required reporting within 10 days. We have modified the regulation to clarify that the reporting timeframe in

§ 668.171(f)(1)(v) is 21 days after the distribution.

*Comments:* Several commenters raised concerns about the Department's use of the terms ''preliminary'' and ''final'' in § 668.171(f)(3)(i) and (ii), respectively. These commenters expressed confusion about how these terms interacted with the triggers, especially the mandatory triggers that are otherwise presented as automatically resulting in a request for financial protection. Commenters stated that without definition, these terms rendered the entire framework of financial responsibility unclear and how the terms will apply to the process of determining if institutions are financially responsible.

*Discussion:* The Department agrees with the commenters that the language used in § 668.171(f)(3) was insufficiently clear with respect to mandatory triggering events. In particular, the concept of a ''preliminary'' determination is not correct for mandatory triggering events, which represent a determination that an institution is not financially responsible and is subject to a requirement for financial protection. Accordingly, we have deleted the word ''preliminary'' in the first paragraph under § 668.171(f)(3)(i).

Other paragraphs within § 668.171(f)(3) raise the same issue identified by commenters about how language about a mandatory trigger resulting in a request for financial protection being contradicted by regulatory language implying the submission of additional information to then make a determination about whether financial protection should occur. In particular, proposed § 668.171(f)(3)(i)(C) contained language about the institution providing information that a mandatory or discretionary triggering event has not had or will not have a material adverse effect on the financial condition of the institution. That reference was not correct for either mandatory or discretionary triggers. As we noted in the NPRM and in this final rule, the idea behind the mandatory triggers is that they represent financial situations that are so concerning that they should result in a requirement for financial protection. That would occur following the reporting procedures in § 668.171(f), which includes the opportunity for the institution to show that the issue has been resolved. But it would not involve the demonstration of a material adverse effect. For discretionary triggers, as we have discussed, we do not think the use of the word ''material'' is appropriate. We have provided several reasons elsewhere in this final rule why this is the case, including that a materiality standard would defer judgments about the potential risks to taxpayer funds to auditors and representations from institutional management when this should be a function carried out by the Department. However, we do agree that discretionary triggers need more evidence of financial effects than just their occurrence to result in financial protection requests. To make the way the triggers work clearer, we have deleted the reference to the mandatory triggers in this paragraph and also clarified that the standard under consideration is a significant adverse effect on the institution. As stated previously, the Department considers an event to have a significant adverse effect when an event or events impact the financial stability of an institution in such a way that the Department determines it poses a risk to the title IV, HEA programs. This aligns with the policy as described in the NPRM and final rule. It also captures the idea that the institution could provide evidence of the lack of a significant adverse effect for discretionary trigger situations.

The Department does not think similar alterations are necessary for the use of the word ''final'' in § 668.171(f)(3)(ii). That paragraph includes discretionary triggering events, which would require a determination that an institution lacks financial responsibility as part of the response in paragraph (f)(3)(i)(C). Accordingly, it is appropriate to keep the word ''final'' in this paragraph.

*Changes:* We removed the word preliminary as it modified the word determination in § 668.171(f)(3)(i). In § 668.171(f)(3)(i)(C), we have also removed the reference to the mandatory triggers under § 668.171(c) and replaced the word ''material'' (adverse effect) with ''significant'' (adverse effect).

*Comments:* Several commenters requested that the Department clarify under § 668.171(f) that reporting is only required when a triggering event is reasonably likely to have a material adverse effect on an institution's financial condition. One commenter said that discretionary triggers should not be required to be reported.

*Discussion:* The Department disagrees with the commenters. We believe it is more appropriate for the Department to use its discretion to review whether a given discretionary trigger has a significant adverse effect on the institution rather than relying on the self determination of institutions. Doing so would ensure greater consistency in the process as two institutions may make different judgments about an otherwise identical event since they would not be aware of what other institutions report. By contrast, the Department will receive reports of discretionary triggers across schools and can consistently treat institutions. Accordingly, we think it is appropriate for institutions to report discretionary triggering events as noted in this section and from that there can be a determination about financial effect. We also note that in reporting the event as laid out in § 668.171(f)(3)(i)(C) the institution may clarify when it reports the triggering event that discretionary triggers do not have a significant adverse financial effect on the institution. Under § 668.171(f)(3)(i)(A) they may also report for the defaults, delinquencies, creditor events, and judgments that are discretionary triggering events as defined in § 668.171(d)(2) that those items have been waived by a creditor. Finally, under § 668.171(f)(3)(i)(B) the institution may report that the triggering event has been resolved or in the case of liabilities or debts owed under the mandatory trigger in § 668.171(c)(2)(i)(A) that the institution has sufficient insurance to cover those liabilities. The extended reporting time of 21 days to report instead of 10 will also further ensure that easily resolvable triggering events can be addressed by the time the institution informs the Department about them.

The effect of these paragraphs is that institutions may show when they first report a mandatory trigger, that is required to be reported in paragraph (f), that the triggering event has been resolved and is no longer a concern or provide additional information clarifying how a discretionary trigger does not present a significant adverse effect on the institution.

*Changes:* As discussed previously, we have changed ''material'' to ''significant'' when describing adverse effect. We also clarified in paragraph (f) the point at which an institution can respond to the Department in response to mandatory triggering events before financial protection is required.

*Comments:* Several commenters suggested that the Department remove the requirement § 668.171(f)(1)(iii) that institutions report the receipt of a civil investigative demand, subpoena, request for documents or information, or other formal or informal inquiry from any government entity because institutions receive regular questions and inquiries from government entities for various reasons many of which are unrelated to financial stability. One commenter stated that if the Department proceeds

with the language, we should clarify the scope of this reporting requirement.

*Discussion:* The Department agrees with commenters, in part. First, we agree that this provision is best located elsewhere, as we have declined to adopt a trigger related to it. We discuss our reasons for this in the ''Directed question'' section. However, we do believe that obtaining this information is critical for riskier institutions. Knowing about ongoing investigations and documentation requests helps the Department identify when there are situations that require our attention. It also allows the Department to know if there is the possibility of lawsuits or administrative actions that could impact the institution's financial health or ability to manage the title IV, HEA programs.

Given those considerations, we think this provision is better located within the set of conditions that the Secretary may impose upon provisionally certified institutions in § 668.14(e). Placing this language in that section allows the Department to request it in a more targeted manner when it would be helpful to be particularly aware of those situations.

The Department also recognizes that the language as drafted in the NPRM was broader than needed and raised questions about how institutions were supposed to comply. We have narrowed and clarified the scope of this requirement to remove the reference to informal requests, which was too vague. We have also updated the language to clarify that institutions do not have to report requests that are unrelated to areas of the Department's oversight. Accordingly, we indicate we are only interested in receiving reports related to recruitment and marketing, awarding of Federal financial aid, or the provision of educational services. The Department chose these areas because they are areas that can lead to substantial misrepresentations and potential borrower defense claims.

*Changes:* We have moved § 668.171(f)(1)(iii) to § 668.14(e)(10) and revised the text. First, we have specified that the provision only applies to formal inquiries, which include civil investigative demands, subpoenas, and other document or information requests. We have removed the reference to informal requests. Second, we clarified that these are requests related to marketing or recruitment of prospective students, the awarding of financial aid for enrollment at the school, or the provision of educational services. This thus excludes the types of requests that would not be relevant to Department oversight, such as a health code violation in the cafeteria, workplace injury investigations, and other similar items.

*Comments:* None.

*Discussion:* As previously discussed in the comments regarding discretionary triggers in paragraph (d) of this section, the Department has added a discretionary trigger at § 668.171(d)(14). As a result of that addition, we also added a corresponding reporting requirement for that trigger in paragraph (f).

*Changes:* We have added § 668.171(f)(1)(xviii) which requires institutions to report no later than 21 days after any event or condition, not already included in paragraph (d), that is likely to cause a significant adverse effect on the financial condition of the institution.

**Financial Responsibility—Public Institutions (§ 668.171(g))**

*Comments:* Multiple commenters supported the Department's proposal that a domestic public institution could show that it is financially responsible by providing a letter or other documentation acceptable to the Department and signed by an official of that government entity confirming that the institution is a public institution and is backed by the full faith and credit of the government entity. The commenters believed that our prior approach excused many public institutions from scrutiny of their financial health. Commenters also provided evidence that institutions by proxy of being public are not automatically backed by the full faith and credit of the State and thus the prior regulatory requirement that institutions solely show they are public in insufficient.

Many other commenters opposed this provision. Commenters argued obtaining such a letter would be overly prescriptive and dramatically increase administrative burden and bureaucracy. Commenters also expressed concerns that States may be unwilling to provide such letters or use such a request to extract unrelated concessions from institutions. Commenters also argued that the need for such a provision is unnecessary as there is no documented history of any risk of precipitous closure or financial collapse of a public institution of higher education.

*Discussion:* Section 498 of the HEA establishes that one way an institution that fails to meet requirements of financial responsibility can still be considered financially responsible is if it ''has its liabilities backed by the full faith and credit of a State or its equivalent.'' The Department's longstanding policy has been to allow institutions that demonstrate they are public to not be otherwise subject to requirements like the financial responsibility composite score. The Department has also looked for full faith and credit backing in considering changes in ownership under current § 668.15. That section is being removed and reserved in this final rule, with some, but not all, of the most relevant provisions moving into § 668.176.

While the commenters are correct that the Department has not seen significant instances of public institutions that seem to be at risk of precipitous closures, we have encountered situations in which public institutions facing the potential for significant liabilities have ended up not, in fact, having full faith and credit backing from a State or its equivalent. When such situations occur, the Department is at risk of having liabilities that cannot be backed by another government entity and insufficient information about the finances of the institution to know if it would be able to reimburse those liabilities.

Accordingly, the Department believes it is critical to have a process in place for reaffirming that public institutions have full faith and credit backing when the Department believes it needs it for oversight purposes. Especially when a new public institution joins the Federal student aid programs, or a private institution converts to a public institution. Since those are brand new public institutions for title IV, HEA purposes, the Department will not have any prior record of their public status. Therefore, we believe it is always appropriate to confirm that these institutions have full faith and credit backing.

For other public institutions, we believe a more flexible approach is preferable as these will be institutions where the Department has a track record of them operating as public institutions for title IV, HEA purposes and the concerns about financial stability that merit double-checking the full faith and credit status are not as universal.

Accordingly, we are proposing to revise § 668.171(g)(1)(ii) to indicate that letters demonstrating public backing will always be required for changes in ownership that result in converting an institution from private to public and upon the first attempt to have an institution recognized as public. We separately reserve the right to make similar requests at other points. For instance, the Department might request such a letter following complaints or concerns about an institution's financial health or evidence of rapid growth that

is not clearly attributable to local population changes. We believe this approach acknowledges the concerns from commenters that applying such requests universally would generate unnecessary work to obtain letters showing what is already known but allows the Department to reaffirm this situation where we believe it to be prudent.

*Changes:* We have revised § 668.171(g)(1)(ii) to require a letter or other documentation acceptable to the Department showing a public institution's full faith and credit backing upon the Department's request, rather than for all public institutions in all instances.

*Comments:* Several commenters expressed confusion about whether the triggering events would apply to public institutions. Others wrote in saying that the financial protection requests attached to mandatory or discretionary triggers should not apply to public institutions because the Department does not seek financial protection from public institutions.

*Discussion:* The commenters are correct that the Department does not seek financial protection from public institutions on the grounds that full faith and credit backing ensures liabilities will be covered. The same would apply to the financial protection requests associated with the triggers. However, a public institution that is subject to a triggering condition could be subject to a finding of past performance, be placed on heightened cash monitoring, or have other conditions besides financial protection placed on them, such as provisional certification or additional reporting requirements.

*Changes:* None.

**Financial Responsibility—Past Performance (§ 668.174)**

*Comments:* One commenter requested that the Department clarify if an institution may be delinquent in submitting its audit and if so, what period of delinquency could exist without being cited for a late audit. Another commenter suggested that if a school fails to submit a close out audit in a timely manner, the regulations should address whether such an institution be subject to a late audit citation and whether the institution can be reinstated as an eligible institution.

*Discussion:* The Department currently provides institutions with a 30-day grace period before they are cited for a late submission. Institutions that fail to provide the audit within the grace period are cited for past performance under § 668.174(a).

*Changes:* None.

*Comments:* One commenter opined that the proposed requirement in § 668.174(a)(2) would require an institution to backdate information and create a significant administrative burden.

*Discussion:* We disagree with the commenter. The requirement spells out when issues uncovered in a final audit determination, or a program review determination report would result in a finding of past performance. There is no retroactive reporting of information involved. The amendment to § 668.174(a)(2) in this final rule just clarifies the timeframe of the reports in question.

*Changes:* None.

**Financial Responsibility—Alternative Standards and Requirements (§ 668.175)**

*Comments:* None.

*Discussion:* In proposed § 668.175(c), we changed a reference to ''providing other surety'' to ''providing financial protection'' to better align with our other references to obtaining financial protection from institutions, when necessary. However, we neglected to make a similar change in § 668.175(b) where we referenced ''providing other surety.'' We have changed that reference, in these final rules, to ''providing other financial protection'' to conform with the change made in paragraph (c) of this section.

*Changes:* We made a conforming change in § 668.175(b) to replace the word ''surety'' with the phrase ''financial protection'' to conform with a previous change made in § 668.175(c).

*Comments:* A number of commenters objected to the proposed requirement in § 668.175(c) and (f) that an institution must remedy whatever issues caused a financial responsibility failure. The commenters said that in many instances the event that triggered the failure would have been something that happened that could not be undone even if the consequences stemming from such an event had been mitigated. Commenters noted that even in some cases where a triggering event could be remedied it may take some time and expense for an institution to do so. Some commenters also said that if a situation that caused a triggering event had been remedied or otherwise resolved there would no longer be any reason for the Department to require the financial protection associated with that event.

*Discussion:* The proposed regulations require an institution failing the financial responsibility standards under § 668.171(b)(2) or (3) to remedy those areas of noncompliance in order to participate in the title IV, HEA programs under a provisional certification. Timely reporting of triggering events may include conditions that cannot be remedied immediately but still require assessments by Department staff of the risks to the institution and its students.

As noted in the discussion related to § 668.171(f), institutions can indicate to the Department that the triggering event has been resolved. If they prove that to the satisfaction of the Department then we would not seek financial protection. However, if that issue has not been resolved, we would continue the financial protection as explained in § 668.171(c) and (d). We do not think releasing the financial protection sooner would be appropriate, as the Department wants to see that issues have been resolved and are not recurring and to give time for the filing of additional financial statements.

*Changes:* None.

*Comments:* Many commenters voiced the concern that the resources needed to provide additional letters of credit would further strain an institution given the requirements by financial institutions to provide 100 percent collateral plus fees for the letters of credit. Commenters also noted that over time letters of credit have become much more expensive for an institution to obtain. The commenters noted that in some cases institutions could be required to post letters of credit that exceeded 100 percent of an institution's annual title IV, HEA funding, an outcome described as being simply unworkable. Other commenters noted that funds used to obtain stackable letters of credit would not be available as working capital for an institution or to assist students. Other commenters acknowledged that the Department has a role to protect students but sees that as an obligation for the Department to protect against an institution's precipitous closure while not unduly impacting an institution's operations to avoid causing the problems the letters of credit are protecting against. Commenters urged the Department to retain its discretion to set the amount of any required financial protection based upon factors including the impact on an institution to meet that requirement.

*Discussion:* The Department recognizes that institutions in weakened financial conditions or at risk of incurring significant liabilities will have harder times providing financial protection. Those same weaknesses and risks warrant providing financial protections for students and taxpayers that are providing Federal student aid funds. Institutions agree to administer

those student aid funds as a fiduciary on behalf of their students, and that reasonably includes obligations to mitigate risks by providing financial protection when an institution does not meet the applicable financial responsibility standards. Students qualify to obtain Federal student aid by enrolling in eligible programs and the risk of any closure can impair or wipe out the value of a student's progress toward completing their educational programs. These risks to the students warrant requiring financial protections from the institutions notwithstanding the additional difficulties institutions may encounter meeting these requirements.

The Department does retain discretion to determine how much financial protection should be so long as that amount is above the 10 percent minimum. We believe that amount provides us a baseline level of protection that would be necessary in all circumstances in which we are seeking financial protection. But we can then make determinations whether greater amounts are needed or not. In doing so, however, the goal is to assess the level of risk to the Department and taxpayers, not simply the institution's ability to meet such requirements. An inability of the institution to provide financial protection equal to the level of risk exhibited by the institution is a concerning sign.

*Changes:* None.

*Comments:* Some commenters pointed out that some reasons the Department requires a letter of credit are not tied to immediate financial risks that an institution may be experiencing. Rather, they deal with an event such as a change in ownership resulting in a change in control where the new owner may have strong financial statements for one year but does not yet have a second year of audited financial statements for the new owner. The commenter viewed this letter of credit requirement as already providing the type of protection that would be covered if a subsequent triggering event happened under the proposed regulations. Consequently, the commenter thought there would be little need for the new owner to provide any additional letter of credit if a triggering event occurred.

*Discussion:* Financial protections required after approving a change in ownership with a new owner or a new approval for an institution to participate in the Federal student aid programs are required. This protection mitigates risks associated with the new owner operating the institution that administers Federal student aid funds as a fiduciary on behalf of its students. During this period the institution begins to demonstrate that it meets the administrative capability requirements and establishes a track record under its then-current ownership. Reports of triggering events tied to an institution's financial responsibility may represent greater risks to the institution's continued operations than were previously known. In these instances, the increased level of financial protection is warranted while the Department reviews the report about the event and additional information provided by the institution.

*Changes:* None.

*Comments:* One commenter suggested that a larger reworking of the financial responsibility regulations was needed to restructure the consequences of a failed score and offered ongoing support to do so.

*Discussion:* The Department believes that the changes in these regulations provide improvements to its administration of the financial responsibility standards it sets and enforces for institutions. Changes to these regulations in the future will similarly be conducted through the negotiated rulemaking process to benefit from discussions and input with multiple stakeholders.

*Changes:* None.

*Comments:* One commenter said that the minimum letters of credit the Department accepts as an alternative way for an institution to demonstrate financial responsibility or to participate under the provisional certification alternative are too low. The commenter pointed out that the potential liabilities for a closed school can be higher than one year of the Federal student aid funding for that institution since substantial liabilities can arise from refunds and program liabilities. The commenter noted that this larger range of liabilities also shows that the smaller letter of credit provided under the provisional certification alternative can also be much smaller than the liabilities that could arise from a close institution. The commenter said that it is insufficient for the Department to use an institution's prior year funding as a reference for setting the percentage of a letter of credit because the potential liabilities from a closed institution could be larger than that amount.

*Discussion:* The Department recognizes that precipitous closures of institutions can easily establish repayment liabilities that exceed one year of Federal student aid funding for an institution but setting financial protection requirements at the largest potential liabilities would be poorly aligned with the day-to-day operations of institutions that may fail the financial responsibility standards for reasons that do not present high risks of precipitous closures. We believe that the proposed regulations with the increased financial responsibility triggers and stacked letters of credit will provide a better alignment of required protections with the relative risks present at an institution. We also note that these increased notifications will also provide more information that Department staff can use in oversight to determine what additional steps may be taken to protect students.

*Changes:* None.

*Comments:* A commenter said that the options were not workable for institutions to have funds set-aside under administrative offset or provide cash to be held in escrow instead of providing a letter of credit. The commenter said it was unrealistic to think that an institution would be able to provide cash in the amounts likely to be required under the proposed regulations and noted that having funds held back through administrative offset would impair an institution's revenue stream potentially for months.

*Discussion:* We understand the challenges from choosing either one of these options would prevent many institutions from choosing them. The option for institutions to provide cash to be held in escrow is available because some institutions have asked to do this to minimize banking fees associated with obtaining a letter of credit. Similarly, the option for institutions to fund an escrow account through offset has been made available for institutions that were unable to obtain a letter of credit.

The goal of these financial responsibility provisions is to help the Department receive the financial protection deemed necessary to protect taxpayers from potential liabilities that may be uncompensated, including those stemming from closures. We recognize that providing financial protection in any form, including administrative offset, can create a cost or burden to the institution. However, we believe that burden is justified in order to protect taxpayers and for the Department to carry out its duties. Were we to adopt the posture that we would never request financial protection if it placed burden on the institution then the Department would never end up requesting such protection, would expose taxpayers to continued liabilities, and fail to meet requirements spelled out in the HEA.

*Changes:* None.

*Comments:* Commenters requested that § 668.175 specifically exclude liquidity disclosure requirements under

Financial Accounting Standards Board (FASB) ASC 958–250–50–1. (For-profit and public institutions do not have such a GAAP requirement.) Commenters made this suggestion because all nonprofit entities have a GAAP requirement to disclose in the notes to financial statements relevant information about the liquidity or maturity of assets and liabilities, including restrictions and self-imposed limits on the use of particular items, which goes beyond information provided on the face of the statement of financial position. According to the commenter, without such an exclusion, any nonprofit institution may be seen as having to provide financial protection and, accordingly, the requirements in § 668.175(c) should explain that referenced disclosures would be for institutions under financial stress and are in addition to those required for nonprofit institutions under FASB ASC 958–250–50.

*Discussion:* The Department regularly reviews financial statements for nonprofit institutions when determining whether the institution meets required standards of financial responsibility, including evaluating the extent to which the institution's assets may be encumbered or subject to donor restrictions. We do not believe that any changes to the regulations are needed to change the way that these resources are evaluated. To the extent that a reportable event takes place concerning these assets, the Department will evaluate the report to determine whether a financial risk warrants financial protection or an increase in existing financial protections. The Department reviews the liquidity disclosure; however, that disclosure does not automatically cause an institution to fail the financial responsibility standards. The language in § 668.175 provides the alternatives that an institution can continue participation in the title IV, HEA programs, an institution must have failed at least one of those standards for this section to apply to them. The Department does not exclude any of the accounting standards or disclosures from the required GAAP and GAGAS submission to the Department.

*Changes:* None.

**Financial Responsibility—Change in Ownership Requirements (§ 668.176)**

*Comments:* Several commenters stated that the Department should abandon these regulations because they would have a chilling effect on ownership transactions. Commenters argued that the postsecondary education sector is in a period of contraction and that allowing for the acquisition of institutions will help avoid closures. They also argued that the Department should encourage (not discourage) financially strong institutions to provide a lifeline to distressed institutions. Commenters also argued that the degree of discretion available to the Department and the burden of these regulations creates too much uncertainty and burden for the parties involved in a transaction. Commenters also pointed to existing accrediting agency policies are sufficient for handling changes in ownership. Finally, commenters raised concerns about requirements that the acquiring institution assume liabilities associated with the institution being purchased as having a chilling effect on transactions.

*Discussion:* The Department believes it is necessary to reevaluate the relevant policies to accommodate the increased complexity of changes in ownership arrangements and to mitigate the greater risk to students and taxpayers when institutions fail to meet Federal requirements. The Department implemented subpart L of part 668 regulations in 1997, and it addresses the financial responsibility of institutions in circumstances other than changes of ownership. Accordingly, the Department has been relying on § 668.15 to evaluate financial health following a change in ownership. The new regulation attempts to harmonize the requirements of § 668.15 with subpart L of part 668 requirements. For example, the Department will now score the audited financial statements that are submitted for the institution and its new owner. In that way, the Department is better able, as one of the commenters suggests, to encourage financially strong acquisitions, and require financial protection in the event the acquiring entity's financial statements do not pass. The Department cannot rely on an accrediting agency to review changes of ownership. Each accrediting agency has its own standards for reviewing such changes, and the rigor and the elements of the review vary among agencies. Although requiring new owners to assume liabilities may limit their interest in some transactions, it ensures that the actual legal entities that own institutions are responsible for any liabilities that an institution fails to satisfy. The Department's interest in requiring owners to assume liability extends to situations where the conduct occurred under prior ownership, or where the liability is established under new ownership. This is also consistent with the Department's longstanding position that liabilities follow the institution, notwithstanding a change in ownership. The Department is committed to working with institutions that seek to change ownership and we believe that these regulations strike the right balance in appropriate increase in the oversight of transactions but also adding significant regulatory clarity to the process and additional financial analysis of changes of ownership to better protect students and taxpayers.

*Changes:* None.

*Comments:* One commenter expressed concern that there may be ''loopholes'' that proprietary schools seeking to convert to nonprofit status will use to take advantage of students and taxpayers, while continuing to charge high tuition. However, the commenter did not identify any specific loophole for the Department to close.

*Discussion:* The Department is committed to evaluating changes in ownership so that those significant organizational changes do not put students or taxpayers at risk. One way the Department is doing that is by ensuring the resulting financial ownership is financially strong. We clarified oversight of for-profit to nonprofit conversions by publishing regulations in October 2022, which went into effect on July 1, 2023.[15] In those regulations we particularly clarified the requirements around financial involvement with a former owner to address issues the Department identified when it examined previous transactions where a purported conversion to nonprofit status involved continuing financial relationships with former owners. The Department has found that these ongoing relationships can result in inflated purchase prices with financing provided by the former owner or revenue-based servicing agreements where the former owner continued to benefit from the same stream of revenue. We believe the changes to the regulatory definition of nonprofit, as well as the increased financial oversight of changes in ownership in this final rule, coupled with the continuing rigor of the Department's review of nonprofit conversions, will allow effective Department decision-making when proprietary schools seek to convert to nonprofit status.

*Changes:* None.

*Comments:* One commenter believes that if an institution undergoes a change in ownership and it fails to submit an audited same-day balance sheet as part of an application to continue participation, the Department should address whether such an institution

[15] 87 FR 65426.

would be cited for late audit submission and be subject to past performance requirements. The commenter also wanted the Department to address whether the institution may be reapproved after a loss of participation if the past performance violation is still effective.

*Discussion:* The HEA and the Department's regulations provide that an institution that undergoes a change in ownership does not qualify to participate in the title IV, HEA programs.[16] It may continue to participate while the Secretary reviews the change by complying with the requirements of 34 CFR 600.20(g) and (h). Requiring the institution to submit a same day balance sheet under § 600.20(h)(3)(i) is a long-standing requirement for continued participation. The Department's review of the same day balance sheet provides a basis for which to seek financial protection promptly following the change in ownership if the same day balance sheet fails. If an institution fails to submit a same day balance sheet—or any of the other requirements under § 600.20(g) or (h)—it will be subject to a loss of eligibility. The institution may seek reinstatement, but a required element of reinstatement is compliance with those requirements—including submission of an audited same day balance sheet. If the commenter is suggesting that a failure to timely submit a same day balance sheet should bar the institution for 5 years, the Department thinks doing so would be a more significant action than is warranted.

*Changes:* None.

*Comments:* One commenter asked the Department to clarify several provisions under § 668.176(b)(2)(iii). In particular, the commenter asked whether the amount of financial protection would be based upon the title IV, HEA funds associated with one or both institutions involved. The commenter also asked how the Department intends to exempt new owners, while still applying financial protections to other new owners. The commenter said the exception for any new owner that submits two years or one year of acceptable audited financial statements is unclear.

*Discussion:* Because there are not always two institutions involved in the change in ownership, the amount of the financial protection is based on the title IV, HEA funding of the institution that is acquired. The Department has historically required financial protection (typically 25 percent) from new owners that do not have audited financial statements. We have typically required a lower amount of financial protection (typically 10 percent) if the new owners have one but not two years of audited financial statements. The new rule codifies the practice of allowing a new owner to submit financial protection in lieu of the requirement in 34 CFR 600.20(g) that two years of audited financial statements must be submitted as part of the materially complete application.

*Changes:* None.

*Comments:* One commenter questioned the Department about whether the changes under § 668.176(b)(3) apply to the target school, the acquiring institution, or both. The commenter stated that if the changes are applicable only to the target school, then the regulation could limit a stronger acquiring institution from rescuing a struggling target school.

*Discussion:* The regulation applies to the school that is being acquired and requires that the new owner submit two years of audited financial statements or post financial protection. The commenter's concern about ''limiting a stronger acquiring institution'' is misplaced. First, not all transactions involve two institutions. Second, when the new owner owns another institution, the Department must confirm that the combined ownership of the two schools is financially stable. If the financial statements of the new owner do not pass the financial responsibility standard, it is prudent to require financial protection.

*Changes:* None.

*Comments:* One commenter stated that the Department should not view a buyer with a composite score below 1.5 to be unqualified (§ 668.176(b)(3)(i)(C)) because many institutions that do not meet the score have demonstrated that they can participate in the title IV, HEA programs without issue.

*Discussion:* The Department has used a composite score of 1.5 as a measure of the financial soundness of an entity for many years. These final regulations do not address the composite score methodology, nor the score required for participation in the title IV, HEA programs. We note, however, that we impose requirements on participating institutions that have a score below 1.5, which may include, among others, financial protection and provisional certification.

*Changes:* None.

*Comments:* A few commenters stated that the Department has not adequately explained in § 668.176(c) how it will determine that an institution is not financially responsible following a change in ownership if the amount of debt assumed to complete the change in ownership requires payments (either periodic or balloon) that are inconsistent with available cash to service those payments based on enrollments for the period prior to when the payment is or will be due.

Commenters either asked the Department to publish more guidance for how it will assess whether an institution can service debt or argued that the level of cash needed to service debt was unclear and must be clarified in the final rule.

*Discussion:* The Department declines to add specifics about the process for making the acquisition debt determination. The question of how much debt is too burdensome for an institution does not have a one-size fits all answer, and so is best addressed on a transaction-specific basis. The Department will also consider issuing sub regulatory guidance in the future.

*Changes:* None.

*Comments:* One commenter requested clarification on whether the audit requirements apply just to those undergoing a change in ownership in the future or also to existing ownership structures during recertification.

*Discussion:* The provisions in § 668.176 apply to institutions undergoing a change in ownership after the effective date of these regulations.

Changes: None.

**Administrative Capability (§ 668.16)**

*General Support*

*Comments:* We received several comments in support of the amendatory changes to the administrative capability regulations in § 668.16. One commenter commended the Department's changes because they believe when institutions fail to meet administrative capability standards it is an indication that the institution provides a substandard education and jeopardizes the financial investments of the Department, taxpayers, and students.

Another commenter approved of the proposed changes related to career services, geographical accessible clinical or externship opportunities, timely disbursement rules, and improvement of financial aid counseling and communication. In addition, a commenter acknowledged the Department's amendments as a positive step to ensure that institutions that participate in Federal student aid programs are held accountable.

*Discussion:* We appreciate the support of the commenters.

*Changes:* None.

[16] 20 U.S.C. 1099c(i); 34 CFR 600.31(a).

*General Opposition*

*Comments:* Some commenters proposed that we remove all the additional administrative capability requirements in the NPRM. The commenters argued that the additional topics are already addressed by other regulations or accreditation standards. The commenters felt that the Department has no evidence to support the need for changes, and the consequence of a finding is significant. According to these commenters, institutions can face fines, penalties, placement on heightened cash monitoring, or even the loss of participation.

*Discussion:* We disagree with the commenters. The Department has identified issues related to administrative capability through program reviews that current regulations do not adequately address. For example, the Department has found that institutions will include externships/clinicals as part of an educational program because the hands-on experience is necessary for the field of study, but then not provide the assistance needed for the students to be placed in the required externships/clinical or the assistance is delayed to the point that the student has to drop out of the program or is dropped by the institution itself. When these required externships are not provided, or if students cannot access them due to geographic constraints, students are unable to complete their programs, or they are unable to obtain licensure or become employed in the field. Ensuring that students are able to complete programs and obtain licensure or a job in their field is an integral part of the administration of a program that provides funds for just that purpose.

Another issue that has been identified during program reviews is that institutions will delay disbursement of title IV, HEA program funds until the end of a payment period so that they can delay the payment of title IV credit balances. This may be done to manipulate an institution's results under the 90/10 rule or to avoid returning funds under return to title IV. In both cases, such actions are a way to evade accountability and oversight of taxpayer funds. Title IV, HEA credit balance funds are needed by students to pay for expenses such as transportation and childcare that are needed for students to attend school. The unnecessary delay in disbursements and payment of credit balances has forced students, who might otherwise complete their programs, to withdraw. The purpose of the title IV, HEA programs is to provide funds needed for students to obtain educational credentials. Institutional actions that thwart that objective are evidence that the institution cannot properly administer the title IV, HEA programs in the best interests of its students.

The Department has a statutory mandate to ensure that institutions participating in the title IV, HEA programs have the administrative capability to properly implement the programs. The Department has determined that the additional requirements related to administrative capability being added in these regulations are necessary to fulfill its obligations under that statutory mandate.

With respect to the concern that noncompliance with these provisions could result in actions being taken against an institution, the Department points out that it has an obligation to properly oversee the title IV, HEA programs. The Department carries out that role using tools such as HCM, fines, suspensions, limitations, terminations, revocations, and recertification denials. The nature of the action depends on the details and severity of the finding. No matter what action is taken, institutions have the ability to respond. The regulations provide appeal rights within the Department when a suspension, limitation, termination, fine, or revocation action is taken. This final rule provides the Department with greater ability to ensure that institutions are administratively capable of providing the education they promise and of properly managing title IV, HEA programs.

Finally, we note that each of these additions to administrative capability touch on distinct areas that we would assess independently. Each plays a separate role that addresses a critical issue that is not otherwise intertwined with the others.

*Changes:* None.

*Comments:* One commenter requested that the Department delay implementation of the administrative capability requirements until July 1, 2025, to allow institutions time to implement the FAFSA Simplification changes.

*Discussion:* The Department declines to adjust the effective date. The administrative capability provisions here are important for improving our ability to evaluate the capability of institutions to participate in the title IV, HEA programs. The changes will benefit students and a delay would leave them unprotected for too long.

*Changes:* None.

*Comments:* Several commenters objected to the new administrative capability requirements. The commenters stated that the extensive changes and regulatory overload would add to the administrative burden currently facing schools, and are vague, duplicative, and challenging to measure.

*Discussion:* We disagree. As we discuss in the regulatory impact analysis, these indicators of administrative capability provide critical benefits for the Department, students, and institutions. Ensuring that students have accurate financial aid information, get their funds in a timely manner, and receive the career services they are promised is critical for having Federal investments in postsecondary education lead to success. Meanwhile, regulations on past performance, negative State actions, valid high school diplomas, and similar areas provide important protection for Federal investments. The benefits from these steps all outweigh the administrative costs to institutions.

*Changes:* None.

*Legal Authority*

*Comments:* Some commenters challenged that the proposed changes to § 668.16 would create new standards that are outside the scope of the Department's statutory authority. These commenters contended that the administrative capability standards addressed in the HEA do not include Federal student aid requirements that are separate from the actual administration of those funds. The commenters also argued that the proposed rules have no bearing on the administrative capability of an institution to efficiently administer title IV, HEA funds. The commenters indicated that provisions on career services, GE, misrepresentation, and the actions of other regulatory agencies do not belong in the administrative capability regulations.

*Discussion:* We disagree with the commenters. In adopting these rules, the Secretary is exercising authority granted by the HEA. HEA section 487(c)(1)(B) [17] authorizes the Secretary to issue regulations as may be necessary to provide reasonable standards of financial responsibility and appropriate institutional capability for the administration of title IV, HEA programs in matters not governed by specific program provisions, and that authorization includes any matter the Secretary deems necessary for the sound administration of the student aid programs. In addition, section 498(d) of

[17] 20 U.S.C. 1094(c)(1)(B).

the HEA [18] authorizes the Secretary to establish certain requirements relating to institutions' administrative capacities including their past performance with respect to student aid programs, as well as to establish such reasonable procedures as the Secretary determines will contribute to ensuring that institutions will comply with the requirements of administrative capability required by the statute. These final rules represent standards the Department has deemed necessary to carry out that authority in the HEA. In the sections that follow and elsewhere in the preamble, we explain why each of the added provisions relate to an institution's ability to administer title IV, HEA programs.

*Changes:* None.

*Administrative Capability—Financial Aid Counseling (§ 668.16(h))*

*Comments:* Many commenters supported the Department's proposal requiring that financial aid communications advise students and families to accept the most beneficial types of financial assistance available to them. The commenters commended the Department for devising meaningful and detailed guidelines for disclosures to students related to Federal student aid which require institutions to disclose vital information such as the cost of attendance broken down into components, the net price, the source of aid, and whether aid must be repaid.

Another commenter supported the amendment to § 668.16(h), saying it would increase the transparency of financial aid offers for students, borrowers, and their families. The commenter believed the proposed changes would enable students and their families to make more informed decisions on how to pay for their education, how to compare financial aid offers, and how to choose among schools.

*Discussion:* We agree. We want students to understand the costs of attending their program, including costs charged directly by the institution, and the financial aid offered by an institution.

*Changes:* None.

*Comments:* A few commenters said the term ''adequate'' financial aid counseling is too vague.

*Discussion:* We believe that the language proposed in § 668.16(h)(1) through (4) provides the necessary clarification for what the Department deems adequate. Those paragraphs lay out the kind of information that would be adequate for institutions to provide students.

*Changes:* None.

*Comments:* One commenter requested that the Department develop a best practices guideline that can be used by institutions to create financial aid communications specific to their student populations. The guideline, as requested by this commenter, would include all required elements to address the issue of accurate financial information such as the different types of aid, the total cost of attendance, net price, etc. The commenter believes that this approach would provide institutions the ability to further engage with students through their communications, as the comprehensive requirement may not be the most effective solution.

*Discussion:* We appreciate the commenter's suggestion. The Department already offers the College Financing Plan. Participating institutions use this standardized form to notify prospective students about their costs and financial aid. It allows prospective students to easily compare information from institutions and make informed decisions about where to attend school. The ''Loan Options'' box on the College Financing Plan includes fields for both the interest rate and origination fee of each loan, along with an explanation that, for Federal student loans, origination fees are deducted from loan proceeds. Furthermore, in October 2021, the office of Federal Student Aid issued a Dear Colleague Letter [19] (DCL) outlining what institutions should include and avoid when presenting students with their financial aid offers. This DCL includes guidance to institutions to present grants and scholarship aid separately from loans so that students and families can understand what they are borrowing.

*Changes:* None.

*Comments:* One commenter requested that the Department remove the phrase ''for students'' from § 668.16 (h)(1) since it seems out of place. The provision requires institutions to provide the cost of attendance and the estimated costs that students will owe directly to the institution based on their enrollment status. The commenter believes that the sentence could be restructured and more clearly stated.

*Discussion:* We decline to accept the commenter's suggestion. In this provision, the language says the Secretary will consider if the financial aid communications and counseling include information regarding the cost of attendance for students. The clause separating the cost of attendance language from ''for students'' is important because it outlines what should be included in the cost of attendance and that it needs to present students with the total estimated costs that are owed directly to the institution.

*Changes:* None.

*Comments:* A few commenters said the requirements in § 668.16(h) are too arbitrary, prescriptive, and interfere with their ability to communicate with their students. They stated that accreditors already require them to report and provide financial aid counseling to their students. In addition, the same commenters noted that some institutions assist students with financial aid applications and debt management.

One commenter also noted that financial aid counselors are required to meet with students in need of financial aid annually, and that their students participate in entrance, exit, and financial planning seminars.

*Discussion:* We disagree with the commenters. This provision does not interfere with the ability of an institution to communicate with students about their aid. Institutions that are already communicating this information in paragraph (h) would not be required to change their practices. Rather, we are concerned that there are too many instances in which financial aid information is not clearly communicated. Not all institutions are able to meet one on one with each student, thus clear and accurate financial aid communications is relevant for those institutions. This is the case despite the presence of entrance and exit counseling because information provided, often through financial aid offers, is confusing or misleading. We cannot speak to the content of financial planning seminars offered by institutions, and it is possible that some of those would fulfill these requirements and thus not necessitate any changes by the institution. This requirement thus outlines standards for how to present communications to provide students and families with accurate information about their financial aid options as they make important educational and financial decisions, such as which school provides them with the most beneficial financial aid offer or how much to borrow. Moreover, the Department is the administrator of the Federal aid programs, which represent most financial aid dollars. While accrediting agencies can also play a role in ensuring adequate financial aid counseling, it would be irresponsible to delegate this

[18] 20 U.S.C. 1099c(d).

[19] GEN–DCL–21–70.

function solely to a non-governmental entity.

*Changes:* None.

*Comments:* Several commenters noted that providing additional Federal aid information to students can create confusion for potential students. One commenter cautions that disclosures that include the total cost of attendance can be beneficial, however it can also confuse students that attend institutions that do not provide student housing. An unintended consequence would be that students may confuse non-program related costs of attendance as additional institutional charges. Another commenter also noted that there is already a wide range of required consumer information provided to students and the addition of more disclosures could confuse potential students.

*Discussion:* The Department disagrees with the commenters. A student pursuing postsecondary education needs to consider how to pay for non-academic expenses, the largest of which is housing. As an example, the Department's College Financing Plan provides one option for how institutions could provide cost of attendance broken down by on campus and off campus costs. Giving students a full sense of what they will pay will help them make decisions about how to balance work, academics, and borrowing. The Department seeks to provide this clarity.

*Changes:* None.

*Comments:* Several commenters suggested that the Department could further clarify what it means in § 668.16(h) to accept the most beneficial type of financial assistance by describing the order in which students should accept their aid. These commenters suggested that scholarships and grants should be accepted first, followed by subsidized and unsubsidized loans, and then private loan options. This would ensure, according to the commenters, that students and families accept the most beneficial aid options. Another commenter further suggested that we prioritize the types of loans and include PLUS and private loans last.

Many commenters argue that the Department is too vague when we propose that institutions advise students and families to accept the most beneficial types of financial assistance available. The commenters contend that institutions are not privy to a student's overall financial status and have no basis to advise a student to incur loan debt for example. According to the commenters, there is no specific guidance for schools to make this decision.

One commenter criticized the one-size-fits-all approach proposed in the NPRM to notify students about the most beneficial aid. The commenter explained that the most beneficial aid decisions are student specific. The commenter also raised concerns that individual financial aid counseling is unlikely because administrators have less time as they comply with additional burdensome regulations while facing record staffing shortages.

Another commenter asserted that the Department must clearly state that financial aid advisors can only speak to the types of aid offered through their institution, as they are not financial advisors. On the other hand, one commenter warned that dictating which types of aid are the most beneficial could expose institutions to legal action if a student followed the advice of a financial aid offer and later found that another type of aid would have been more beneficial to them.

Several commenters request that the Department remove this new requirement from the final rule.

*Discussion:* The Department's goal with this language is not to dictate what is most beneficial, which may vary by institution or student, but rather to identify patterns and practices when an institution is repeatedly counseling students to accept one kind of aid ahead of another, even when the latter would be the better choice. For instance, an institution that repeatedly counseled students to take out loans before grant aid that does not have to be repaid would clearly not be the most beneficial. So, too, would be encouraging students' parents to take out a Parent PLUS loan ahead of the student maximizing their loans. We also have seen past instances where institutions aggressively pushed their own private loan products, including some that were sometimes presented as grants when they were actually short-term loans. Such practices would not be the most beneficial for students.

The Department already offers the College Financing Plan which provides one example to institutions on how to present financial aid information in a clear way that advises students and families to consider aid that is most beneficial, such as aid that does not have to be repaid, followed by subsidized and unsubsidized loans, and other loan options.

At the same time, we recognize that individual student circumstances vary and that students may have access to specific scholarships or there can be State loan options. We do not expect institutions or financial aid advisors to advise individual students based on their specific financial status. We believe the emphasis of considering this issue in terms of overall patterns and practices in financial aid communications and clarity on the types of aid, such as grant and scholarship aid and loan options, rather than individual situations addresses the concerns of most of these commenters. We do not believe this would require additional burden on financial aid advisors or open institutions up to legal action.

Regarding the comments about broader financial counseling, this provision is only about financial assistance to pay for postsecondary education and does not create an expectation for institutions to understand and provide counseling to families on broader financial topics such as investments or retirement planning.

*Changes:* None.

*Comments:* One commenter proposed that the Department update the College Financing Plan to include items listed in the proposed regulations. The commenter also believes that if we interact with the financial aid community, the College Financing Plan could be improved further to entice additional institutions to use it.

*Discussion:* The Department has reached out to financial aid administrators to obtain comments on the College Financing Plan during past revisions. We will consider additional opportunities to obtain feedback during future revisions as well. The College Financing Plan is not covered by regulations and does not need regulatory changes to address this issue.

*Changes:* None.

*Comments:* Several commenters suggested that the Department strengthen the proposed rule by better defining financial aid communications. These commenters believe we should clarify that financial aid communication is any communication made to the student detailing his or her financial aid package.

*Discussion:* The Department has included the details in § 668.16(h) of what should be included in financial aid communications provided to students. Financial aid counseling and financial aid communications inform students of the cost of attendance for the program, the costs charged directly by the institution, and the financial aid offered by an institution. Institutions still have the flexibility to determine the best format in which the information is provided to their students.

*Changes:* None.

*Comments:* One commenter proposed that instead of focusing on institutional

capability, the Department should develop financial training and career development modules that students would be required to complete prior to being able to access student loans. They argued that this would take the burden off of institutions.

*Discussion:* Entrance loan counseling is required for students to complete before their student loans are processed. Entrance counseling informs students of the terms and conditions of their loan before borrowing and students are also informed of their rights and responsibilities. Students learn what a loan is, how interest works, repayment options, and tips to avoid delinquency and default. The Department agrees that the financial training provided in the required entrance loan counseling is important information for students to complete before a loan is processed on their behalf. However, institutions are also a trusted source of information for students. It is critical that institutions offer students information that is accurate and complete.

*Changes:* None.

*Comments:* One commenter wanted the Department to require institutions to include information about military education benefits such as the Post 9/11 Bill or GI Bill in the types of aid that they must disclose to students.

*Discussion:* We think it is important for institutions to inform eligible students about their military education benefits, but they are not included in title IV, HEA program funds and so are not appropriate to cover in this provision.

*Changes:* None.

*Administrative Capability—Debarment or Suspension (§ 668.16(k))*

*Comments:* One commenter criticized § 668.16(k)(2) and suggested that we rewrite it to clarify our intent. The same commenter also suggested that we revise § 668.16(k)(2)(ii) to separate the actions of the individual and the impact to an institution. The commenter believes that we should clearly state that it is the misconduct of an individual and the closure of an institution that the Department refers to in the proposed regulation.

*Discussion:* The amendment to § 668.16(k)(2) is to improve institutional oversight of the individuals that are hired to make significant decisions that could have an impact on the institution's financial stability and its administration of title IV, HEA funds. An institution's ability to meet these responsibilities is impaired if a principal, employee, or third-party servicer of the institution committed fraud involving Federal, State, or local funds, or engaged in prior conduct that caused a loss to the Federal Government.

*Changes:* None.

*Administrative Capability—Negative Action by State or Federal Agency, Accrediting Agency, or Court (§ 668.16(n))*

*Comments:* One commenter supported the addition of § 668.16(n) requiring that an institution has not been subject to a significant negative action. The commenter believes that the regulation strengthens the Department's ability to preserve the integrity of the title IV, HEA programs.

*Discussion:* We thank the commenter for their support.

*Changes:* None.

*Comments:* Several commenters noted that § 668.16(n) fails to provide any basis to determine what action the Department would view as a significant negative action that would prompt administrative capability concerns.

Two commenters requested clarity for the term ''significant negative action.'' These commenters suggested that the Department clearly state that this term applies to instances where the conduct that was the basis for the action or finding directly relates to an institution's handling of title IV, HEA funds. According to the two commenters, the Department should also clarify that the finding must be a ''significant negative finding.''

*Discussion:* We disagree with the commenters. The Department makes an administrative capability finding when it determines that an institution is not capable of adequately administering the title IV, HEA programs. The new provision regarding significant negative findings provides the Department with another method of determining whether an institution is administratively capable by assessing whether the institution has sufficient numbers of properly trained staff, its systems or controls are properly designed, and its leaders are acting in a fiscally responsible manner and with the best interests of students in mind. The Department declines to provide a definition for ''significant negative action'' or ''significant negative finding.'' Generally, we view a significant negative finding as something that poses a substantial risk to an institution's ability to effectively administer title IV, HEA programs. We would review the circumstances, the fact and issues at hand, and other relevant information related to the institution and finding in our determination of whether the underlying facts pose a substantial risk.

*Changes:* None.

*Comments:* One commenter requested additional clarity around the terms ''finding,'' including whether it must be significant and negative, ''repeated,'' ''unresolved,'' ''prior enforcement order,'' and ''supervisory directive.'' The same commenter asked for clarity on whether loss of eligibility in another Federal program would lead to an administrative capability issue if that loss of eligibility was limited to a program or quickly cured.

*Discussion:* We do not believe the terms used in the provision are ambiguous or need further clarification. The words ''significant'' and ''negative,'' both of which have clear meanings, are operating as a modifier to either action or finding. Similarly, the terms used in the regulatory example, repeated and unresolved, are clear terms of art that need no further clarification. It is thus unnecessary to add additional definitions in this provision.

Regarding the loss of eligibility in another Federal education assistance program, we note that it could refer to either institutional or programmatic eligibility loss, but the administrative capability determination is not automatic. The Department would consider the facts and circumstances of the eligibility loss, including whether the issue was resolved, and eligibility quickly restored, when making an administrative capability determination.

*Changes:* None.

*Comments:* Several commenters argued that a non-final action by another agency or court should not deem an institution administratively incapable. These commenters believe the Department would be unjustified if we considered an institution to lack administrative capability because of an accreditor's probation and that we should revise the rule. Ultimately, the Department should state in the preamble that if an accrediting agency continues probationary action after reviewing an institutions response, the Department will consider the institution administratively incapable.

*Discussion:* The Department disagrees with the commenters. It is the Department's experience that a negative action by a State, accreditor, or other Federal agency usually arises from weaknesses in program administration or intentional misconduct, either of which can have a direct impact on the institution's administration of the title IV, HEA programs. Consequently, as part of its oversight responsibilities, the Department must be able to consider these actions when evaluating an institution's ability to properly administer the title IV, HEA programs.

Further, final decisions on these matters may take many years which could put additional students and title IV, HEA funds at risk. Waiting until the various processes are resolved would be insufficient to protect students and taxpayers.

As with actions initiated by a State or another Federal agency, whether a probationary action would be captured here would depend on whether the conduct that resulted in the action is repeated or unresolved and whether it has a significant effect on the institution's ability to serve its students.

We also note that administrative capability findings do not automatically result in ineligibility for title IV, HEA participation. Instead, the Department may consider a range of actions, which can range from heightened cash monitoring to a fine, suspension, limitation, termination action, a revocation of a provisional PPA, or a denial of recertification. No matter what action we take, institutions may respond; institutions may internally appeal fines, suspensions, limitations, terminations, and revocations.

*Changes:* None.

*Administrative Capability—High School Diploma (§ 668.16(p))*

*Comments:* We received many comments in support of the proposed changes to § 668.16(p). Several commenters supported the amendments to strengthen requirements for institutions to devise adequate procedures to evaluate the validity of high school diplomas. One commenter stated that the proposed regulations will prevent institutions from abusing title IV, HEA aid by enrolling students who are not academically prepared to attend postsecondary education. Another commenter noted that the changes will restore greater program integrity.

*Discussion:* We agree and thank the commenters for their support.

*Changes:* None.

*Comments:* Two commenters suggested that the Department publish a list of unaccredited high schools. These commenters believed this would assist institutions in evaluating the validity of a student's high school diploma when needed. Another commenter suggested that the Secretary publish a list of valid high schools.

*Discussion:* K–12 education is not like postsecondary education in which accreditation is a requirement for access to title IV, HEA aid and unaccredited institutions are generally not considered to offer valid degrees and credentials. States have discretion whether to require accreditation and the Department does not review or approve accreditors of K–12 schools. As such, it would not be appropriate to publish a list of unaccredited high schools. The Department is evaluating the feasibility of creating a list of identified high schools that issue invalid high school diplomas, and the regulatory language is drafted such that, if the Department creates one, the institutions would be expected to consider it when evaluating the validity of high school diplomas.

Regardless of whether the Department publishes such a list, institutions are responsible for enrolling students who have valid high school diplomas, regardless of whether there is a list of them. Any such list would not include all unaccredited high schools, as new ones are created on an ongoing basis. The Department does not need regulatory language to grant the authority to publish such a list, but paragraph (p)(1)(iii) in this section specifies that institutions must consider such a list if it is created. We think a list of high schools that award invalid high school diplomas would be more useful as it would identify high school diplomas that have already been identified as problematic for institutions to monitor.

*Changes:* None.

*Comments:* Several commenters urged the Department to change the language in the proposed regulation in § 668.16(p)(1) to clarify the procedures for institutions. The commenters requested that we explain what constitutes an invalid diploma or when to doubt the secondary school from which the diploma was obtained. Secondly, the same commenters requested that the Department clarify when an institution must use a review process. Finally, the same commenters believe that any business relationships that involve an unaccredited secondary school should require institutions to initiate further validation.

*Discussion:* We believe the language in paragraphs (p)(1)(i) through (iii) of this section lay out what procedures institutions must have for determining the validity of a high school diploma they or the Department believe may not be valid. Under paragraph (p)(1)(i)(A) that means looking at the transcript, the description of course requirements, or obtaining documentation from the secondary school leaders about the rigor. If the school is overseen by a State or other government agency, then paragraph (p)(1)(ii) requires the institution to obtain evidence that the high school is recognized or meets requirements. Paragraph (p)(1)(iii) says institutions should look for the high school on a list of invalid secondary schools if the Secretary chooses to create one. We believe those paragraphs create clear procedures and that the language in paragraph (p)(1)(ii) gives institutions clarity about when or when not to consider State or other governmental recognition.

Regarding the questions about when to review a high school diploma, the language in § 668.16(p)(2) spells out when an institution should take a closer look at a high school diploma.

We disagree with the suggestion from commenters to require further validation of every instance in which there is a business relationship between the high school and the institution. While we have seen many instances of problematic relationships of this sort, there are also legitimate relationships as well. Requiring validation of every instance of this thus risks being overbroad.

*Changes:* None.

*Comments:* One commenter criticized that the language, ''has reason to believe'' used in the proposed regulation, § 668.16(p)(1) is too broad. According to the commenter, the regulation should be more specific so that the standard is clear. The commenter also believes that the added cost for institutions to perform additional work to evaluate the validity of high school diplomas should not be overlooked.

*Discussion:* We disagree with the commenters. Students who lack a valid high school diploma or its recognized equivalent are only eligible for Federal aid through narrow and specific pathways. Giving aid to students who do not have a valid high school diploma and do not qualify through those pathways represents an illegal expenditure of taxpayer funds. We believe students who lack high school diplomas also tend to have lower success rates in postsecondary education, which can have lasting effects on students if they take out loans that must be repaid. Ensuring students meet these basic eligibility criteria is thus an important protection against fraud, and institutions are the key party to catch these issues. It is thus reasonable for institutions to exercise sound judgment and caution when reviewing high school diplomas to look more closely at ones that seem questionable. We also remind commenters that this provision is about reviewing the institution's procedures and looking at whether there's a pattern or practice of repeatedly failing to identify invalid high school diplomas.

We discuss the relative costs of this provision versus the benefits in the RIA of this final rule. But we reaffirm that the potential costs of disbursing

unallowable funds and the potential for low success for those students are greater than the administrative costs to institutions.

*Changes:* None.

*Comments:* Several commenters objected to the provisions in § 668.16(p)(1)(i) requiring institutions to obtain additional documentation from high schools to confirm the validity of the high school diploma if there is reason to believe that it is not valid. Two commenters raised concern that many non-traditional students would not be able to provide the required documentation because their high schools have closed.

*Discussion:* We disagree. The proposed regulations provide institutions with procedures for determining the validity of a high school diploma. Acceptable documentation includes a transcript, written descriptions of course requirements, or written and signed statements by principals or executive officers of the high school. In general, when high schools close there are record retention policies from States, districts, or other oversight entities that address this issue and provide students access to their diplomas or other records of high school completion. As noted above, the Department would consider an institution's procedures in terms of their pattern or practice. We anticipate the situations described by commenters to be rare. If the required documentation cannot be provided due to high schools closing, we would consider the specific circumstances on a case-by-case basis.

*Changes:* None.

*Comments:* Several commenters objected to the Department's proposal under § 668.16(p)(1)(ii) to add procedures to evaluate the validity of a student's high school diploma. The commenters state that we should allow institutions to continue to follow the procedures that they already have in place, rather than require a new and complicated set of guidelines.

*Discussion:* We disagree with the commenters. Providing aid to ineligible students is a perpetual source of fraud in the student aid programs and represents a misuse of taxpayer dollars. The standards outlined in this section are not requiring institutions to individually verify every student's high school diploma. They are asking institutions to engage in reasonable due diligence when they encounter high school diplomas that appear questionable.

*Changes:* None.

*Comments:* One commenter suggested that the Department develop a process to verify student's high school diplomas through a national database that the Department maintains. The commenter believes that the Department could collaborate with organizations that provide verification services to quickly validate high school diplomas. The commenter also noted that the database could serve as a repository for verified high school diplomas.

*Discussion:* We do not believe that would be an appropriate role for the Department, as standards for high school diplomas are a State function. However, as previously mentioned, we will consider creating a list of high schools that the Department has deemed to award invalid high school diplomas. The list would in no way be exhaustive, but we believe this would be beneficial.

*Changes:* None.

*Comments:* One commenter raised general concerns that in some areas of the country there are large populations of immigrants. According to the commenter, these individuals may not be able to provide the required documentation about their high school education or may not have been able to complete their high school education due to factors within the country they were born.

*Discussion:* We remind commenters that the intent of the regulations is to add clarity to the process that schools must follow when they or the Department have questions about the validity of a high school diploma. We acknowledge that there are cases where students attended high school in another country but do not have that credential in hand when applying to a postsecondary institution. A student's failure to produce a high school diploma does not obligate the institution to treat the diploma as invalid and the student as ineligible solely because the student does not have the diploma in hand. If, however, other information suggests that the student does not actually have a valid diploma, then § 668.16(p) would require the institution to take additional steps. Institutions may establish policies regarding whether to collect high school diplomas from students and/or what steps to take if a student cannot produce their diploma due to exceptional circumstances. In instances where a student from a foreign country cannot produce his/her high school diploma, the institution should determine what next steps to take based on their process for determining whether a student has completed high school or has met other criteria in § 668.32. When determining compliance with § 668.16(p), the Department will review the institution's procedures, the steps it has taken under those procedures, and the documentation it maintains, when dealing with situations where facts suggest that a student does not actually have a valid high school diploma. As it does now, the Department will review these situations on a case-by-case basis.

*Changes:* None.

*Comments:* Many commenters criticized as unnecessary the proposed requirement in § 668.16(p)(2)(i) around when a high school diploma is not valid. The commenters particularly objected to the language in paragraph (p)(2)(i) around the Department's proposal that institutions would determine whether the diploma met the requirements established by the appropriate State agency, Tribal agency, or Bureau of Indian Education in the State where the high school is located, and if the student does not attend in person classes, in the State where the student was located at the time the diploma was obtained. The commenters believe that the Department should remove this provision because it burdens institutions, and we should not require an institution to determine whether a high school meets the requirements of the high school's regulatory agency. The commenters suggest that institutions rely on State licenses and approvals and that regulators are better equipped to determine whether a high school should be licensed, approved, or recognized when the high school is physically located within the State.

Many commenters suggested we clarify the language in § 668.16(p)(2)(i) to explain that a high school diploma is not valid if the entity did not have required secondary school licenses or meet requirements from the home State. The commenters suggested that the Department clarify that documentation from a State agency is required to validate a diploma only when the State has a mandatory licensing requirement for private secondary schools in a given State.

*Discussion:* We disagree. Ensuring that students have a valid high school diploma is a critical part of maintaining integrity in the title IV, HEA financial aid programs. Failure to ensure that a student is qualified to train at a postsecondary level often results in students withdrawing from institutions after incurring significant debt and investing time and personal resources. Extra steps taken by institutions on the front end, prevent withdrawals and lost enrollment down the road due to students not prepared to be successful at the postsecondary level. These regulations will provide institutions with additional information when

necessary to determine the validity of a high school diploma.

We believe the added guidance under § 668.16(p)(2)(i) will provide institutions with clarity when determining whether a high school diploma is not valid. This provision would only apply in instances where the State has oversight and has established specific requirements that must be met in order for a student to receive a high school diploma. If private secondary schools are not subject to State agency oversight, then the requirement to receive documentation from a State agency in § 668.16(p)(1)(ii) would not apply.

*Changes:* None.

*Comments:* Many commenters requested that the Department delete the clause from § 668.16(p)(2)(i) regarding a student not attending in-person classes in the State where the student was located when they obtained their credential. The commenters suggested that the standard is not an indicator of an invalid high school diploma because most States regulate high schools located within their borders, but do not regulate online high schools or those located in other States. Furthermore, the commenters thought it would be unfair to students who move from one State to another during their high school years. The commenters further believed this provision would force institutions to reject students even if their high schools were approved in the State in which they started their high school education.

*Discussion:* We agree with the commenters that the provision would be challenging for an institution to enforce as it would have to look at how one State might apply requirements to a high school potentially located in another State.

*Changes:* We have removed the reference to a student's home State for someone not attending in-person classes from paragraph (p)(2)(i).

*Comments:* Several commenters objected to § 668.16(p)(2)(iii), which requires institutions to determine if a diploma was obtained from an entity that requires little or no secondary instruction. The commenters believed that regulatory agencies should determine the validity of the diploma to avoid creating a burden for institutions and suggested that we remove this requirement.

*Discussion:* We disagree with the commenters. The requirements in this paragraph relate to the items included in paragraph (p)(1)(i) of this section in terms of how the institution would make this kind of determination. While the determination of a regulatory agency is important, there are circumstances when the regulatory agency does not have sufficient information. Institutions should act on any information they obtain from any source which suggests that there is little, or no instruction being provided by the entity or that suggests that the entity is a diploma mill. If after a good faith effort, they are unable to obtain any information indicating that students received coursework and instruction equivalent to that of a high school graduate, then institutions could treat the inability to find that information as proof that the concern in paragraph (p)(2)(iii) is occurring.

This specific provision says that a high school diploma is invalid if it was obtained from an entity that requires little or no secondary instruction or coursework to obtain a diploma, including through a test that does not meet the requirements of § 600.2. The regulations in § 600.2 define a recognized equivalent of a high school diploma. Under that provision, there are two equivalencies that can be obtained by passing a test: a General Education Development certificate (GED) and a State certificate received after passing a State-authorized examination that the State recognizes as the equivalent of a high school diploma. We believe these equivalencies are common and pose little burden on institutions. This provision is an important protection to students and title IV, HEA funds and the requirement is a minimum expectation to protect the integrity of Federal student aid programs.

*Changes:* None.

*Comments:* Commenters asked the Department to expand the provisions in § 668.16(p)(2)(iv) around validating diplomas when there is a business relationship between the institution and the high school. Commenters said the language in paragraph (p)(2)(iv)(B) of this section, which says that a high school diploma is not valid if there is a business relationship and the school is unaccredited, is insufficient. They said that this safe harbor should also include high schools that are licensed or approved by their home State too.

*Discussion:* The Department included this provision because we have seen many instances in the past where there are concerning relationships between high schools and institutions of higher education. However, the high school in question in that relationship has also exhibited issues that would lead to them being identified as invalid under paragraphs (p)(2)(i) through (iii) of § 668.16. As such, we think it is better to remove paragraph (p)(2)(iv) entirely rather than expanding it. This removal reduces what would otherwise end up duplicating with what is already present in other parts of § 668.16(p)(2). The Department will continue in its own work to look for concerning business relationships when it identifies other evidence of a high school diploma not being valid.

*Changes:* We have removed paragraph § 668.16(p)(2)(iv).

*Administrative Capability—Adequate Career Services (§ 668.16(q))*

*Comments:* Several commenters supported the Department's proposal that institutions provide adequate career services to their students because some institutions leave students on their own to search for jobs or make employer connections. The commenters also noted how unfortunately, it is not until graduation that students learn that the school has no career services staff or no industry connections. The commenters further stated that the requirement to invest in career services creates an expectation at institutions to better prepare students to enter the work force after graduation.

*Discussion:* We appreciate the support of these commenters.

*Changes:* None.

*Comments:* Many commenters supported adding career services to the regulation but believe the Department should not include the criteria regarding the share of students enrolled in programs designed to prepare them for gainful employment. The commenters believe we should remove this from § 668.16(q) because institutions should be required to provide adequate career services for all programs including non-GE programs.

*Discussion:* We disagree with the commenters. The share of students in GE programs is an important factor for the Department consider when evaluating whether institutions have sufficient career services. GE programs are career training programs and having a significant share of enrollment in these programs is a factor to consider whether there are sufficient career services resources. Institutions that do not have significant numbers of students in GE programs would still be considered under paragraphs (q)(2) through (4) of this section.

*Changes:* None.

*Comments:* Many commenters recommended that the Department create career assessment services to assess programs in fields that use a different hiring structure. Career development in the fine and performing arts industry differs from corporate recruiting, according to the commenters, since typical hiring avenues differ. Performing artists typically audition for

work, visual artists, and entrepreneurs, such as cosmetologists are self-employed and run their own businesses. The same commenters questioned how the Department will apply this career services regulation at institutions with non-traditional programs.

*Discussion:* The Department believes that all students should receive career services that are appropriate for the program they attended that will assist them in securing employment in the relevant occupation. The institution and not the Department determines the type of services that are most appropriate. Institutions decide what programs to offer and construct the curricula used. Therefore, they are best suited to know what career opportunities exist that are tied to a given program and how to help students reach career goals, including what kind of career assessment services are needed. This is the case regardless of whether a program is traditional or non-traditional, since in both cases the institution would know what it is preparing students to do. Our concern is ensuring that institutions made good on the commitments they make to students and have the staff and resources in place to help students reach their career goals.

*Changes:* None.

*Comments:* Many commenters raised general concerns that this provision would give title IV, HEA compliance officers leverage to demand more career services resources than merely those that are necessary.

*Discussion:* This requirement still provides institutions with the discretion to determine how they want to devote their resources between career services and other functions. However, what it does require is that there must be an alignment between the commitments made with regard to career services and what is actually offered. An institution will also have the opportunity to respond and appeal to a finding that it is not administratively capable due to its lack of career services and will have an opportunity to provide additional information to demonstrate that its staffing was appropriate given the institution's circumstances.

*Changes:* None.

*Comments:* Many commenters raised general concerns that title IV, HEA compliance officers be adequately trained in employment services so they can determine whether an institution is providing adequate career services to students, including Departmental review of the number and distribution of staff, the services the institution has promised to its students, and the presence of partnerships with recruiters and employers who regularly hire graduates.

*Discussion:* The Department believes that institutions should have sufficient career services to help students find jobs and honor any commitments made about the type of job assistance they provide. The Department's focus on evaluating institutions will remain on whether the institution can make good on its commitments with appropriate staff and resources in place while institutions are best equipped to determine what is appropriate to offer based on the education it provides.

*Changes:* None.

*Comments:* We received a number of comments opposing the Department's proposal to include adequate career services as a requirement for administrative capability. Many commenters asked the Department to eliminate this provision because accreditors already require that institutions provide career services. The same commenters argued that the standards are too vague and do not clearly state how the Department would determine the adequacy of services. Many commenters also questioned the Department's statutory authority, contending that no link between the administration of title IV, HEA programs and the adequacy of career services was provided. One commenter stated that the issue is more aligned with misrepresentations about the employability of graduates found in § 668.74.

Many commenters recommended that we revise § 668.16(q) to clearly state what is expected of institutions to stay in compliance. For example, one commenter asked whether the Department expected a certain ratio to determine how many career services staff should be employed to accommodate students in GE programs. Another commenter noted that institutions with a limited workforce may need to hire additional staff. One of the commenters also noted that future graduates and alumni rely on the career services that institutions provide. The same commenter stated that the proposed regulation eliminates resources provided by dedicated professionals to fulfil unidentified metrics. To promote consumer awareness, according to the commenter, the Department should clarify the standards so that institutions can inform their students of available career services. One commenter stated that the rule overlooks the fact that programs designed to prepare students for gainful employment are used for career advancement or maintenance, not new employment. The commenter pointed to registered nurses who often intend to stay with their same employer and do not need career services. The commenter said the Department should provide a carve out for these types of programs and students. The same commenter pointed to other examples where the goals of the regulation are already met, such as programmatic accreditation, disclosure requirements and misrepresentation rules.

*Discussion:* The Department disagrees with commenters and affirms the importance of keeping this requirement. With respect to accreditors, the oversight of postsecondary institutions rests on a reinforcing regulatory triad. While there are some elements that one part of the triad will not consider, such as how the Department cannot consider academic quality, some overlap of areas of concern helps ensure there are multiple perspectives looking at an issue. With respect to career services, the Department has seen this as an issue in the past where institutions use promises related to career services as a way to market and recruit students. But then they lack the resources to back up those promises and students report getting no assistance on their job search. The Department is concerned that such behaviors could contribute to the approval of borrower defense to repayment claims if the institution is making promises to students about assistance it knows it cannot provide.

This provision complements, but is not replaced by, the misrepresentation standards for employability of graduates in § 668.74. Many of those items are distinct because they are concerned with things that relate to promises made during recruitment but not the career services offered. This includes areas such as relationships between institutions and employers, promises made about employment, and statistics provided about employment. The overlap involves things such as promised placement services, but the provisions are mutually reinforcing. Having institutions demonstrate they have sufficient career services assists with establishing whether the failure to deliver on those services is a form of misrepresentation.

We also disagree with commenters that there is no link between these provisions and administration of the title IV, HEA programs. Student surveys repeatedly show that obtaining employment is one of the key reasons why they go to college. A national survey of college freshmen at baccalaureate institutions consistently finds students identifying ''to get a good job'' as the most common reason why

students chose their college.[20] Another survey of a broader set of students found financial concerns dominate in the decision to go to college with the top three reasons identified being ''to improve my employment opportunities,'' ''to make more money,'' and ''to get a good job.'' [21] While postsecondary education is not solely about employment, the continued reliance on loans to finance postsecondary education means students need to have a path to successful careers so they can afford their loan payments. Career services thus intrinsically connect to ensuring that the aid programs generate their intended results. And as noted already, misleading students about the availability of career services support could be grounds for a loan discharge.

The Department declines to adopt a specific ratio for career services staff or create exceptions for career-oriented programs focused on advancement within a given employer. We believe such an approach would not properly capture the significant variation that exists among institutions. For instance, an institution that only offers career-oriented programs might need a lower ratio than one where only one program is career-oriented and the vast majority of students are being prepared to transfer to higher-level programs. Instead, we think the language provides flexibility to consider the range of institutional circumstances when considering whether there are sufficient career services. We disagree that additional clarity is needed for institutions to tell students what services they offer. Institutions will be aware of what they have available for students, and they should provide accurate information about what services they offer. Moreover, the institution can consider whether programs are designed for career advancement within an employer when considering what types of services, they need to provide. For instance, someone seeking a promotion within a given employer may need different help around asking for a pay increase and how to make their case, as opposed to help with job hunting.

With respect to career services usage by alumni, our focus in this language is on the commitments made to students and what services are provided there. As noted above, there's no requirement that institutions shift resources away from dedicated professionals so long as they have the resources in place to make good on the commitments they provide to students. This language does not dictate what career services promises institutions must make to students. It simply requires that the commitments and resources align.

*Changes:* None.

*Comments:* One commenter believes an alternative solution for institutions to provide adequate career services would be to collaborate and with and get feedback from students, and partner with industries. The commenter opined that if institutions develop a student-centered approach to career services, students should benefit from the personalized support and guidance as they matriculate through college. A student-centered approach can serve the diverse needs of both students and institutions according to this commenter. The commenter continued by explaining that institutions can identify the changing needs and expectations of their students, and students can contribute to the development of the career services offered through conversations and collaboration. Additionally, the commenter suggested that institutions can provide feedback opportunities, via surveys or advisory committees to get input from students regarding their career service experiences. The feedback, the commenter explained, can determine the effectiveness of existing services, identify areas for improvement, and provide ideas for future initiatives.

*Discussion:* The Department supports the idea of a student-centered approach to career services that includes institutions obtaining feedback from students and partnering with private industry. We, however, do not see this suggestion as a substitute for the provision we proposed. We note a high-quality student-centered approach advocated by the commenter likely would comply with the requirement to provide adequate career services, provided the institution is able to fulfil its commitments with respect to career services.

*Changes:* None.

*Comments:* Several commenters questioned how institutions will determine how many career services staff should serve students in GE programs if the formula to determine ''adequate'' is not provided. These commenters noted that there is no set ratio for institutions to determine if they are providing adequate career services to eligible students.

One commenter said that all faculty and staff members throughout their campus and not just career services staff prepare students for employment and inform them of opportunities. If the institution is judged only by the number of employees in their career services office, according to this commenter, the collective work of the university would be ignored.

*Discussion:* The Department disagrees. The language in § 668.16(b)(2) requires institutions that participate in the title IV, HEA programs to have an adequate number of financial aid staff. There is no formula to determine adequate. Instead, the Department determines adequacy based on varying factors. Determining the adequacy of career services staff would be similar. The Department will consider the factors set out in § 668.16(q)(1) through (4) in relation to characteristics of the particular institution such as its size, the number and types of programs offered and the requirements for employment in those fields of study. A finding of a lack of administrative capability under this provision would not be automatic. Therefore, institutions that rely on career services support across the faculty could present this information to the Department if they are identified for administrative capability concerns and the Department could take it into consideration.

*Changes:* None.

*Comments:* One commenter disagrees that the Department prioritize GE programs when assessing an institutions' career services. Most institutions offer programs to prepare students for various careers; however, not all programs may be considered GE programs.

*Discussion:* This regulatory language does not prioritize GE programs. Rather it is one factor among four that the Department will consider when judging the adequacy of career services. This helps the Department get a sense of how many programs have a statutory connection to career training or not.

*Changes:* None.

*Comments:* Two commenters suggested that the Department require institutions to provide detailed information on the career services offered and provide the job placement records of all graduates in GE programs. The commenters believe that the change of required data will prevent misleading marketing practices and allow

[20] A national survey of college freshmen at baccalaureate institutions consistently finds students identifying ''to get a good job'' as the most common reason why students chose their college. Another survey of a broader set of students found financial concerns dominate in the decision to go to college with the top three reasons identified being ''to improve my employment opportunities,'' ''to make more money,'' and ''to get a good job.''

[21] Stolzenberg, E.B., Aragon, M.C., Romo, E., Couch, V., McLennan, D., Eagan, M.K., Kang, N. (2020). ''The American Freshman: National Norms Fall 2019,'' Higher Education Research Institute at UCLA, *www.heri.ucla.edu/monographs/TheAmericanFreshman2019.pdf*.

institutions to deliver on the promises that they make to students during recruitment.

One commenter noted that their institution already takes extra measures to assist students by sponsoring attendance to conferences and trade shows, hosting career fairs, and providing one-on-one career counseling to demonstrate the importance of preparing students to enter the workforce.

Another commenter asserted that the Department should consider verified employment rates to be the number one priority for institutions to demonstrate that they provide adequate career services.

*Discussion:* The Department disagrees. The Department has existing regulations related to job placement rates, including in §§ 668.14, 668.41, and 668.43, and regulations related to misrepresentations, among others. We, therefore, do not need separate requirements related to job placement rates in this section. With respect to the comment regarding an institution providing placement rate records, the Department already has the authority to obtain these records and it does obtain and review these types of records when determining the validity of advertised placement rates. We appreciate the examples highlighted by the commenter and those are the kinds of things that would be considered when looking at paragraph (q)(3) of this section.

*Changes:* None.

*Administrative Capability—Accessible Clinical or Externship Opportunities (§ 668.16(r))*

*Comments:* One commenter expressed full support for the requirement that institutions provide students with a geographically accessible clinical or externship opportunity within 45 days of successful completion of other required coursework.

*Discussion:* We thank the commenter for their support.

*Changes:* None.

*Comments:* Many commenters suggested that institutions be required to provide students with clinical or externship opportunities that previous students participated in. The commenters felt that students should also be reminded that it is ultimately their responsibility to secure placement.

In addition, some commenters agreed with the Department's requirement that private institutions provide students with a clinical site.

*Discussion:* The Department agrees that it is critical institutions provide students with the clinical or externship experiences they need to earn their credential, including those opportunities that previous students participated in. This requirement applies to institutions of all types where it is relevant. We do not think it is reasonable to put the burden of securing a clinical or externship solely on the student if it is required to complete their program.

*Changes:* None.

*Comments:* Many commenters expressed concern that the providers of clinical and externship opportunities have a say in a students' placement. They want to ensure that the students selected for placement possess the skills and expertise to deliver impeccable care.

Another commenter recommended that institutions be involved and arrange the student placement for their students. The commenter believes that students are more connected and get better care when institutions are involved.

In addition, two other commenters asserted that the responsibility for placement should be a partnership between the institution, the student, and the receiving practice to be a positive training experience.

*Discussion:* We do not see a conflict between the comments and the regulatory language. The Department is adding this requirement because we are concerned that in the past institutions have enrolled students, received significant tuition payments, then failed to find them the clinical opportunities those students needed to complete the program. The absence of those clinical experiences then makes it impossible for the student to work in the field in which they are being prepared. The Department has also seen this occur in some situations where the institution knew as it was recruiting students that it lacked sufficient partnerships to offer clinical spots to all the students it was enrolling.

This regulatory text does not require that a student attend a clinical at a specific spot, just that the institution make sure they have a geographically accessible option. Institutions can and should work with their students around securing placements. If a student chooses to secure a placement on their own, we would not separately demand that the school provide them a placement. This provision is to address situations where an institution fails to provide required clinicals and the students are unable to secure the clinicals on their own.

*Changes:* None.

*Comments:* Many commenters request that this rule not apply to medical schools, allied health, or other health profession programs because it is confusing to students who are already scheduled to participate in experiences throughout their third and fourth years of schooling, not at the end of their coursework as the regulation suggests. Another commenter suggested that post-graduate training also be excluded from the rule.

*Discussion:* The Department wishes to clarify the coverage of this provision. This language applies to the clinical or externship experiences that are needed for students to complete their programs. Thus, experiences that occur as part of credential completion, such as those in the third or fourth year of a program or at the end of a program, would be included. It does not apply to post-graduation parts of the career ladder, which include things like the national residency program for graduates from medical school. The reference to how the externship or clinical is related to licensure in a recognized occupation is to note that some licensure requirements state that there must be a clinical or externship completed as part of the credential earned. The result is that residencies, clerkships, and other similar post-graduation experiences are not covered by this requirement.

*Changes:* None.

*Comments:* We received a number of comments requesting the Department to define ''geographically accessible'' clinical or externship opportunities. Several commenters suggest that the definition should specify the mile radius, and which States and regions of the country should be considered.

A few of the commenters expressed concern that if the Department narrowly defines the geographical location required for placement, it may not consider the fact that students in rural areas may be limited and that some students may need to travel outside of their geographic location to complete the requirement.

Another commenter proposed that the Department use commuting zones to provide a reasonable estimation of the geographic areas that a student is likely to look for a clinical placement or externship after graduation. The commenter explained that commuting zones is defined by the Department of Agriculture's Economic Research Service. Commuting zones break the country up into 709 areas based on the geographical distribution of an area's labor market. The commenter believes that it is reasonable to use commuting zones to clarify the definition, geographically accessible. Commuting zones already account for various distances required when it comes to commuting in metropolitan areas compared to rural areas and have

already factored in variations in distance.

One commenter also stated that the term geographically accessible be removed all together.

*Discussion:* The Department declines to provide a specific set of metrics for measuring what is geographically accessible, as there could be programs on the edge of one commuting zone or another and that different program types could have different expectations for what is geographically accessible. For example, a clinical experience tied to a highly specialized field as part of a graduate program may see a geographically accessible option as one that is in another part of the country. By contrast, a commuting zone concept is likely to be a better fit for certificate programs where students are more likely to be staying close to where they live. The Department also declines to remove the geographically accessible requirement. This is a critical concept to maintain because we do not want institutions to otherwise get out of providing the required clinical or externship options by simply offering students an opportunity that is completely infeasible for them to reach. We also remind commenters that this requirement only applies to pre-completion situations, so concerns about how students with medical degrees participate in a national matching program would not be affected.

In terms of assessing geographic accessibility, the Department would consider how accessible distances look very different in rural areas versus urban ones. The level of the credential will also likely affect this consideration. Someone completing a professional degree in a highly specialized field is almost certainly going to have travel longer distances for a clinical and so something quite far away would still be viewed as accessible and in line with their expectations. By contrast, a student completing a 12-month certificate program is not likely expecting to move hundreds of miles away for a clinical experience. Nor would they be completing a credential with a level of specialization such that there may only be a handful of relevant placement options in the country. Preserving the concept of geographic accessibility while recognizing the need for flexibility in how that is considered based upon the credential level, type, and the physical location of the institution is appropriate.

*Changes:* None.

*Comments:* Several commenters opposed the clinical externship opportunities regulation and suggested that the Department allow the accrediting agencies, credential agencies, and State licensing agencies set the requirements for programs.

*Discussion:* We disagree with the commenters. Accreditation agencies are one part of the regulatory triad and they play an important role in institutional oversight. But the Department must oversee and protect the Federal investment. To that end, we are concerned that students who do not get offered these clinical or externship experiences will not be able to benefit from the educational programs paid for with Federal resources. Having this requirement thus complements whatever work accreditors conduct in this area.

*Changes:* None.

*Comments:* Two commenters warned that to ensure compliance, some institutions may only enroll the number of students that will have clinical opportunities. The same commenters believe that the unintended consequences of this action would cause a decline in enrollment for allied health students. Another commenter agrees that enrollment in high-need areas will be capped, because of the added financial burden placed on the institution to secure placements. The commenter said they anticipate that institutions will need to hire additional staff or contract with private agencies to support out-of-State placements. One commenter warned that an institution may secure a spot in clinical opportunity that is against the students wishes and would result in more than one spot secured for each student. The commenter suggested this could result in a competitive structure that creates added challenges for smaller schools and companies without the same financial resources.

*Discussion:* This provision is not dictating the enrollment size of given programs nor the exact location of where students go for their clinical or externship. But it is critical that institutions have in place the resources to help students secure clinical or externship opportunities if they are required for completing the program. We also note that institutions do not need to provide additional opportunities for students who have already secured a clinical spot on their own. While we recognize this could be an added cost for institutions, we think the benefits for students are significant, as failure to participate in a clinical or externship could make it impossible for the student to graduate or obtain State licensure or certification. Given the downside risk to students, it is an acceptable tradeoff if institutions decide they have to offer fewer spots in order to ensure that the students they do serve will be able get the additional educational experiences necessary to achieve their goals.

Concerns about a student potentially turning down a spot ignores two key elements. First, a spot turned down by one student may well be accepted by another. Second, the provision is around offering spots that are geographically accessible. Rejections of spots would not be deemed a failure to abide by this provision unless widespread rejections and a lack of spots indicated that the institution was finding some way around this requirement.

*Changes:* None.

*Comments:* Several commenters felt that the Department is exceeding the statutory limits by adding new requirements for clinical or externship opportunities. The commenters do not believe the requirements are related to an institution's administrative ability to process student aid and should be removed from the final regulation.

*Discussion:* Properly administering the financial aid programs means ensuring that the students you enroll and who are funded with Federal aid are able to complete their programs. Institutions that knowingly enroll students in excess of the spots for these required experiences are setting students up for an inability to complete their program either entirely or in a timely manner. It is also a sign that the amount of work going into recruitment and marketing efforts may not be sufficiently matched with the resources needed to make good on those commitments.

*Changes:* None.

*Comments:* We received a number of comments regarding the requirement to provide a geographically accessible clinical or externship within 45-days of successful completion of other required coursework in § 668.16(r). One commenter requested the Department clarify when the 45-day measurement would begin. Another commenter asked that the Department extend the placement timeline from 45 days to 90 days as they have students from every State and many live in rural areas. Two commenters claimed it is unreasonable to expect an externship to begin within 45 days of coursework completion but believe that it is within reason for students to receive their assigned opportunity within that time. One commenter raised a concern that the requirement for students to complete clinical or externship assignments within 45 days of coursework completion would place a hardship on

students. This commenter suggested that we reconsider the rule. One commenter stated that 45-day window does not account for the role of third parties in finding placement spots.

*Discussion:* The requirement is that institutions provide the students with the opportunity within 45 days of successful completion of other required coursework. That does not mean the experiences must start exactly within 45 days. However, the Department will consider whether a pattern where these experiences start well outside reasonable periods, *e.g.,* offering a spot that starts in a year so the student has an extended gap after finishing their coursework is in fact a sign that an institution is not abiding by this requirement and does not have sufficient spots for clinical or externships and thus should result in a finding of a lack of administrative capability. We decline to adopt a longer timeframe. Making a student wait 90 days to receive their spot and then potentially waiting longer to begin that experience risks delaying their ability to complete their program and begin entering the workforce.

We also disagree with the concerns about 45 days being insufficient for third parties. Our anticipation is that institutions will be assessing how many clinical spots they have an ongoing basis for students who will be needing them in terms to come. Students who find their own spots also do not need a second spot offered to them. As such, there is nothing that prevents an institution from planning ahead and working to find spots with third parties.

*Changes:* None.

*Comments:* Two commenters urged the Department to revise § 668.16(r) to state that the institution ''make reasonable'' efforts to provide students with geographically accessible clinical or externship opportunities.

*Discussion:* We decline to accept the recommendation by commenters. These are opportunities that institutions require as part of the path to completion. Much like we expect institutions to offer students the courses they need to finish their chosen programs, they must provide them with the clinical or externships they need as well. As previously noted, students who find their own spots do not need a spot offered to them.

*Changes:* None.

*Comments:* One commenter proposed that the Department amend § 668.16(r) to require institutions to disclose their placement policies and the services that they promise to provide and require institutions to provide the services promised in the disclosure.

*Discussion:* We decline to adopt the suggestion by the commenter. Our concern here is making sure that if a student must do a clinical or externship to finish their program then they must be given the opportunity to do so. We do not think disclosures would address the situation sufficiently when a needed experience is not offered. We do, however, expect that institutions will deliver the career services they promise to students.

*Changes:* None.

*Administrative Capability—Timely Funds Disbursement (§ 668.16(s))*

*Comments:* One commenter supported § 668.16(s), which requires institutions to disburse funds to students in a timely manner. The commenter also concurred with the Secretary's conditions.

*Discussion:* We thank the commenter for their support.

*Changes:* None.

*Comments:* One commenter suggested that the condition related to high rates of withdrawals attributable to delays in disbursements be eliminated from the regulation because it is very difficult to implement. The commenter stated that the Department would need evidence that student withdrawals were specifically caused by delayed disbursements.

Another commenter questioned how the Department, or an institution would be able to quantify what we consider to be a high rate of withdrawals attributable to disbursements.

*Discussion:* The Department disagrees with the suggestion to remove this requirement. We think it is critical that students receive their Federal aid funds in a timely manner. If students are unable to timely receive the funds for which they are entitled, it can impact their ability to persist in their programs and can cause them to have to withdraw because they are unable to use their funds to pay for books, housing, and more. We are particularly concerned in the past that some institutions have held onto disbursements to manipulate their 90/10 rates. This can be done by holding a disbursement until after the end of the institution's fiscal year. The Department has also seen instances where institutions on a reimbursement payment method hold disbursements to students who have a credit balance. In making a finding on this issue, the Department would need to establish that any of the conditions in paragraph (s)(1) through (4) of this section were occurring, including evidence that a student's withdrawal occurred due at least in part to delayed disbursement.

In terms of quantifying this problem, the Department would look at students who are marked as withdrawn and see if they had a credit balance owed to them, and if so when it was paid. The Department also interviews students as appropriate when conducting oversight matters.

*Changes:* None.

*Comments:* One commenter questioned how the Department would determine or document how an institution has delayed a disbursement to pass the 90/10 ratio. The commenter pondered how the Department would enforce this and whether institutions would have the right to challenge it. The commenter believed we can simplify the rule to require all institutions to disburse funds 10 days before the beginning of the term.

*Discussion:* The Department could assess whether an institution has delayed a disbursement to pass the 90/10 ratio by looking at the timing of disbursements relative to when an institution's fiscal year ends. Disbursements occurring just before or after the end of an institution's fiscal year could be a sign of manipulation, especially when funds that would pay for balances owed prior to the end of the fiscal year are disbursed in the next fiscal year. We decline to accept the commenter's suggestion to require disbursements 10 days before the beginning of the term. This change would apply to cash management regulations, which we did not address in this rule.

*Changes:* None.

*Comments:* One commenter believed that the condition when the Secretary is aware of multiple verified and relevant student complaints as stated in proposed § 668.16(s)(1) could be misinterpreted to suggest that a complaint could cause an administrative capability violation if it is verified to come from a student and relevant because it relates to the timing of disbursements. The commenter further contended if a first-time student complains about the timing of a delayed disbursement under the Department's 30-day delay requirement for disbursing loans to first time students, the institution could be considered in violation of this proposed rule. The commenter recommended that § 668.16(s)(1) be amended.

*Discussion:* The Department agrees with the commenter that ''valid'' would be a better word than ''verified'' in this provision to accomplish the Department's goal. Using the word valid would address situations, like the one raised by the commenter with respect to the 30-day loan disbursement delay for

first time students, where a student believes the delay in disbursement is not in their best interest, but the institution was complying with another regulatory requirement. To avoid confusion, the Department will change the wording of that regulatory provision.

*Changes:* The Department has changed ''verified'' to ''valid'' in § 668.16(s)(1).

*Comments:* One commenter agreed that if an institution receives a significant number of student complaints, it is an indication that the institution is not disbursing funds in a timely manner.

On the other hand, another commenter believed the primary issue of multiple student complaints is scale. Multiple can mean two. The commenter points out that two complaints at a school with 10,000 title IV, HEA recipients is on a different scale than 100 hundred complaints at a school with 1,000 recipients, however, the commenter acknowledges that they are equally troublesome.

*Discussion:* Historically, the Department has seen that most institutions do not generate significant numbers of student complaints. This is the case even at institutions with proven instances of widespread misconduct. As such, we do not think simply dismissing complaints due to the overall scale of the institution should be dispositive in an administrative capability analysis. However, the Department will consider the number and nature of these complaints when determining whether there should be an administrative capability finding.

*Changes:* None.

*Comments:* One commenter proposed that the Department remove the condition regarding student complaints from § 668.16(s). The commenter contended that the condition is too vague and hard to prove. The commenter suggested an alternative to eliminating the regulation would be for the Department to state that only complaints that meet all of the following conditions should be considered: (1) complaints that have been made in writing to a Federal or State agency, (2) complaints that remain outstanding for 120 days, following the institution's opportunity to resolve the complaint, and (3) complaints that are material and directly relate to an institution's handling of title IV, HEA funds. When the Department identifies complaints meeting all three conditions, institutions will lack administrative capability only if the number of those complaints exceed 5 percent of the institution's current enrollment.

*Discussion:* We disagree with the commenter. We believe the language in paragraph (s)(1) of this section about valid and relevant student complaints captures this concept without needing to create as much complexity as the commenter suggests. Saying the concepts need to be valid captures the idea that they must be proven to be true, while relevant makes the connection to what we are worried about with timely disbursements. We do not think adopting a threshold for the number of complaints is appropriate because most institutions do not generate significant numbers of student complaints—even at institutions with proven instances of widespread misconduct. We note that the commenter did not provide a rationale for setting the threshold at five percent.

*Changes:* None.

*Comments:* One commenter stated that the language in § 668.16(s) fails to recognize that institutions may have conflicting regulatory restrictions on the timing of disbursements, which could put a school in a position to choose which requirement to comply with. If an institution creates a disbursement schedule to align with title IV, HEA disbursement regulations, the commenter posited that the institution should be considered compliant with administrative capability requirements regardless of student complaints.

*Discussion:* The Department disagrees with the commenter. There is nothing in this administrative capability standard that suggests institutions should not first comply with all required title IV, HEA disbursement rules. Student complaints about an institution's compliance with required disbursement rules would clearly not trigger this provision. What this administrative capability standard addresses are the situations where an institution may comply with specific disbursement rules, such as the 30-day delay for first time loan recipients, but then further delay the disbursement until a time period that is beneficial to the institution but harms the student. Establishing a compliant disbursement schedule would not itself resolve this problem because an institution could still unacceptably delay disbursements.

*Changes:* None.

*Comments:* Two commenters suggested that the Department remove the addition of § 668.16(s) from the final rule since disbursing funds is already regulated. One of the commenters added that we already require funds to be disbursed during the current payment period according to the cash management regulations in § 668.164.

*Discussion:* Although the disbursement regulations in § 668.164 require institutions to disburse during the current payment period, the Department has determined that some institutions wait until the very end of a payment period to delay paying credit balances to students without regard to whether such policies are in students' best interests. In these cases, there is a direct harm to students who need the credit balance funds to pay for educationally related expenses such as books, transportation, or childcare. The delay in making the disbursements and paying the credit balances can cause students to withdraw from their educational programs.

Existing cash management regulations only require institutions to disburse funds intended for a payment period at some point during that payment period (except in unusual circumstances). Regulations for the Pell Grant and campus-based programs require institutions to pay students during payment periods at such times and in such amounts as it determines will best meet the student's needs. The Direct Loan regulations require only that institutions disburse such funds on a payment period basis and, generally, in substantially equal amounts. The current requirements are not consistent across programs, and there is no clear definition in the regulations for what it means to make disbursements at such times and in such amounts that best meet students' needs for the Pell Grant and FSEOG programs. Therefore, the Department believes that the additional regulatory standard is necessary to deter unscrupulous institutional behavior with respect to disbursement timing and to ensure that institutions are required to disburse funds at times that best meet student needs for all the title IV, HEA programs.

*Administrative Capability—Gainful Employment (§ 668.16(t))*

*Comments:* Commenters claimed the Department failed to provide evidence to explain why 50 percent was the proper threshold for title IV, HEA funds from failing GE programs or for the share of full-time-equivalent enrollment in failing GE programs to determine that an institution lacks administrative capability. Other commenters argued that the Department should not use undefined terms like ''full-time equivalent'' as students may shift their enrollment statuses.

*Discussion:* The Department's goal with this provision is to identify the point at which an institution's inability to offer programs that prepare students for gainful employment in a recognized

occupation shifts from being a program-level issue to instead represent a widespread issue that shows there is a more systemic problem with the way the institution operates.

In the NPRM, the Department proposed a threshold based on enrollment and title IV, HEA revenue because we thought both were useful for gauging the impact of failing GE programs. However, we are removing the measurement based upon full-time-equivalent (FTE) students to address concerns raised by commenters. While looking at enrollment using FTE is a common practice within higher education, the way to convert that enrollment may not be clear. Title IV, HEA revenue can also to some degree capture a similar concept as presumably a student who undertakes a larger courseload might receive more Federal aid than one who takes fewer courses. Accordingly, we will only measure this provision in terms of title IV, HEA revenue in the final rule.

Regarding the threshold for revenue, the Department chose 50 percent partly because that is the point where an institution has more title IV, HEA revenue associated with failing GE programs than there are with those that are either not failing or not evaluated for eligibility under the GE metrics. This metric also considers the students who might be enrolling in a failing program but not completing it, and it makes sense to consider how the failing programs may be impacting the larger pool of students while also making the same comparison for students enrolling in the passing programs at the institution. At that point, more of the title IV, HEA funding going to the institution is for students enrolling in failing GE programs than for students enrolling in GE-programs that are consistent with continued participation in title IV. That is an obvious warning sign for the institution, and the 50-percent threshold represents a relatively familiar and easily understood measure that is reasonably related to the Department's regulatory concerns. At lower percentages of title IV, HEA funds at risk it is, in our judgment, relatively more likely the case that the issue is tied to program-specific challenges and a lesser threat to the institution as a whole. We must draw a line for this rule to be fairly clear, and we have concluded that 50 percent reflects a reasonable balance of considerations based on available information. Furthermore, in § 668.16(m) the Department already uses a similar metric related to loan outcomes by considering an institution's cohort default rate.

*Changes:* We have removed the threshold for at least half of an institution's full-time equivalent title IV, HEA recipients that are not enrolled in programs that are ''failing'' under subpart S in proposed § 668.16(t)(2).

*Comments:* We received many comments suggesting that the Department should not connect administrative capability to the number of passing GE programs. Commenters argued that although high numbers of failing GE programs may indicate an institution's financial vulnerability, it should not be assumed the institution is unable to administer title IV, HEA programs. The commenters feel that the Department has failed to explain how these two concepts are related. The commenters further stated that debt-to-earnings rates and earnings premium measures assess financial value, not administrative capability. One of these commenters asserted that the Secretary has no statutory authority to propose the rule since GE standards are based on program eligibility and administrative capability is separate from program eligibility. The commenters requested that we eliminate this proposal.

*Discussion:* Demonstrating administrative capability means that the institution can show that it complies with the HEA. While it is true that GE operates on a programmatic basis, and it is a measure of a program's financial value, the Department believes that an institution's compliance with programmatic eligibility requirements is fully appropriate to review within the consideration of whether an institution is administratively capable of administering title IV, HEA aid, especially when the compliance issue affects the majority of Federal student aid funds received. As explained previously in this section, the Secretary has the authority under HEA section 487(c)(1)(B) to issue necessary regulations to provide reasonable standards of appropriate institutional capability for the administration of title IV, HEA programs within the parameters of requirements set out in specific program provisions, including any matter the Secretary deems necessary for the sound administration of the student aid programs. Institutions that participate in the Federal student aid programs must demonstrate that they meet administrative capability standards that encompass numerous program and institutional requirements. An institution that cannot show at least half of its title IV revenue comes from passing GE programs is failing to meet the requirement in HEA section 102 that its programs prepare students for gainful employment in a recognized occupations and it is failing to demonstrate administrative capability at the institutional level. The requirement is, therefore, well-connected to the administrative capability requirements and reflects a reasonable choice. If a majority of an institution's title IV, HEA funds go to students enrolling in failing GE programs, then that suggests institution-level deficiencies in administering the title IV programs.

*Changes:* None.

*Comments:* A number of commenters objected to the addition of GE criteria to the administrative capability standard. The commenters believed the added regulations will cause institutions to be penalized twice. Once under the GE rules, and again under the administrative capability rules. Two commenters also criticized the Department's proposal to connect administrative capability to GE, asserting that it stacks unnecessary consequences on institutions. Institutions can face penalties, fines, and loss of program participation, therefore lacking administrative capability caused by a single GE award year failure. The commenters argue that the GE regulations already prohibit failing programs from being offered which leaves no basis for administrative capability concerns.

*Discussion:* The Department disagrees with commenters. While failing GE programs have their own consequences, the Department is particularly concerned that at the point where GE failures are this widespread that the issues at hand represent a more systemic issue. This is a scenario where an institution is at risk of losing at least half of its title IV, HEA revenue, which could result in an inability to meet other requirements and provide students with the education that they have promised to provide. This requirement in administrative capability thus draws a distinction between an institution that may have a few failing GE programs that do not represent a significant effect on the school with a more pervasive set of challenges.

*Changes:* None.

*Comments:* One commenter raised a concern that an institution can be deemed administratively incapable before being given the opportunity to appeal failed GE rates. The proposed administrative capability rule states that an institution can be incapable due to failing GE rates in the most recent award year; however, under the proposed GE regulation an institution can appeal the calculation of rates after the Department starts a program termination action when a program fails GE standards in two out of three award years. The

commenter requests revision of the administrative capability rule to state that the Department would request an institution to provide challenge or appeal information to the Department before initiating action.

*Discussion:* The Department disagrees that the commenter's concern could occur. Institutions have opportunities to review the information used to calculate the GE measures at different points. As a part of the process for calculating the GE measures, an institution may review the accuracy and make corrections to the list of students identified as completers of the program under § 668.405(b)(1)(iii). That step is completed before the calculations of the debt-to-earnings or earnings premium metrics. The program cannot be failing while that process is ongoing. In addition, § 668.603(b) provides for an institution to initiate an appeal if it believes the Secretary erred in the calculation of a GE program's D/E rates or earnings premium measure.

*Changes:* None.

*Comments:* One commenter raised general concern that the addition of GE Programs to the administrative capability standards create a higher compliance standard for GE programs, and it creates needless distinction between GE programs and non-GE programs. The commenter believes that this effort to expand the extent of administrative capability in this way is confusing and provides minimal value to their students.

*Discussion:* The Department disagrees. This provision is a straightforward situation in which an institution has a majority of its title IV, HEA revenue coming from programs that fail to meet the GE requirements. The work to comply with this provision rests in the GE regulations. The Department here is indicating it will take a closer look when an institution shows its typical title IV, HEA dollar flows to a failing GE program.

*Changes:* None.

*Administrative Capability—Misrepresentation or Aggressive Recruitment (§ 668.16(u))*

*Comments:* One commenter supported the proposal to discourage aggressive and deceptive recruitment tactics. The commenter believes that admissions representatives should not pretend to be employees of institutions when they work for third parties.

*Discussion:* We appreciate the commenter's support.

*Changes:* None.

*Comments:* We received a number of comments requesting clarification of the language used in the proposed regulation. Two commenters questioned what is meant by aggressive recruiting. They felt it is unfair to require an institution to comply with something of which they are uncertain. Another commenter stated that the new language proposed in § 668.16(u) is unnecessary and unwarranted because the Federal definition of misrepresentation was recently expanded and included in the July 1, 2023, Borrower Defense to Repayment regulations located in part 668, subpart F. One other commenter suggested that use of the term unreasonable should be reconsidered. The commenter believes that a clear definition should be provided.

*Discussion:* The Department has explained these terms in part 668, subparts F and R, which would apply here. We believe the term unreasonable, which is used in part 668, subpart R, is important because it indicates a higher standard than just to take advantage of someone, which helps distinguish from common sales tactics versus what crosses the line into aggressive and deceptive recruitment.

*Changes:* None.

*Comments:* One commenter accused several institutions of falsifying information to improve school rankings. The commenter questions if the deceptive actions will be treated the same as aggressive and deceptive recruiting actions. The commenter also asks if the institutions will be sanctioned for its actions.

*Discussion:* The Department cannot comment on the specific conduct of institutions. We would need to consider the facts specific to part 668, subpart F.

*Changes:* None.

*Comments:* Two commenters recommend that the Department edit the proposed version of § 668.16(u) to change misrepresentation to substantial misrepresentation. The HEA prohibits substantial misrepresentation. The statute permits the Department to impose a penalty on an institution that has engaged in substantial misrepresentation. The commenters state that statutory provisions do not allow sanctions based on non-substantial misrepresentation. It is noted that other regulations and guidance distinguish between misrepresentation and actionable substantial misrepresentation.

*Discussion:* The Department agrees with the commenter for the reasons they raised, and we have adjusted the language accordingly.

*Changes:* We have added the word ''substantial'' before misrepresentation in § 668.16(u).

*Comments:* One commenter argued that the misrepresentation rules are not a measure of administrative capability, and the Department has no authority to enforce this new standard. The commenter feels the Department fails to provide a valid reason for evaluating an institution's administrative capability so the proposal should be deleted from the final rule, otherwise it should be revised to state that only a final judicial or agency determination which establishes a pattern of misrepresentations can cause an institution to lack administrative capability. Therefore, the commenter contends the new language in § 668.16(u) is considered unnecessary because misrepresentation issues are already addressed in part 668, subparts F and G.

*Discussion:* The authority for the inclusion of this regulation is derived from section 498(d) of the HEA, which provides broad discretion to establish reasonable procedures as the Secretary determines ensure compliance with administrative capability required by the HEA. The inclusion of this in the administrative capability regulations is designed to align with the provisions of part 668, subparts F and R. In addition to being violations of the specific regulatory standards in subparts F and R, the Department believes that institutions engaging in substantial misrepresentations or aggressive recruitment show an impaired capability to properly administer the title IV, HEA programs. These activities not only harm students but also undermine the integrity of the title IV, HEA programs as a whole. As such, these activities must be reviewed, along with other factors, when determining if an institution is administratively capable. The Department does not need a final ruling on substantial misrepresentation or aggressive recruitment in order for it to consider these factors in an administrative capability analysis. Waiting for a final judicial determination could take a substantial amount of time and delay our ability to protect students and taxpayers and minimize potential harm. As with any other determination by the Department, an institution will have the ability to respond to a finding of impaired administrative capability and the factors related to that finding.

*Changes:* None.

**Certification Procedures (§§ 668.13, 668.14, and 668.43)**

*General Support*

*Comments:* Several commenters supported the proposed certification procedure regulations. These commenters believe these requirements

will improve institutional integrity and help to protect students and taxpayers.

A few commenters expressed appreciation that the proposed certification procedures included State consumer protection laws, the withholding of transcripts, and limits to title IV, HEA access.

*Discussion:* We appreciate the commenters' support of these provisions.

*Changes:* None.

*Comments:* Another commenter supported the Department's proposals of adding criteria to enter into a PPA, requiring disclosures related to professional licensure requirements, adding requirements to PPAs that would better protect students directly, including a regulation which would prohibit institutions from withholding transcripts for balances that result from errors or wrongdoing on the part of the institution, and a provision which prohibits institutions from creating additional, unnecessary barriers to students' accessing the title IV, HEA assistance to which they are entitled. The commenter further encouraged the Department to consider requiring entities whose services directly lead to the recruitment and enrollment of over 50 percent of an institution's student enrollment to sign the PPA.

*Discussion:* We appreciate the commenters' support of these provisions. We believe the suggestion related to recruitment is best considered within the issue of third-party servicer guidance and regulations.

*Changes:* None.

*Comments:* A few commenters agreed with the addition of States' attorneys general to the list of entities that can share information with each other, the Department, and other entities such as the Federal Trade Commission and the Consumer Financial Protection Bureau (CFPB). These commenters voiced that any information related to institutions' eligibility to participate in the title IV, HEA programs or any information on fraud and other violations of law would help protect students who are harmed by misconduct.

*Discussion:* We appreciate the commenters' support of this provision.

*Changes:* None.

*Comments:* One commenter agreed that special scrutiny should be applied to institutions that are at risk of closure or those who affiliate with entities that have committed fraud or misconduct using title IV, HEA funds.

*Discussion:* We appreciate the commenter's support of this provision.

*Changes:* None.

*General Opposition*

*Comments:* One commenter argued the Department already has sufficient oversight authority when it comes to certification and that these new regulations will only create unnecessary administrative burden. According to the commenter, it takes a lot of effort to have programmatic accreditation in addition to institutional accreditation. Other commenters stated that the proposed certification procedures introduce statutory concerns, and the Department is operating outside of its authority granted by Congress, as well as infringing on the authority granted to States with the provisions related to State licensure and certification.

*Discussion:* Throughout this final rule, we sought to strike a balance between avoiding imposing unnecessary burden on institutions, and providing greater protections for students who might attend institutions exhibiting signs of financial struggle or that do not serve the students' best interest, as well as protect the taxpayer dollars that follow students. We believe that these final rules will provide that necessary protection, and any burden on institutions are warranted given the risks to students and taxpayers.

We disagree with the commenters that the proposed and final certification procedures exceed the Department's statutory authority. HEA section 498 describes the Secretary's authority around institutional eligibility and certification procedures and includes provisions related to an institution's application for participation in title IV, HEA programs and the standards related to financial responsibility and administrative capability. Section 487(a) of the HEA requires institutions to enter into a PPA with the Secretary, and that agreement conditions an institution's participation in title IV programs on a list of requirements. Furthermore, as discussed elsewhere in the preamble, HEA section 487(c)(1)(B) authorizes the Secretary to issue regulations as may be necessary to provide reasonable standards of financial responsibility and appropriate institutional capability for the administration of title IV, HEA programs in matters not governed by specific program provisions, and that authorization includes any matter the Secretary deems necessary for the sound administration of the student aid programs.

Regarding the comment that the Department is infringing on authorities granted to States, we disagree. As explained in the specific provisions related to State licensure and certification, requiring institutions to meet standards established by States in no way infringes on the rights of the states that are setting those standards. These regulations do not impose any additional requirements on States and are related to requirements for institutions. In fact, our regulations are intended to help States use their authority, while protecting students.

*Changes:* None.

*Comments:* Some commenters recommended the Department keep certification procedures as it currently stands and not implement any of these new regulations asserting the existing certification processes are adequate to determine institutional eligibility.

*Discussion:* We disagree with the commenters. We believe that improving upon the existing regulations related to certification procedures is important to protect the integrity of the title IV, HEA programs and to protect students from predatory or abusive behaviors. By amending the certification procedures and adding new requirements, including adding new events that cause an institution to become provisionally certified and new requirements for provisionally certified institutions, these final rules address our concerns about institutions that have exhibited problems, but remained fully certified to participate in the Federal student aid program. The existing regulations inhibit our ability to address these problems until it is potentially too late to improve institutional behavior or prevent closures that harm students and cost taxpayers.

*Changes:* None.

*Removing Automatic Certification (§ 668.13(b)(3))*

*Comments:* A few commenters supported removing the automatic recertification provision. These commenters believe eliminating the automatic timeframe will give the Department greater flexibility in making decisions in the best interests of students and taxpayers rather than being forced to decide quickly.

*Discussion:* We appreciate the commenters' support.

*Changes:* None.

*Comments:* Several commenters requested that the Department maintain the current regulation and automatically renew an institution's certification if the Department is unable to make a decision within 12 months. Other commenters asserted that the Department did not provide evidence that it had granted an automatic recertification under the existing regulations. These commenters alleged that removing this provision will remove the incentive for the Department to act on certification

applications within a reasonable timeframe. These commenters also believed that automatic certification at the one-year mark has kept the Department accountable in prioritizing the processing of certification applications. A few commenters noted that the automatic certification provision reached consensus in negotiated rulemaking sessions that took place only a few years ago and that the provision has only been in place for a short period of time. Because of this they argued the Department needed a clearer factual basis for rescinding this provision than it provided.

One commenter recommended that the Department amend language around approving an institution's certification renewal application if a determination has not been made within 12 months to specifically exclude those applications that the Department is actively investigating instead of removing the entire provision.

Many commenters sought a collaborative approach where the Department and institutions work together to establish reasonable timelines and timely responses if the Department moves forward with removing the automatic recertification provision.

*Discussion:* We disagree with the commenters' concern of removing the automatic recertification provision. As explained elsewhere in this preamble, while this provision received consensus approval from negotiators in the prior rulemaking, the Department has realized that imposing a time constraint on recertification negatively impacts our goal of program integrity. As the Department faces the first cohort of institutions subject to this provision, we have seen that this strict timeline can lead to premature decisions of whether to approve applications or not when there are unresolved issues that are still under review, which can have negative consequences on students, institutions, taxpayers, and the Department. In order to avoid an automatic recertification, the Department has had to reprioritize resources, such as expending extensive staff time on a school with only a few hundred students that exhibited significant concerns and should not have been recertified, when it could have been addressed over time. The efforts to resolve these pending applications also delays work for other institutions, as the most complicated cases necessitate the greatest amount of work. The result is that institutions that would have a recertification without issues can see their application delayed as the Department redirects resources to avoid automatically recertifying an institution that should not be given that treatment. Thus, the Department's primary concern revolves around the resources needed to avoid automatic recertification and not that the prior regulations caused it to grant automatic recertification.

We disagree with the commenter that stated that eliminating this provision will remove the incentive for the Department to act on certification applications within a reasonable timeframe. The Department strives to find a balance between providing timely responses and making informed decisions that protect students and taxpayers from high-risk institutions. As noted previously, the automatic certification provision in the prior regulations forced the Department to prioritize resources in ways that were not best for properly overseeing the Federal aid programs. The removal of this provision allows the Department to act in a reasonable timeframe as it relates to certification applications, while maintaining our goal of program integrity.

We also disagree with the commenters who believed that automatic certification at the one-year mark has kept the Department accountable in prioritizing the processing of certification applications. The prior regulations created situations where the Department had to prioritize reviews of some institutions ahead of others solely to meet this deadline, even if a risk-informed process that considered issues such as the size of the school would have dictated otherwise.

While the presence of this provision has created challenges for the Department's proper oversight of the title IV, HEA programs, its removal does not create harm to institutions. An institution that does not receive a decision on its recertification application before its existing PPA expires maintains access to the Federal aid programs. That participation continues under the same terms as the PPA that expired. The institution's situation thus does not change, and it continues operating as it had been before the PPA expired.

We do not think the suggestion for the Department to only exempt institutions under active investigation from this provision because it would create an unclear standard as to what constitutes an investigation and when it is still ongoing.

We appreciate many commenters offering to work together to establish timelines that help reach this goal, but this is ultimately a question of what is appropriate for the Department in its oversight function. Having the Department regulate itself by creating such a short timeline for review of applications, unnecessarily binds our oversight authority. These timelines are thus best set by the Department, motivated by a general goal of providing responses back to institutions while also protecting taxpayer interests.

*Changes:* None.

*Events That Lead to Provisional Certification (§ 668.13(c)(1))*

*Comments:* Some commenters asserted that the proposed rule imposed provisional certification in circumstances that exceeded the Department's statutory authority. One commenter argued that the Department cannot provisionally certify institutions except in those situations explicitly defined in the HEA. This commenter argued that the proposed provision contradicts the HEA, which provides that an institution may receive a provisional certification when the Secretary determines that an institution has an administrative or financial condition that may jeopardize its ability to perform its financial responsibilities under a PPA.

Another commenter argued that the new requirements in the certification procedures exceed statutory authority, particularly in conjunction with the financial responsibility triggering events. This commenter argued that we should remove proposed § 668.13(c)(1)(ii)(A), which says an institution becomes provisionally certified if it is subject to one of the financial responsibility triggers under § 668.171(c) or (d), because it is arbitrary and inconsistent with the Department's proposed financial responsibility rules. This commenter stated that while the proposed rule authorizes the Secretary to provisionally certify an institution when a mandatory or discretionary financial responsibility trigger occurs under § 668.171(c) or (d) and the Secretary would require the institution to post financial protection, the commenter pointed out that the mandatory or discretionary financial responsibility events under § 668.171(c) or (d) are not necessarily events that would threaten the administrative or financial condition of the institution so as to jeopardize its ability to perform its financial responsibilities under its PPA. This commenter argued that discretionary triggers encompass circumstances where no such concern would exist, including probationary and show cause actions in their early stages, declines in Federal funding that are not necessarily indicative of any financial concerns, pending borrower defense claims that may have no potential for

material adverse financial effect, and instances of State licensure exceptions regardless of their materiality.

This commenter also argued that the proposed rule's requirement for the Secretary to obligate the institution to post financial protection does not constitute a determination by the Secretary that the institution is unable to perform its financial responsibilities under its PPA. This commenter is concerned that the proposed rule authorizes the Secretary to provisionally certify an institution without first determining if the institution has an administrative or financial condition that may jeopardize its ability to perform its financial responsibilities under a PPA, as required by statute. This commenter is troubled that although the financial responsibility rules on discretionary triggering events provide that the Secretary may determine that an institution is not able to meet its financial or administrative obligations if any of the discretionary triggering events set forth in the regulation is likely to have a significant adverse effect on the financial condition of the institution, the proposed rule in § 668.13(c) states that the institution's certification would become provisional if the institution triggers one of the financial responsibility events under § 668.171(d) and, as a result, the Secretary would require the institution to post financial protection. The commenter is concerned that the financial responsibility rules provide that the occurrence of a discretionary triggering event permits (but does not require) the Secretary to determine that an institution is unable to meet its financial or administrative obligations under that section, and therefore, would allow for provisional certification. However, the proposed certification rule mandates provisional certification of an institution, upon notification from the Secretary, if a discretionary triggering event occurs, provided that the Secretary also requires the institution to post financial protection.

Ultimately, this commenter asserted that in both the certification procedures and financial responsibility rule, provisional certification is inconsistent and at odds with one another. This commenter stated that provisional certification is required when a discretionary triggering event occurs under the certification rules, while in the financial responsibility rule, it is merely permissible when a discretionary triggering event occurs. This commenter is worried this would create an unworkable regulatory scheme, would cause confusion, and would lead to problems with enforcement.

*Discussion:* We disagree with the commenters. We discuss the statutory authority of the discretionary and mandatory triggers in the financial responsibility sections of this final rule. This includes explaining that discretionary triggers require a determination that the event would or has had a significant adverse effect on an institution, which addresses the concern raised by the commenter about probation and other events. In both cases, we assert that when the triggering condition results in a request for financial protection that means that the institution is no longer financially responsible. One effect of not being financially responsible is that an institution becomes provisionally certified. This is also outlined under § 668.175, which discusses how institutions with a failing composite score may continue participating as a provisionally certified institution depending on the amount of financial protection they provide.

As explained in the financial responsibility section, the events outlined in the financial responsibility triggers are ones that pose a threat to an institution's financial condition. HEA section 498(h)(1)(B)(iii) provides the Department with the authority to provisionally certify an institution if it has been determined that its administrative or financial condition may jeopardize its ability to perform its financial responsibilities under a PPA. We believe those events meet that standard.

*Changes:* None.

*Comments:* One commenter did not agree with institutions being provisionally certified as a result of a change in ownership or merger because they do not believe that indicates a financial or operational concern. This commenter argued that institutions often change ownership or merge because they believe the transaction would materially improve or benefit their financial condition and educational operations. While this commenter understands the Department's desire to monitor institutions that undergo such transactions, they disagreed with the breadth of the conditions the Department would place on provisionally certified schools (including schools provisionally certified solely for having undergone a transaction).

*Discussion:* We disagree with the commenters' assertion that a change in ownership or merger does not create a condition that warrants attention. Provisional certification provides an opportunity for the Department to oversee and more thoroughly monitor institutions. New owners may have little or no experience administering the title IV, HEA programs. Therefore, the Department must assess the institution's efforts and determine whether technical assistance, further oversight, or both are needed. As another example, provisional certification is particularly important when institutions have undergone a change in ownership and seek to convert to a nonprofit status. As explained in the NPRM and in this preamble, provisional certification provides the Department with greater ability to monitor the risks of some for-profit conversions, such as identifying situations in which improper benefits may inure to private individuals or for-profit entities following a change in ownership or control. Furthermore, HEA section 498(h)(b)(ii) explicitly provides that the Secretary may provisionally certify an institution if there is a complete or partial change in ownership.

*Changes:* None.

*Comments:* Two commenters requested the Department clarify proposed § 668.13(c)(1)(i)(G). One commenter assumed the provision of subpart L applies to institutions that participate via the provisional certification alternative in § 668.175(f), as they believed this would be consistent with the language in the preamble in which the Department describes the provision as allowing the Department to provisionally certify an institution if it is permitted to use the provisional certification alternative under subpart L. If the commenter's understanding is correct, they request the Department clarify in the final rule that institutions may be provisionally certified if an institution is participating under the provisional certification alternative in § 668.175(f). This commenter brought this issue to the Department's attention because they believe every title IV, HEA participating institution is already under the provisions of subpart L, as subpart L contains financial responsibility requirements applicable to all institutions even if select provisions only apply to a subset of institutions.

Another commenter recommended the Department specify that provisional certification may only be applied if an institution is not financially responsible under the provisions of subpart L.

*Discussion:* We agree with the commenters. We want the ability to provisionally certify an institution that has jeopardized its ability to perform its financial responsibilities by not meeting

the factors of financial responsibility under subpart L or the standards of administrative capability under § 668.16. Since an institution is only permitted to use the provisional certification alternative once these standards have been met, we will make this clarification in § 668.13(c)(1)(i)(G).

*Changes:* We have clarified that § 668.13(c)(1)(i)(G) may be used to provisionally certify an institution if it is under the provisional certification alternative of subpart L.

*Provisional Certification Time Limitation for Schools With Major Consumer Protection Issues (§ 668.13(c)(2)(ii))*

*Comments:* In response to the Department's directed question in the NPRM on proposed § 668.13(c)(2) on whether to maintain the proposed two-year limit or limit eligibility to no more than three years for provisionally certified schools with major consumer protection issues, a few commenters recommend that the Department retain the two-year timeline as a maximum. These commenters suggested that the shorter duration would be better than risking an additional year of a low-quality, provisionally certified program continuing to operate largely at students' expense. These commenters stated that the Department has historically failed students and taxpayers in adequately addressing institutions placed on provisional status.

One commenter stated that the recertification process is lengthy and burdensome, and that the Department is likely concerned about the challenges a short recertification period may present to institutions and the Department itself. However, the commenter asked the Department to consider that actions against an institution are also a lengthy process. The commenter further explained that should the Department determine the consumer protection concern warrants new limitations or termination of eligibility it will only have extended that process. According to this commenter, that extension would come at the expense of students who would continue to enroll in the institution, using taxpayer-financed title IV, HEA dollars in the interim. This commenter encouraged the Department to accept the relatively small additional burden of going through another recertification process at two years or shorter, as appropriate, rather than forcing students to bear the expense and wasted time of enrolling in a program with known concerns without the benefit of careful Department oversight.

Another commenter expressed concern for extending the provisional certification timeline to three years for institutions that have consumer protection issues because that would allow institutions to continue operating without the best interest of students and taxpayers in mind.

A few commenters suggested that the Department consider whether an even shorter timeframe of one year might be more appropriate for institutions under provisional certification as a result of claims related to consumer protection laws. Given those consumer protection concerns, the commenters said the Department should pursue the most stringent timeline possible for reassessing provisional certification in the interest of enrolled students.

*Discussion:* Upon consideration of the comments received, the Department believes a three-year limit for provisional certification is more appropriate. Overall, we are concerned that two years may be too short to gain enough information into the major consumer protection concerns. Moreover, this is a maximum period and there is nothing that prevents the Department from selecting a shorter period if it desires.

The Department reached this conclusion after considering the process that goes into recertifications, including the types of information considered and what has been helpful to understand consumer protection concerns in the past. The Department seeks to review all available data to determine the appropriate outcome for certification and actions. As one commenter suggested, the Department is concerned with the challenges that can occur when we recertify for a short duration. For example, a two-year certification might not provide the Department with enough information to understand if a problem or concern has been rectified. Commonly used information sources include the compliance audit and financial statements that institutions submit annually, recent program review findings, cohort default rates, and an institution's policies, among other things. We review the compliance audit, for example, to determine whether the institution has resolved prior findings, particularly repeat findings. If the duration of the certification period is too short, the Department will not have adequate information to make an informed decision. In some instances, if the Department were to adopt a one- or two-year limitation, we could be required to fully certify an institution when there are still problems that have not been addressed, whereas provisional certification gives us greater ability to monitor risks and impose conditions on an institution.

The Department does not consider a longer provisional certification period to be a way to minimize Department workload as one commenter may believe, nor do we consider it to be an extension for institutions to continue operating when there are issues. Instead, it provides the Department with more time to monitor an institution to determine whether concerns can be resolved. Furthermore, the response to the commenter who raised the issue of limitations or termination that the Department may want to impose is the same. The Department's oversight of institutional eligibility does not exist only when we consider a recertification application. We would have ample opportunities throughout the duration of the certification period to act if we had cause to do so. If the Department received information on a consumer protection issue, as one commenter suggested, the Department would evaluate that information and determine the appropriate course of action.

Gathering adequate evidence to justify an adverse action—such as a limitation, suspension, or termination—takes time. The longer provisional certification duration may provide the time needed to build our case. Conversely, if we tried to terminate or limit eligibility without adequate evidence, our effort could be unsuccessful, which is certainly more problematic for students and taxpayers. Additionally, recently recertifying an institution, even provisionally, could lend credibility to a program that could impede on our ability to impose an adverse action. Finally, the Department sees the best outcome to provisional certification as the institution resolving our concerns. We would not want to limit, suspend, or terminate an institution that has done so.

For the reasons above, we have decided to keep the maximum duration of provisional certification at three years. We note, however, that nothing precludes us from setting a shorter time period where we believe it is useful as some commenters suggested. The Department could impose a provisional certification for a period as short as 6 months.

*Changes:* We are extending the maximum period of recertification from two years to three in (§ 668.13(c)(2)(ii)).

*Comments:* A commenter said that the Department should change its position regarding whether a provisionally certified institution can be given another provisional certification when applying to continue participating in the Federal student aid programs. The commenter noted that section 498(h) of

the HEA does not explicitly provide for consecutive re-approvals when fixing a maximum time limit for provisional certification at three years and contended that this longstanding practice of continuing to issue provisional certifications was unlawful.

*Discussion:* The Department disagrees with the commenter's view that institutions are prohibited from obtaining consecutive approvals to participate in the Federal student aid programs under provisional certification. The Department's longstanding interpretation of section 498(h)(1)(B) of the HEA is that these three-year limits refer to the individual length of provisional certification. In other words, that institutions covered by this provision may not receive a provisional certification that lasts up to six years, the maximum length for fully certified institutions. We believe the purpose of this provision is to ensure that institutions in these situations are revisited on a regular and shorter basis than other institutions, not that it serves as a ticking clock toward ineligibility. We note that the process of requiring institutions to apply for recertification represents a significant safeguard since institutions with demonstrated problems can have the application denied, or corrective actions can be required as a condition of approval. Furthermore, institutions can participate under provisional certification with financial protections while otherwise demonstrating they have administrative capability to provide valuable programs to their students.

*Changes:* None.

*Comments:* One commenter stated that the timeframes for compliance and monitoring settlements between consumer protection agencies and for-profit colleges are illustrative. This commenter pointed out that when agencies such as the Federal Trade Commission (FTC) and State attorneys general reach settlements with institutions for consumer protection violations, they frequently require resolution of consumer protection violations within a short period (generally a few months) and then provide for compliance reporting in one year. This commenter stated that when the FTC entered into an agreement with DeVry University in 2016 regarding the FTC's charges of deceptive advertising, the agreement provided a four-month period for the school to initiate training to address the deceptive practices and imposed a compliance reporting requirement one year from the date of resolution. Similarly, the commenter suggested, the Department should require resolution of consumer protection violations within a short period (several months) and require recertification after one year.

*Discussion:* While the Department understands the concerns of the commenters, we cannot verify that all problems have been addressed in such a short period of time. A year would not give us enough time to review compliance audits and financial statements that institutions submit annually, recent program review findings, cohort default rates, and an institution's policies, and then monitor an institution's progress. We note, however, that we do not only look at institutions during a recertification. We review each incoming audit and financial statement, for example, and when we do, we also look at many other things as part of a comprehensive compliance review.

*Changes:* None.

*Comments:* One commenter argued that the Department's proposal to end an institution's provisional certification after two years if their provisional status is related to substantial liabilities owed due to borrower defenses to repayment, false certification, or other consumer protection concerns violates fundamental notions of fairness, institutions' due process rights, and contradicts the governing statute. The commenter argued that provisional certification based upon liabilities potentially owed violates fundamental notions of fairness because provisional certification would be based on unproven and unsupported allegations. The commenter also addressed potential liabilities owed in connection with borrower defense by stating that the proposed rule violates institutions' due process rights, which are expressly established in the applicable borrower defense to repayment regulations. The commenter also stated that the borrower defense to repayment regulations provide for multiple layers of fact finding, administrative review, and adjudications in advance of any loan discharge or determination of institutional liabilities associated with borrower defense to repayment claims.

The commenter further stated that the proposed rule is vague and overbroad and failed to define what a substantial liability is, how it is measured, or how tentative or certain a liability must be for it to be considered potentially owed under the regulation. This commenter stated that the proposed rule failed to provide institutions adequate notice for when a provisional certification may be subject to early expiration. According to this commenter, ending an institution's provisional certification with unproven allegations or premature facts is the same as ending an institution's provisional certification without justification. In addition, the commenter claimed that the proposed rule fails to define what constitutes a claim. This commenter questioned whether a claim would encompass any allegation that is made against an institution, whether formally or informally. This commenter specifically would like to know whether complaints made through an institution's complaint procedures would be considered a claim or if only claims that were filed in a lawsuit or an administrative proceeding would be considered. Further, the commenter pointed out that the phrasing used under consumer protection laws is also overbroad and vague and fails to appropriately narrow the universe of claims that may trigger the application of this proposed subsection of the rule.

In addition, this commenter argued that the proposed two-year period is contrary to the governing statute. This commenter mentioned that the applicable HEA provision provides for provisional certification in only a few specific circumstances, and the only relevant circumstance articulated in the statute is when the Secretary determines that an institution is in an administrative or financial condition that may jeopardize its ability to perform its financial responsibilities under a PPA. This commenter claimed that the proposed provision contemplates that institutions will be placed on a limited term of provisional certification based on subjective and undefined criteria, particularly when the institution faces a substantial potential liability related to borrower defense or arising from claims under consumer protection laws. According to this commenter, the criteria in this provision are ill-defined and unrelated to whether an institution's financial responsibility has been jeopardized.

*Discussion:* We disagree with the commenters but provide additional clarification as to how these provisions work that addresses their concerns. The HEA provides that we can provisionally certify an institution for no more than three years, but it does not say that the Department cannot provisionally certify an institution for a shorter amount of time. Nonetheless, as noted above, upon consideration of the comments received, the Department will require provisionally certified schools that have substantial liabilities owed or potentially owed to the Department for discharges related to borrower defense to repayment or false certification or arising from claims under consumer protection laws to recertify after three

years, and not two. This additional year will give the Department more time to investigate these substantial liabilities owed or potentially owed. We also remind commenters that this provision does not dictate that an institution automatically becomes ineligible by the end of that three-year period. It is instead designed so that the Department looks more frequently at institutions that are provisionally certified. It is thus not a penalty or some kind of adverse action.

We also disagree with the commenter that the maximum timeline for provisional certification due to reasons related to substantial liabilities owed or potentially owed to the Department for discharges related to borrower defense to repayment or false certification, or arising from claims under consumer protection laws violates an institution's due process rights. Substantial liabilities owed or potentially owed related to the aforementioned reasons could pose a serious threat to the continued existence and operation of an institution. That threat bears directly on the statutory requirement that the Secretary determine whether the institution for the present and near future, the period for which the assessment is made, ''is able to meet . . . all of its financial obligations.'' 20 U.S.C. 1098(c)(1)(C). That consideration looks not merely at obligations already incurred but looks as well to the ability of the institution to meet ''potential liabilities'' and still maintain the resources to ''ensure against precipitous closure.'' We see no basis for the contention that taking into account risk posed by substantial liabilities owed or potentially owed somehow deprives an institution of its due process rights. If the risk posed is within the statutory mandate to assess, as we show above, taking that risk into account in determining whether an institution qualifies to participate in the title IV, HEA programs cannot deprive the institution of any constitutionally protected right. The institution remains free to respond to any claim in any way it chooses. The Department disagrees with the contention that we are barred from considering whether that risk warrants financial protection for the taxpayer as a condition for the continued participation by that institution in this Federal program. And in this instance, we would remind the commenter that a maximum provisional certification period does not mean that an institution would lose certification, rather it is the amount of time the Department would allow for that period of provisional certification. At the end of that time, the Department would choose to fully certify, provisionally certify, or deny the certification of the institution.

The Department also provides some additional clarity around issues related to the breadth or what constitutes a claim under consumer protection. We do not believe this provision to be overbroad. This provision is designed to capture serious concerns raised by governmental bodies, similar to what we have laid out in the triggers for financial responsibility and the items where we are seeking additional reporting under § 668.14(e)(10). Complaints filed by borrowers or students through an institutions' internal complaint process would not rise to that level since they have not been reviewed by an independent body and a determination made regarding the validity and seriousness of the claim. Although the internal student complaints may ultimately give rise to a governmental action regarding consumer protection violations, the Department believes that governmental action is necessary to trigger this provision. We disagree with commenters that this provision is overly broad.

*Changes:* We amended § 668.13(c)(2) to provide that the maximum time an institution with major consumer protection issues can remain provisionally certified is three years.

*Supplementary Performance Measures (§ 668.13(e))*

Overall

*Comments:* Many commenters wrote in favor of the proposed supplementary performance measures. These commenters stated these measures would be a significant improvement and would collect valuable and helpful data that would improve the process of institutional oversight and certification. These commenters further shared that these measures would better protect students from investing time and money into programs that provide little or no value while also protecting taxpayer dollars. One commenter recommended the Department strengthen the provision further by amending it to provide that the Department shall, rather than may, consider the supplementary performance measures, which will protect students and taxpayers from investing in low-value programs.

*Discussion:* We thank the commenters for their support. We decline the commenter's suggestion to change ''may'' to ''shall'' in the regulations. The benefit of the supplementary performance measures provision is that it gives the Department flexibility to consider the varying circumstances at each institution. We believe this language gives us sufficient ability to meet oversight responsibilities without binding the Department into taking actions that may not be warranted.

*Changes:* None.

*Comments:* A few commenters contended that this regulation is an overreach of government, and that the Department does not have the legal authority to adopt these measures. Several commenters insisted that the supplementary performance measures are not found in or are inconsistent with the HEA. One commenter asked what justification the Department has identified to establish the need to create supplementary performance measures. Commenters stated that HEA section 498 provides the requirements an institution must meet for certification including eligibility, accreditation, financial responsibility, and administrative capability. Commenters opined that the performance measures on the list (withdrawal rates, expenditures on instruction compared to recruitment, and licensure passage rates) do not relate to those requirements. Commenters stated these measures are arbitrary and are not found elsewhere in the HEA or its regulations.

A few commenters stated that there is a statutory provision under 20 U.S.C. 1232a that prohibits the Department from exercising control over expenditures on instruction. They assert that the proposed rule violates the statute by interfering with the normal operations of institutions.

*Discussion:* The Department disagrees. Commenters are correct that HEA section 498 describes the Secretary's authority around institutional eligibility and certification procedures and includes provisions related to the required standards related to financial responsibility and administrative capability. Contrary to the commenters' suggestion, that provision provides the Department broad discretion in determining what factors we deem necessary for an institution to be deemed financially and administratively responsible when being certified or recertified for participation in the title IV, HEA programs. Additionally, HEA section 487(c)(1)(B) provides the Department with the authority to issue regulations as may be necessary to provide reasonable standards of financial responsibility and appropriate institutional capability for the administration of title IV, HEA programs in matters not governed by specific program provisions, and that authorization includes any matter the Secretary deems necessary.

The supplementary performance measures in the final rule are within our broad authority to ensure institutions are meeting the standards necessary to administer the title IV, HEA programs in a manner that benefits students and protects taxpayer dollars. The Department has determined that these supplementary performance measures, which we will evaluate during the certification or recertification process, provide factual evidence that is indicative of whether an institution can properly administer the title IV, HEA programs. We disagree with the commenter who stated that such performance measures are arbitrary, not relevant, and are not found elsewhere in HEA or existing regulations. How an institution operates and administers the programs directly impact elements like withdrawal rate and licensure passage rate. In addition, these elements are identified in other places in the regulation. For example, the existing regulations in § 668.171(d)(5) provides a discretionary trigger for institutions with high annual dropout rates.

We also disagree with the commenter who stated that 20 U.S.C. 1232a prohibits the Department from regulating in these areas. Considering an institution's spending on education and pre-enrollment expenditures as a part of a broad range of factors during the certification process does not constitute the Department exercising control over curriculum, program of instruction, administration, or personnel of any educational institution, the spending or exercising any direction, supervision, or control of an institution, curriculum, or its program of any of the provisions listed in 20 U.S.C. 1232a.

*Changes:* None.

*Comments:* One commenter questioned the timeframe for implementation of the supplementary performance measures and requested more time to implement these measures.

*Discussion:* We disagree. Postponing implementation of these supplementary measures would unnecessarily delay the benefits of the rule. We believe the need for the transparency and accountability measures is too urgent to postpone any of these measures; to do so would abdicate our responsibility to provide effective program oversight. However, we note that these provisions will follow the master calendar requirements of the HEA and will be applied with recertifications or initial certifications starting after that point, which means this provision will phase in for institutions.

*Changes:* None.

*Comments:* Several commenters opined that these performance measures are ambiguous, vague, and subject to interpretations without specific measurements. The commenters stressed that any supplementary performance measures should be clear, specify the thresholds of acceptability, and detail what the ramifications would be if not met. These commenters stated that without this specificity, it would not be possible for an institution to know if it is meeting the standards.

*Discussion:* We disagree with the commenter. As noted in other discussions in this section, these performance measures are among many factors that the Secretary may consider when determining whether to certify, or condition the participation of, an institution. When making this determination, the Secretary may consider the performance of the institution on the measures alongside all other requirements. By listing the measures here, we are providing greater clarity to the field about what indicators we are considering when deciding an institution's certification status.

However, as discussed in greater detail within the relevant subsections in this preamble, we have elected to remove the two supplementary performance measures that are related to GE—debt-to-earnings and earnings premium.[22] We have also removed the audit requirement for instructional spending. Overall, these changes better focus on the measures we are most concerned about that are not captured under other provisions. We believe these remaining measures are clearer and the discussion in the preamble and RIA provides necessary information about how they would be used. The removal of the audit requirement related to spending on instruction versus other areas, meanwhile, reduces burden for institutions.

*Changes:* We have amended § 668.13(e) by removing two supplementary performance measures, listed in the NPRM as paragraphs (e)(ii) and (iii), that are related to GE-debt-to-earnings and earnings premium. We also removed the audit requirement for instructional spending listed in the NPRM as paragraph (e)(iv) and renumbered in the final rule as § 668.13(e)(2).

*Comments:* One commenter expressed concerns about the list of supplementary performance measures that institutions would have to comply with. This commenter worried that these requirements would cause institutions to close and lead to areas completely lacking certain types of available schools. Another commenter stated that the proposed supplementary measures do not provide more protections for the student than what is currently offered.

*Discussion:* We disagree with the commenter. The supplementary performance measures are a signal to the field about the kind of information the Department will take into account as we review applications from institutions for certification or recertification. The Department will carefully review these applications to determine how concerning the results are of these different measures. We believe these measures are strong indicators of how well an institution is providing educational programs, and how the use of them will protect students. The measures listed in this section identify considerations that are of the utmost importance to both students and taxpayers when evaluating an institution's performance. These are whether students will finish (the withdrawal rate), what kind of investment will the institution make in them for their money (the instructional spending test), and will students be able to get the jobs they prepared for (the licensure pass rate). Institutions that regularly struggle on each or every one of these measures merit a closer look at how they should be certified to participate in the title IV, HEA programs.

We also disagree with the commenters and believe the measures do not create substantial burden for institutions to be in compliance. We note that these performance measures are among many factors that the Secretary may consider when determining whether to certify, or condition the participation of, an institution. They will also go into effect under the requirements of the master calendar and apply to certifications that begin after the effective date of the regulations, which will result in a phase-in for institutions. Finally, two of the five supplemental measures presented in the proposed rules will be removed in the final rule, as well as the auditing requirement in the instructional spending measure, further reducing burden to institutions. These are discussed in greater detail in the subsection of this part of the preamble related to these measures.

*Changes:* None.

*Comments:* One commenter requested that the supplementary performance measures regulation be modified to state that the Department would consider punitive action if two or more of the

[22] These measures were listed in the NPRM as proposed § 668.13(e)(ii) and (iii). Since they were removed in this final rule, the remaining supplemental measures have been renumbered as § 668.13(e)(1) through (3).

measures were problematic instead of any one of the five measures.

*Discussion:* The Department does not take punitive actions. We only take administrative action to protect students and taxpayers. As noted in other discussions in this section, these performance measures are among many factors that the Secretary may consider when determining whether to certify, or condition the participation of, an institution. We do not think the suggested modification would be appropriate. For instance, an institution with low withdrawal rates and a high share of spending on education and related expenses that has horrendous job placement rates that cover most of their students merits a closer look.

*Changes:* None.

*Comments:* Other commenters shared that the five proposed measures are not adequately defined in the supplementary performance measures regulatory text. These commenters stressed that these measures must be defined to provide meaningful and valid performance metrics.

*Discussion:* We disagree with the commenters. First, we have removed the debt-to-earnings rates and earnings premium measure from the supplementary performance measures. The remaining measures are common areas with which institutions are familiar. For example, the withdrawal rate measure is of the percentage of students who withdraw from the institution within 100 percent or 150 percent of the published length of the program, aligning with the reporting requirements for the College Navigator as required by section 132(i) of the HEA. Institutions report spending across many categories annually in the Integrated Postsecondary Education Data System (IPEDS) Finance Survey in accordance with the appropriate accounting standards. The Department provides detailed instructions for institutions in the survey materials each year that outline how institutions report various expenses. Lastly, licensure passage rates are a common calculation made for programs that are designed to meet the requirements for a specific professional license or certification required for employment in an occupation.

*Changes:* None.

*Comments:* Several commenters stated that the supplementary performance measures are redundant because all regional accreditors routinely evaluate and set acceptable measures for education spending, graduation rates, and placement rates. These commenters expressed that any new rules would create unnecessary burden on institutions.

*Discussion:* We disagree with the commenters. As explained in other discussions in this section, these are common measures with which institutions are familiar. Furthermore, accrediting agencies vary in their standards and even in the calculations used when they evaluate an institution for accrediting purposes. We believe it is important for the Department to consider these measures as part of the determination of certifying or conditioning an institution's participation.

*Changes:* None.

*Comments:* Many commenters expressed concern about the other information the Secretary may consider in the supplementary performance measures. These commenters stated that institutions should be clear on what information the Secretary may consider when deciding whether to grant or qualify institutional or program eligibility. Other commenters said that the list of supplementary measures should be finite so institutions have notice of what the Department will consider during recertification.

*Discussion:* The final § 668.13(e) lists three measurable items or aspects useful in recognizing a program or institution's overall effectiveness with regard to title IV, HEA administration. We decline to adopt an exhaustive list of measures for determining whether to certify or condition the participation of an institution under § 668.13(e). Conducting proper oversight requires the Department to carefully review institutions, including if they have unique circumstances that merit a closer look. Listing these three measures is important because it clarifies what institutions can expect the Department to consider. We think an exhaustive list would constrain the Department's ability to engage in sufficient oversight.

*Changes:* None.

*Comments:* One commenter argued that the supplementary performance measures in the proposed rules will have a disproportionate effect on schools with many first-generation college students in which over half are Pell Grant recipients. The commenter stated that the proposed regulation overlooks the reality that certain vital professions offer lower salaries, and many students pursue degrees without expecting immediate financial gains. This commenter noted that they would prefer to see policies and rules that support and commend individuals who chose careers in teaching, both at elementary and secondary levels, as well as other public service-oriented fields, recognizing that financial rewards may not be as substantial. Therefore, the commenter stressed that labeling programs as failing based on the income of recent graduates compared to those who have been out of high school for over ten years, or because they don't meet the debt-to-earnings ratio, diminishes the true worth of higher education to just immediate earnings. The commenter shared that such perspective poses a significant risk, particularly to first-generation students and that imposing these requirements as part of the PPA could potentially lead to the termination of certain programs due to the GE data requirements.

*Discussion:* As discussed in greater detail in the relevant subsection, we have removed the debt-to-earnings rates and earnings premium measure from the supplementary performance measures. The commenter's concerns are thus no longer relevant for this section.

*Changes:* We have removed the supplementary performance measures related to debt-to-earnings rates and earning premium measures of programs from § 668.13(e).

*Comments:* One commenter argued that the Secretary already has regulatory powers and processes that enable the Department to address concerns in these areas and, therefore, the supplementary performance measures proposed rules are redundant and unnecessary.

*Discussion:* We agree that the Secretary already has this regulatory authority. However, we see value in highlighting that the Department will look at these measures when reviewing an institution's certification. As noted earlier, this is not an exhaustive list of measures, which reflects the Secretary's broader authority.

*Changes:* None.

Withdrawal Rate Measure (Proposed § 668.13(e)(i), Renumbered as § 668.13(e)(1) in the Final Rule)

*Comments:* One commenter noted that the Department is advantaging traditional, highly selective universities in the withdrawal calculation. The commenter writes that risk factors for withdrawal are more present among non-traditional students who attend adult-serving institutions. The commenter recommends removing withdrawal rate from the list of supplementary performance measures.

*Discussion:* We disagree with the commenter. While we recognize that an institution's resources contribute to their ability to support their students, we believe this measure neither advantages nor harms specific types of institutions. Like the high dropout rate

trigger in the financial responsibility regulations in § 668.171(d)(4), we will consider this measure among many factors when reviewing an institution. We decline to remove this provision because we believe that high withdrawal rates can indicate substantial problems at an institution, particularly when there are other concerns that may be related.

*Changes:* None.

Debt-to-Earnings Ratio and Earnings Premium Measure (Proposed § 668.13(e)(ii–iii), Now Removed in the Final Rule)

*Comments:* Two commenters expressed concern that the Department is using inaccurate income data to calculate GE failure. These commenters worry that since earnings data are tied to failing GE programs, certification procedures will be negatively impacted through the set enforcement authority. Another commenter believed that the debt-to-earnings ratio and Earnings Premium measure fail to accurately indicate the quality of a cosmetology institution. The commenter stressed that the current § 668.13 is adequate for institutional eligibility purposes. One commenter emphasized that the Department had stated it had no intention, nor authority, to apply the GE framework to non-GE programs. The commenter shared that this proposed language could be used to determine institutional eligibility on GE metrics for both GE and non-GE programs. The commenter further shared that we did not discuss this approach during negotiations for non-GE programs. The same commenter shared that if debt-to-earnings ratio and an earnings premium measure were calculated for all programs at all institutions and used as a supplementary performance measure, the Department would be applying the GE rules to institutional eligibility by using those GE metrics to approve or recertify an institution's PPA or place them on provisional approval status, even if the institution had no GE programs, or if only its non-GE programs were failing the GE metrics.

*Discussion:* Upon review by the commenters, we have decided to remove the two indicators related to GE, which were in proposed § 668.13(e)(ii) and (iii). While we think these measures do provide important information about schools, we are persuaded that their inclusion here creates confusion about how they interact with the regulations included in a separate final rule related to GE and financial value transparency (88 FR 70004). Similarly, there are already criteria related to administrative capability and financial responsibility for having 50 percent or more of an institution's title IV, HEA revenue coming from failing GE programs in §§ 668.171(c)(2)(iii) and 668.16(t), respectively. We think it is better to preserve those clearer measures. We refer commenters to the discussion of those metrics and their integrity in the separate final rule related to GE. The removal of the GE measures from this section addresses the concerns for this provision.

*Changes:* We have removed the supplementary performance measures related to debt-to-earnings rates and earning premium measures of programs from § 668.13(e).

Educational and Pre-Enrollment Expenditures (Proposed § 668.13(e)(iv), Renumbered as § 668.13(e)(2) in the Final Rule)

*Comments:* A few commenters opined that the supplementary performance measures rules regarding educational spending place institutions who educate low-income students and have fewer resources at a disadvantage. The commenter stated that education spending, instruction, and academic support are not defined with precision, leaving institutions unsure about applicability and usage.

*Discussion:* We disagree with the commenters but recognize there may be confusion about what this measure considers that we want to clarify. This performance measure does not consider an institution's absolute levels of spending. Rather, the Department wants to look at relative prioritization of spending on instruction and instructional activities, academic support, and support services compared to the amounts spent on recruiting, advertising, and other pre-enrollment expenditures. We recognize that the amount of money available for institutions to spend on educating their students will vary based upon their relative affluence, endowment resources, State investment, and other factors. However, we are concerned about institutions that devote a comparatively small share of their spending to core educational activities and instead devote more to getting students to enroll.

To clarify this issue, we have adjusted the text of proposed § 668.13(e)(iv) (renumbered § 668.13(e)(2)) in the final rule) to include the words ''compared to'' instead of ''and'' when referring to the amounts spent on recruiting, advertising, and other pre-enrollment expenditures.

The Department, however, affirms the importance of this measure. It is a well-known concept that budgetary prioritization shows overall priorities. To that end, we are worried about institutions that prioritize enrolling students over academic related expenditures.

We also disagree with commenters' assertion that amounts spent on instruction and instructional activities, academic support, and student services are not well defined. As explained elsewhere in this preamble, institutions report educational spending across the categories listed in the measure annually in the IPEDS Finance Survey in accordance with the appropriate accounting standards. The Department provides detailed instructions for institutions in the survey materials each year.

*Changes:* We have clarified that the spending levels in proposed § 668.13(e)(iv), renumbered § 668.13(e)(2) in the final rule, are relative to one another.

*Comments:* One commenter stated that the instructional expense category in the proposed supplementary performance measures is not relevant or well-suited to distance education programs. This commenter opined that the learning and teaching experience in online programs may not solely be composed of activities conducted by the teaching faculty, but may also involve course and curriculum designers, support instructors, faculty mentors, and staff who are otherwise qualified in student engagement and instruction, as well as utilization of online library, tutorial, and interactive learning resources.

*Discussion:* We agree that there are important activities that contribute to students' instruction outside of those provided by teaching faculty, not only for distance education programs but for many programs and institutions. However, we note that this measure considers more than just instruction, including academic support and support services. As explained elsewhere in this preamble, institutions report spending across these categories annually in the IPEDS Finance Survey in accordance with the appropriate accounting standards and the Department provides detailed instructions for institutions in the survey materials each year. In these instructions, the various kinds of activities mentioned by the commenter are captured across the categories of spending.

*Changes:* None.

*Comments:* As discussed in the financial responsibility section related to § 668.23, commenters raised concerns about the reference to disclosures in the audited financial statements of the

amounts spent on academically related and pre-enrollment activities that is included in § 668.13(e)(iv).

*Discussion:* We agree with the commenters that the provision in § 668.23 could be overly confusing, especially considering that the Department can also obtain this information from IPEDS. Accordingly, we have deleted the provision related to the audit disclosure in § 668.23 and have removed it from proposed § 668.13(e)(iv), renumbered § 668.13(e)(2) in the final rule as well.

*Changes:* We have deleted ''as provided through a disclosure in the audited financial statements required under § 668.23(d)'' from proposed § 668.13(e)(iv), renumbered § 668.13(e)(2) in the final rule.

*Comments:* One commenter stated the proposed supplementary performance measure of resources spent on marketing and recruitment would not show if an institution were financially unstable. The commenter further stated that smaller and non-traditional institutions do not have the ability to rely on name recognition like larger more well-known institutions. The commenter concluded that the Department's proposed supplementary performance measure may disadvantage non-elite and non-traditional institutions that must advertise heavily to survive.

*Discussion:* We disagree with the commenters. As stated above, this performance measure provides important insight into how an institution spends their resources, regardless of institutional size, traditional adherence, or prestige. As explained elsewhere in this rule, we note that this is not a measure of the total dollars spent, but rather a consideration of how an institution allocates its funds in the context of their budget. We feel strongly that this supplemental measure is relevant, applicable, and useful in determining any participating institution's performance.

*Changes:* None.

*Comments:* Another commenter stated that the negotiated rulemaking process did not involve the type of substantive consideration of institutional budgeting, strategic planning, and enrollment management that would be required to consider whether the educational and pre-enrollment spending supplemental performance measure is appropriate and, if so, which ratios or thresholds would be fair to various sectors of postsecondary education. The commenter recommended the Department complete additional research while involving stakeholders, define expenditure categories sufficiently, and allow for temporary changes in expenditures.

*Discussion:* We disagree with the commenters. We discussed this issue during negotiated rulemaking and although we did not reach consensus, we considered those discussions when writing our NPRM. In response to the NPRM, we received comments from more than 7,500 individuals and entities, including many detailed and lengthy comments. We note that we are not establishing a single bright-line standard. We recognize there will be variation in institutional budgeting priorities that we should consider during the review process. As discussed, with the removal of the audit component from this language, the Department will likely rely upon the IPEDS data in reviewing this issue. The National Center for Education Statistics within the Institute of Education Sciences has responsibility for the IPEDS finance survey where these data are reported. It has its own process for updating that survey as needed.

*Changes:* None.

Licensure Pass Rates (Proposed § 668.13(e)(v), Renumbered § 668.13(e)(3) in the Final Rule)

*Comments:* Several commenters wrote that the definition of licensure pass rates is vague and asked the Department to clarify the scope and implications for institutions.

*Discussion:* As with other supplementary performance measures in proposed § 668.13(e)(v) (renumbered § 668.13(e)(3) in the final rule), we decline to set a specific threshold for this measure. It would be inappropriate to set a threshold in this context because, as we have said previously, these measures are ones we will consider among many factors when determining whether to certify, or condition the participation of, an institution.

However, we believe the concept of licensure pass rates itself is not vague. These would be considered for programs that are designed to lead to licensure in a State and would involve looking at the rate at which the students from that institution obtain their license, including through the passage of necessary licensing tests. This is information readily available to institutions and commonly required by institutional and programmatic accreditors.

*Changes:* None.

*Comments:* Many commenters supported the inclusion of this provision. For example, one commenter thanked the Department for this addition, saying it would bring added protections for students and taxpayers as the Department currently has little requirements for programs designed to lead to licensure and no ability to hold institutions accountable for low passage rates.

*Discussion:* We thank the commenters for their support.

*Changes:* None.

*Signature Requirements for PPAs (§ 668.14(a)(3))*

*Comments:* A few commenters supported adding the PPA signature requirement for entities with ownership or control over a for-profit or private nonprofit institution. One commenter believed it would remind institutions and their principals that the Department has the authority to recover unpaid liabilities from controlling entities and individuals. One commenter suggested that this reminder may deter misconduct and help to prevent unwarranted legal challenges to the Department's efforts to pursue redress for liabilities. Another commenter supported this provision because it expanded on a policy previously outlined in Departmental guidance. This commenter asserted that these signature requirements would offer a common-sense protection to ensure that the Department is able to recoup liabilities from the institution and the company that owns it, as applicable.

One commenter stated that taxpayers should not have to foot the bill due to fraud and mismanagement committed by owners and executives of for-profit colleges. This commenter argued that in the same way the Department has forgiven student debt for borrower defense claims that have indicated widespread fraud, such as the Department's recent loan discharges for former students of institutions like Corinthian Colleges and Marinello Beauty Schools, the Department should also hold companies and executives accountable for their fraud. This commenter claimed that failing to hold highly compensated executives accountable for fraud and mismanagement incentivizes repeat bad behavior. According to this commenter, without a significant change in approach from the Department, executives can act with impunity, knowing they will walk away with millions in compensation and leave taxpayers responsible for the financial harm they have caused. This commenter noted that given the amount of money involved, it is unlikely that the Department would recover more than a fraction of the liabilities, but this proposed provision will hold

individuals accountable and disincentivize the worst types of behavior and preemptively protect students from being harmed.

*Discussion:* We appreciate the commenters' support of this provision.

*Changes:* None.

*Comments:* Many commenters believed we do not have the statutory authority to require financial guarantees from entities in § 668.14(a)(3)(ii). These commenters believed the proposed language is vague, unlawful, and contradicts the purpose of the HEA. These commenters also contended that the Department's authority to require financial guarantees from owners derives from HEA section 498(e), which provides the Secretary the authority to require financial guarantees from an institution, which includes the corporation or partnership itself as well individuals who exercise substantial control over that institution. However, these commenters argued that this authority does not extend to other entities, whether it be a parent or holding company.

*Discussion:* We disagree with the commenters. The HEA speaks to clear limitations for the imposition of personal liabilities on owners. The specific authority for requiring personal signatures from owners, and the specific parameters of such authority, is necessary in the HEA given that general corporate law otherwise places even more restrictive conditions on when it is possible to pierce the corporate veil. By contrast, the HEA does not include any similar limitation on when the Department may obtain additional protection from corporate entities. It does not provide any similar limitations the way it does for individuals. Furthermore, HEA section 498(e)(1)(A) (20 U.S.C. 1099c(e)(1)(A)) outlines the Secretary's authority to require financial guarantees from institutions or individuals who exercise substantial control over an institution. Although HEA section 498(e) specifically addresses individual signatures and does not explicitly address entity signatures, HEA section 498(e)(2)(B) provides that the ''Secretary may determine that an entity exercises substantial control over one or more institutions'' where the entity ''directly or indirectly holds a substantial ownership interest in the institution.'' As institutional ownership has grown exceedingly more complex, the Department has determined that as a matter of prudent stewardship of Federal funds, the entities that directly and indirectly own or control institutions should assume responsibility for the institution's obligations under the participation agreement. Without the signature of the owner entities, the Department can face significant legal hurdles in attempting to collect unsatisfied liabilities, since corporations and similar entities are used to insulate higher level entities or individual owners from liability.

We also disagree with the commenter that the language of § 668.14(a)(3)(ii) is vague as it describes the institutions, the type of ownership of the authorized representative of an entity and includes four examples of circumstances in which an entity has such power.

*Changes:* None.

*Comments:* One commenter said that the PPA signature requirement will cause mass departures of vital employees from postsecondary institutions. The commenter asserted that individuals in business should not be held personally liable for unintended mistakes or mismanagement any more than government employees should be held responsible for misjudgments and errors that potentially create additional costs for taxpayers.

*Discussion:* The commenter is confusing signatures on behalf of an entity versus one in a personal capacity. This regulation is not addressing when the Department requests signatures in a personal capacity, which is limited under the HEA to certain conditions. This is addressing signatures on behalf of the entities that own institutions, including higher levels of ownership. If an entity can profit from or control an institution while times are good, it is prudent that they also accept liability if it cannot be covered by that same institution. Entity owners of institutions that do not incur liabilities will not face any effects from this provision.

*Changes:* None.

*Comments:* One commenter stated that the language in § 668.14(a)(3) failed to define what is meant by the power to exercise control. According to this commenter, the absence of definitional language and the fact that the proposed language only includes examples indicates that the proposed rule merely provides a non-exhaustive list. This commenter is concerned that the Secretary might consider an entity to have requisite power and require one of its authorized representatives to sign the PPA, which opens the door for other, undefined scenarios. This commenter observed that the proposed rule does not provide any information regarding what constitutes the ability to block a significant action under § 668.14(a)(3)(ii)(B), making the regulation too vague to guess its meaning and application. The commenter concluded that this proposed rule fails to put institutions on notice for when additional signatures are required for a PPA and fails to provide adequate guidance. This commenter disagrees with the Department's rationale for this provision, specifically that this provision would help maintain integrity and accountability around Federal dollars. The commenter pointed out that several statutory and regulatory financial protections already exist to minimize the risk of financial losses that the Federal Government might incur. This commenter asserted that these protections are specifically designed to ensure that an institution receiving title IV, HEA funds can repay its debts and are more effective than a rule that requires other entities to sign an institution's PPA. For example, the commenter cited 20 U.S.C. 1099c(c) and the financial responsibility standards as examples where the Department has already imposed mechanisms to ensure the financial viability of institutions and, more broadly, entities. The commenter concluded that proposed § 668.14(a)(3) is arbitrary, contradicts the HEA's purpose, and urged the Department to remove it from the final rule.

*Discussion:* We affirm the importance of this provision and decline to remove it. HEA section 498(e)(3) (20 U.S.C. 1099c(e)(3)) provides an expressly non-exhaustive list of what is an ownership interest.

As discussed throughout the NPRM and this final rule, the Department is concerned about the significant unpaid liabilities that have accrued over years as institutions close with little to no warning or engage in misconduct that results in approved borrower defense to repayment discharges. In several of these situations, an additional corporate entity could have helped offset some of these losses, but the Department could not seek repayment from them because they had not signed the PPA. This provision works together with the financial responsibility requirements to ensure that the Department and in turn taxpayers are better protected from uncompensated losses.

Regarding the comments about the lack of a definition of what it means to exercise control, we point commenters to §§ 600.21(a)(6)(ii) and 600.31, which provide definitions and discussions of what it means to exercise control. As to the issue of the power to block a significant action, the Department generally considers those to be the types of actions described in operating agreements, articles of organization or bylaws as needing consent by a

shareholder or group of shareholders to be approved.

*Changes:* None.

*Comments:* A few commenters declared that our proposal to require entities to sign PPAs would likely discourage other entities from investing or from sustaining existing investments in institutions of higher education. One commenter claimed that while there are certainly smaller mom and pop institutions, owning and operating a higher education institution or group of institutions is a complex and expensive endeavor that requires substantial resources. Some commenters stated that reducing outside investment would harm institutions, deter their operations and growth, and hinder their ability to serve students and provide a variety of programs. Consequently, these commenters alleged that the rule could result in the unanticipated closure of institutions, thereby causing students to have fewer educational options and limiting accessibility, in contravention to the purposes in the HEA.

Several other commenters noted that the proposed signature requirement would be overly burdensome and unnecessary for institutions to comply with.

*Discussion:* The Department is not persuaded by the arguments about the chilling effect on outside investors. If a party wants to take a position of direct or indirect control in a school, it should be willing to assume responsibility for the institution's participation in the title IV, HEA programs. As to the hypothetical investor, if the investor is worried about potential liabilities related to an institution, that may indicate that the institution's ongoing participation poses a risk to the government.

Similarly, we do not believe these requirements would provide undue amounts of burden. In March 2022, the Department published an electronic announcement updating our signature requirements and has been seeking entity signatures under that announcement.[23] We have found that process to be reasonable and manageable. When burden arises under this provision it has largely not been due to the complexity of the act of providing a signature but rather entities arguing about whether they should have to comply.

*Changes:* None.

*Comments:* Several commenters expressed concern with proposed § 668.14(a)(3) and argued that although the HEA allows the Secretary to determine if an entity exercises substantial control over the institution, the HEA does not provide the Department the statutory authority to require a financial guarantee from a legal entity. These commenters reasoned that Congress intentionally excluded language that imposed financial guarantees on entities when they discussed both individuals and entities in HEA section 498(e) and that the final rule should thus remove mention of signatures from entities.

In addition, these commenters also maintained that non-profit and public institutions are not subject to HEA section 498(e) because they do not have owners. These commenters claimed that the leadership structure in these institutions is not the same as the kind of owners Congress contemplated in the 1992 amendments to the HEA. In making this point, these commenters namely pointed a Congressional hearing discussing proprietary school owners who, ''when schools close or otherwise fail to meet their financial responsibilities'' ''escape with large profits while the taxpayer and student are left to pay the bill.'' [24]

If the Department decides to move forward with a co-signature requirement, these commenters suggest that the final regulation, at minimum, be amended to meet the requirements under HEA section 498(e)(4). According to these commenters, the Department cannot impose financial guarantee obligations on an institution that has met the four criteria outlined under HEA section 498(e)(4), subparagraphs (A)–(D).

One commenter also expressed concern that it would be unclear whether faith-based organizations providing financial support to an institution would represent substantial control as defined by the Department. The commenter was concerned that many faith-based institutions, who were formed by religious denominations, have clergy and other religious leaders in authoritative roles that could be considered liable under the proposed rule. Thes commenter emphasized that the HEA does not give any indication that these types of religious leaders should be considered owners and be held personally liable. The commenter also contended that faith-based institutions do not have private shareholders or individuals that escape with large profits as proprietary owners do.

*Discussion:* First, the provisions in this final rule are not related to the imposition of personal liability on individuals. The Department also acknowledges that nonprofit entities, including many faith-based organizations, do not have shareholders that are entitled to profit distributions. However, we disagree that the HEA restricts the Department from requiring an entity or entities that own a nonprofit institution from assuming liability for that institution's obligations by signing the participation agreement. All nonprofit institutions are owned and operated by one or more legal entities. Those legal entities are organized under State law, typically as nonprofit, nonstock (or public benefit) corporations or limited liability companies. The commenter cites the Congressional hearing on HEA 498(e) for the proposition that the entity owner signature requirement cannot apply to nonprofit institutions. First, that statutory provision provides the Department with the authority to seek individual signatures, and the limitations on that authority. The commenter apparently seeks to use the statements of the Department's Inspector General during that hearing to argue that the entity signature requirement should be limited to proprietary schools.

Although the Inspector General explained that the motivation for the proposal was based on an investigation of proprietary schools, the Inspector General nevertheless agreed that the individual signature requirement should not be limited to proprietary schools.[25] The language of section 498(e) contains no such limitation, and instead refers to ''an institution participating, or seeking to participate, in a program under this title.''

As already discussed in this section, the HEA places specific limitations on requiring individual people from assuming personal liability or personal guarantees out of recognition that it is a significant step for the Department to take. Those limitations are outlined in section 498(e)(4)(A)–(D). However, the HEA does not restrict the Department from requiring signatures on behalf of corporations or other entities that

[23] *https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2022-03-23/updated-program-participation-agreement-signature-requirements-entities-exercising-substantial-control-over-non-public-institutions-higher-education.*

[24] Hearings on the Reauthorization of the Higher Education Act of 1965: Program Integrity, Hearings Before the Subcommittee on Postsecondary Education of the Committee on Education and Labor, House of Representatives, 102nd Congress, First Session (May 21, 29, and 30, 1991).

[25] Hearings on the Reauthorization of the Higher Education Act of 1965: Program Integrity, Hearings Before the Subcommittee on Postsecondary Education of the Committee on Education and Labor, House of Representatives, 102nd Congress, First Session, May 21, 29, and 30, 1991, p.313–314.

exercise substantial control over an institution. Requiring signatures from owner entities allows the Department to ensure that owners are not using multiple layers of corporate entities to shield resources from repayment actions if liabilities are established and the institution does not satisfy them. If Congress had wanted to restrict the Department's ability to require an entity owner to sign the participation agreement, it would have said so, just as it limited the circumstances in which the Department can require an individual to assume personal liability or provide a financial guaranty. In fact, the statutory language governing program participation agreements in section 487 of the HEA references the definitions in section 498(e) of the HEA and refers to individuals and entities separately. Moreover, when Congress added the individual signature provision, the original House version of the bill did not include the limitation on the circumstances where individuals would not be required to assume liability, but it was added in conference. As the conference report states, ''The conference substitute incorporates this provision with an amendment providing a set of conditions under which the Secretary cannot require financial guarantees and clarifies that the Secretary may use his authority to the extent necessary to protect the financial interest of the United States.'' [26] Since Congress did not restrict the Department's ability further and gave the Secretary broad authority, we do not think it would be appropriate to limit entity signatures in the manner that Congress set forth for assumption of personal liability in the HEA.

*Changes:* None.

*Comments:* One commenter expressed frustration that States and accrediting agencies are not being held financially accountable for the costs of their failed consumer protection and negligent oversight of school quality. This commenter explained that Federal taxpayers are incurring billions of dollars in loan discharge costs because States and accrediting agencies have failed to provide meaningful oversight of educational quality and argued that they do not have any incentive to do better. This commenter argued that after incurring billions in loan discharge costs, the Department has a compelling reason to hold States and accrediting agencies accountable as gatekeepers to title IV, HEA funds in the regulatory triad. This commenter reasoned that the Department should hold States and accrediting agencies jointly liable for the wide range of school misconduct they have enabled and tolerated by requiring these agencies to co-sign a PPA, which would incite States to develop risk pools or decline to co-sign a PPA for a failing or untrustworthy school.

*Discussion:* Accrediting agencies are subject to statutory provisions under the HEA, as well as Department regulations which address issues such as the quality of their oversight. They do not exercise substantial control over the institution; therefore, it is not appropriate for them to sign a PPA. States effectively provide the same financial guarantee as a private owner when they pledge their full faith and credit to a public institution.

*Changes:* None.

*Comments:* One commenter supported the Department's view that to protect taxpayers and students, entities that exert control over institutions should assume responsibility for institutional liabilities and that requiring such entities to assume liability provides protection to the recurring problem of institutions failing to pay its liabilities. However, this commenter argued that the signature requirement in proposed § 668.14(a)(3) is unnecessary. This commenter believed that entities did not have to sign a PPA to be held financially liable. This commenter asserted that the Secretary has broad power to invoke the authorities within HEA section 498(e), and therefore does not need a signature to invoke that authority. This commenter argued that the HEA enumerates specific circumstances in which the Department may not impose the statutory liability requirements and under the doctrine where the expression of one thing implies the exclusion of others. For example, this commenter stated that the list in HEA section 498(e) represents the complete set of circumstances in which the Department is prohibited from exercising its authority in section 498(e)(1)(A) and (B). In this case, circumstances support a sensible inference that PPA signatures being left out must have been meant for them to be excluded.

This commenter determined that the Department's signature requirement is bad policy because it would require the Department to predict, in advance, whether an individual or parent company must sign the PPA. The commenter questioned what would happen if the Department failed to accurately predict the losses, specifically if the Department took the position that a corporate parent (or individual) must sign the PPA before creating those losses to the government. Likewise, the commenter questioned the proposed 50 percent threshold, particularly whether an institution that caused massive losses to taxpayers and has an entity with a 49 percent ownership would face consequences even though the entity was not required to pre-sign a PPA. The commenter believed the 50 percent threshold would encourage owners to stay under a 49 percent threshold or use corporate structures to avoid signature requirements.

This commenter also argued that the Department's statements in the NPRM and Electronic Announcement (EA) GENERAL–22–16 constituted an unexplained departure from longstanding and current Department regulations regarding substantial control in § 668.174(c)(3). The commenter stated that for decades the Department has considered a person to exercise substantial control over an institution if the person directly or indirectly holds at least a 25 percent ownership interest in the institution or servicer. The commenter pointed out that in 1989 the Department took the position that ownership of more than 50 percent of an institution or its parent corporation confers an ability to affect, and even control, the actions of that institution. The commenter noted, however, that these proposed regulations reflect the fact that the Secretary also considers the ownership of at least 25 percent of the stock of an institution or its parent corporation generally to constitute ability to affect substantially the actions of the institution. The commenter continued that in the 1991 final rule, the Department wrote that there were circumstances under which the Secretary considers a person to have the ability to affect substantially the actions of an institution even when that person does not have a controlling interest in that institution or the institution's parent corporation. The commenter asserted that the Department's statement regarding substantial control remains in the regulations today, with no proposals to change that.

The commenter observed that the proposal in the NPRM, like the guidance outlined in EA GENERAL–22–16, completely disregarded decades of Departmental policy without any explanation. The commenter is not satisfied with the Department's justification that owning more than 50 percent is considered a simple majority and therefore 50 percent would be a suitable percent to use as the threshold. Moreover, the statements in the NPRM regarding substantial control undermine the basis for the Department's definition of substantial control in § 668.174. Finally, the commenter would like to know why the Department has not

[26] H. Rep. 102–630.

explained why it is not drawing from the Internal Revenue Code's (IRC) use of a 35 percent threshold for disqualified individuals with respect to private foundations. The commenter described that under the IRC, the term disqualified person is vital to the determination and status of exempt organizations classified as a private foundation, and in addition, the commenter noted that Congress has provided a list of disqualified persons with respect to a private foundation. The commenter then provided the list of disqualified persons, including corporations, partnerships, trusts and estates.

The commenter concluded that signature requirements are not necessary, but if the Department decides to move forward with this provision, they encourage the Department to use a 25 percent threshold. The commenter argued that there are reasoned options to use a different percentage besides 50 and that it provides stronger protections for taxpayers and stronger deterrents for entities. The commenter also asked the Department to not leave out individuals if signatures from holding parent entities and investors will be required. The commenter is troubled that the proposed regulation is tailored only to entity liability but ignores personal liability, given the Department's EA GENERAL–22–16 (Entity Liability) and its subsequent EA GENERAL–23–11 (Personal Liability), they see no reason why both issues would not be considered in this final rule.

*Discussion:* We agree with the commenter that the absence of the mention of entities in the HEA provides us with the authority to seek the signature, but they do not explain why such an absence would allow us to seek liability from a higher-level owner that has not signed the PPA. Traditionally, only the institution of higher education signed a PPA. Absent such a signature from other entities, the Department thus did not have a relationship established with those entities in which there was a clear acknowledgment of acceptance of liability. This is particularly important because many institutions today are structured with multiple levels of ownership, such that it is possible that many entities are being asked to sign. The signature thus clearly establishes that the entity signing will agree to be responsible for any unpaid liabilities from the institution.

We disagree with the commenter that this approach is bad policy. As noted in the March 2022 electronic announcement, as well as in this final rule, seeking signatures will allow the Department to be more proactive about future efforts to ensure taxpayers are compensated for liabilities owed from institutions. We think continuing the status quo argued for by commenters would not result in receiving greater amounts of financial protection and could delay the process of recouping funds as the Department would have to defend against potential challenges from owner entities that they are not liable absent a signature. Seeking additional signatures is thus a prudent policy that improves protection and makes clearer to entities that they will be financially responsible for taxpayer losses caused by the institution.

The Department also disagrees with the commenters regarding the 50 percent threshold in § 668.14(a)(3)(ii)(A). The Department determined that the 50 percent threshold described in (A) was appropriate because that is the level at which the Department typically sees control, most often exercised through the rights described in § 668.14(a)(3)(ii)(A). Blocking rights (as described in paragraph (a)(3)(ii)(B)) are another source of control, which may be held at even lower percentages of ownership. Because the list is non-exhaustive, the Department retains the ability to require signatures from entities that own less than a 50 percent direct or indirect interest in the institution if the Department determines that the entity has the power to exercise control over the institution.

The Department also disagrees with the use of the 35 percent threshold as suggested by the commenter because based on the transactions that the Department has reviewed, the Department believes that the thresholds identified in the regulation are adequate and provide sufficient flexibility for the Department to address control that might exist below 50 percent.

*Changes:* None.

*Comments:* One commenter asserted that the proposed signature requirements in § 668.14(a)(3) ignores well-established law on corporate veil-piercing. The commenter explained that it is a bedrock principle of corporate law that corporations (and other corporate forms) exist as separate and distinct legal entities with their own responsibilities, including for liabilities. Otherwise, the commenter noted, there would be little purpose to corporations, as one could impute liabilities to all individual owners or ownership entities and would no longer be limited to the assets available to the specific corporation. The commenter stated that if this was the case, entire economies would fail as no business would be able to operate without fear of potentially unlimited liability. For this reason, the commenter claimed, the exception to limited liability for corporate entities, piercing the corporate veil, is very narrow and typically does not apply absent fraud or a similar wrongful purpose. This commenter argued that the Department's proposed regulation would ignore the long-established liability limitations for corporations and instead require ownership entities that meet a certain control threshold to assume liability for the institution's actions in all instances. This commenter believed this approach is tantamount to a declaration by the Department that corporate liability limiting principles will not apply in the title IV, HEA context. This commenter argued that the Department lacks the statutory authority to implement such a seismic change that runs counter to longstanding public policy and the commenter urged the Department to revise the proposed language to instead require ownership entities to sign PPAs only if the Department can establish grounds to pierce the corporate veil under applicable law.

This commenter also suggested that the Department revise the proposed signature requirements to list only the circumstances in which a signature would be required. This commenter believed the proposed language provides the Department flexibility to require additional entities that do not fit the enumerated examples to sign the PPA. The commenter is concerned that giving the Department this much discretion would have an even bigger impact on investment in the space as for-profit and nonprofit purchasers could not even make a minority investment in an institution with certainty that it would not be required to assume liability for the institution. This commenter urged the Department to, at a minimum, revise the language to provide that the enumerated examples are in fact the only circumstances in which the Department would require a PPA signature.

Finally, this commenter requested that the Department clarify what constitutes a significant action. For the reasons mentioned above, this commenter stated it was inappropriate for the Department to abandon corporate law principles by requiring entities to sign the PPA. However, if this requirement remains in the final rule, this commenter requested the Department to clarify which significant actions would constitute control. This commenter presumed the Department is referencing actions that could impact the day-to-day operations of an institution, thus demonstrating exercise over the operations of the institution,

but as written, the regulations are not clear. This commenter emphasized that clarity is paramount as investors and lenders would not commit resources without forewarning of whether they would be required to cosign the PPA.

*Discussion:* The Department disagrees with the commenters. The entity signature requirement has nothing to do with corporate veil-piercing to impose liability on individuals. Moreover, corporate law does not require that an agreement can only be entered into by the lowest level entity or organization. As explained above, the entity signature requirement is protection for taxpayers so that entities cannot shield themselves from liabilities by structuring their ownership in level upon level of different entities. The entities may structure themselves as they deem appropriate for tax or other reasons, but the Department needs to make sure that the entities that want to participate in the title IV, HEA programs are responsible for any liabilities that the institution is unable to satisfy. As stated in § 668.14(a)(3)(ii), the Secretary will only seek an entity signature from entities that exercise control over the institution. An entity that does not meet the requirements of § 668.14(a)(3)(ii)(C) or (D) can affirmatively establish through its corporate governance documents that it does not have the power to exercise any direct or indirect control, by blocking or otherwise. In response to the comment about what the Department means by the ability to block significant actions, the Department's evaluation of that question would depend on the entity's organizational or operational documents. These actions might include the ability to amend the organizational documents, to sell assets, to acquire new institutions or other assets, to set up subsidiaries, to incur debt or provide guarantees.

In further response to one of the commenters, substantial control is not limited to exercising control over day-to-day operations of the institution itself. Most typically, entities exercise indirect control over the institution by their control over major financial and governance decisions.

*Changes:* None.

*Limiting Excessive GE Program Length (§ 668.14(b)(26)(ii))*

*Comments:* A few commenters supported the NPRM's proposal to address maximum program length for eligible GE programs. During negotiations, the Department had proposed to set a maximum length for eligible GE programs, not to exceed the shortest minimum program length required by any States in order to enter a recognized occupation. In the NPRM, the Department revised its proposal to instead stet the maximum length for an eligible GE program at the minimum program length required by the State in which the institution is located, if the State has established such a requirement, or as established by any Federal agency or the institution's accrediting agency. The NPRM also proposed an exception whereby an institution may apply another State's minimum required length as its maximum if the institution documents, with substantiation by a certified public accountant, that: a majority of students resided in that other State while enrolled in the program during the most recently completed award year; a majority of students who completed the program in the most recently completed award year were employed in that other State; or the other State is part of the same metropolitan statistical area as the institution's home State and a majority of students, upon enrollment in the program during the most recently completed award year, stated in writing that they intended to work in that other State.

Commenters that supported the NPRM's proposal stated that they understand our concerns with excessive length and the wide variation among States' requirements for the same professions, but that the Department's original proposal during negotiated rulemaking would place undue hardship on institutions and students in States with much longer requirements. The commenters also raised a concern that, if the new rule went into effect immediately, it could place undue hardship on students currently enrolled in a program that could lose title IV, HEA eligibility before they complete their program due to circumstances outside their control.

Another commenter said they are glad the Department is taking the issue of inflated program lengths seriously, especially given reports that program lengths have been deliberately inflated in some States. This commenter supported the proposal to limit program lengths to the minimum hours required for State licensure or, where applicable, the hours required for licensure in a bordering State. This commenter stressed that allowing programs to require up to 150 percent of the hours needed for licensure has created a situation ripe for abuse, with excessively long programs requiring students to spend more time and money than needed to complete their studies. This commenter agreed that these proposed changes will benefit students and reduce the taxpayer dollars spent on programs requiring licensure that exceed the required length.

Several other commenters supported the proposal to limit the hours that an eligible GE program can require. The commenters noted that the proposed rule would ensure that students only pay for the hours necessary to obtain licensure and do not unnecessarily use up their lifetime eligibility for Pell Grants.

*Discussion:* We appreciate the commenters' support and believe that this provision protects students from being charged for unnecessary training.

While we think it is important to protect students through this provision, we also agree with the commenters who said that it would not be appropriate for this new requirement to affect students who are already enrolled in eligible programs, as we do not want to disrupt those students' educational plans if their program were to lose eligibility for title IV, HEA funds due to being too long. Therefore, when these regulations are implemented, we will permit institutions to continue offering a program after the implementation date of the regulations that exceeds the applicable minimum length for students who were enrolled prior to the regulatory change taking effect. This will mean that some institutions may temporarily offer two versions of the same program concurrently but will not be able to enroll new students in the version of the program that exceeds the minimum length. In these cases, the institution is not required to report both programs to the Department but must internally document the existence of two separate versions of the program and indicate which students are enrolled in each program.

*Changes:* None.

*Comments:* One commenter stated the proposed rule would curtail title IV, HEA eligibility in ways that would sharply reduce nursing graduates, worsening the severe shortage of nurses. The commenter argued that many institutions may no longer be permitted to offer Bachelor of Science in Nursing (BSN) programs with title IV, HEA eligibility because such programs would include more credits than necessary to practice as a nurse, which in many States only requires a diploma or associate degree.

*Discussion:* We agree with the concerns raised by the commenter about how degree programs subject to State hours requirements could be affected and have made a change to address this issue. We are clarifying that this provision does not apply to situations where a State has a requirement for a

student to obtain a degree in order to be licensed in the profession for which the program prepares the student. Minimum length requirements typically operate differently for non-degree and degree programs. For a non-degree program, the hours required by a State typically represent all, or the vast majority of, the curriculum offered in a program. By contrast, State educational requirements for licensure or certification within a degree program may only represent a portion of that credential and likely will not include other components of a degree, such as general education requirements. As such, minimum length requirements for degree programs may understate the potential length of the program and inadvertently exclude programs that are otherwise abiding by the minimum time related to the component of the program that fulfills specific State licensure requirements. For instance, a State may establish requirements for the component of a bachelor's degree in registered nursing related to the nursing instruction, but not speak to the rest of the degree program.

Importantly, this exclusion of State requirements related to completing a degree is based upon the way the requirement is defined, not how the program is offered. In other words, if the State has a requirement for non-degree programs measured in clock hours, an institution could not simply offer a degree program and avoid having this requirement apply.

*Changes:* We have added new § 668.14(b)(26)(iii), which provides several exceptions to the requirement in § 668.14(b)(26)(ii), including that the requirement does not apply in cases where a State's requirements for licensure involve degree programs.

*Comments:* Several commenters argued that the acceptable length of a program is best determined by the institutions and their accrediting agencies and has been refined over time. These commenters noted that accreditors are trusted with ensuring the quality of an educational program. These commenters further claimed that this proposal is an overreach and amounts to prohibited direction, supervision, and control over the curriculum offered by the institution.

*Discussion:* The Department disagrees that § 668.14(b)(26) is an overreach or amounts to control over the institution's curriculum. The general authority of the Department to issue regulations regarding the certification of an institution and an institution's administrative capability is fully outlined in response to multiple comments and is equally applicable here. Further, these requirements are not dictating the length of a particular program, or its curriculum. Instead, the Department has concluded that programs exceeding the length the State has set for licensure or certification in a given occupation should not be supported by Federal student financial aid. As a result, institutions may offer longer programs; the students who attend them, however, cannot receive title IV, HEA funds to pay for them. The Department determined that it did not have the legal authority to partially fund a program, nor did it believe such an approach was appropriate given the potential harms to students who enroll in partially funded programs and are unable to complete their programs due to a lack of title IV, HEA funds.

The Department is concerned that the language in the NPRM sent conflicting signals about how program length requirements set by accrediting agencies could be considered for this provision. While the provision had previously focused on State requirements, the regulatory text in proposed § 668.14(b)(26)(ii) included a mention of the institutional accrediting agency as one of the three parties whose program length requirements would establish the maximum number of hours. We are concerned that continuing to include accrediting agency requirements in this provision would undercut the purpose of focusing on State requirements, as an accreditor could decide to simply set hour requirements higher than what a State deems necessary. Moreover, the inclusion of institutional accrediting agency requirements is problematic in this situation because there are some programmatic accreditors that are sometimes also able to operate as institutional accreditors depending on a school's program mixture. These accreditors may have specific hour requirements, while other institutional accreditors do not. This would create situations where institutions otherwise in the same State would have different requirements based upon their underlying program mix. Removing the provisions pertaining to program length requirements of accrediting agencies will thus ensure greater consistency.

The removal of accrediting agencies' program length requirements also recognizes the different roles of these entities in the regulatory triad compared to the Department and States. Accrediting agencies are responsible for overseeing academic quality while States oversee consumer protections and the Department administers the title IV, HEA programs. While we understand that accrediting agencies may have policies related to program length, they are involved in setting States' requirements and not required to consider the value of title IV, HEA funds when they make determinations about academic quality, and could therefore approve programs that they may view to be academically valuable without considering the relative costs and benefits to students, including the potential harm to students created by excessive borrowing or loss of Pell Grant lifetime eligibility due to program length that exceeds States' requirements for licensure or certification for the occupation in which a student seeks employment. Therefore, we believe the Department has its own unique interest in this issue that cannot be satisfied merely by relying on accrediting agency determinations about program length.

*Change:* We have removed references to accrediting agency program length requirements from § 668.14(b)(26)(ii).

*Comments:* One commenter suggested the rule should be amended to allow programs to meet title IV, HEA eligibility by allowing for the longer of two measures: The program length can be no longer than the longest number of credit hours required for licensure in a State in which the institution is permitted to enroll students in compliance with § 600.9; or the program length is in compliance with the standards of one of the institution's accreditors. The commenter argued that this approach would allow distance education programs to continue to participate in the title IV, HEA programs while recognizing the licensure variances amongst States.

*Discussion:* The Department recognizes that § 668.14(b)(26)(ii) as written in the NPRM created the potential for confusion for programs offered entirely online or through correspondence. As drafted in the NPRM, the limitation on the number of hours that may be included in an eligible program relied on the minimum in the State where the institution is located. For fully online programs, there may be situations when the length of a program required in the institution's State differs from State requirements for the length of a program in the student's State. To address this issue, we have clarified that this provision does not apply to fully online programs or programs offered completely through correspondence, since these are the only situations where this disparity might occur. Given that the concerns being addressed in this provision are largely focused on in-person or hybrid programs, we believe this change will reduce confusion and better meet the Department's goals. With regard to the commenter's suggested revision to the

language to rely on an institution's accreditors, the Department disagrees. The suggested revision would allow the program length standards of an accrediting agency to set the minimum program length for eligibility and, as mentioned above, the Department is concerned that this inclusion would allow an accrediting agency to set a program length longer than the minimum in a given State and undermine the authority of the State to set requirements. The Department has concluded that following the limits set by States, eliminating the mention of institutional accrediting agencies, and not exposing students to excessive costs for extra hours is the better approach.

*Changes:* We have added new § 668.14(b)(26)(iii) to establish exceptions to the requirement in § 668.14(b)(26)(ii), including that the requirement does not apply to programs that are offered fully through distance education or correspondence courses.

*Comments:* One commenter disagreed with the proposed limitation on excessive hours for GE programs and urged the Department to eliminate that provision of the NPRM. The commenter stated the proposed rule is vague and ambiguous, and that the proposed limitations on program lengths are illogical, contrary to the HEA's purpose, and not supported by any rational basis. The commenter asserted that the proposed rule failed to recognize that for many GE programs, there are no required minimums in that there are no minimum number of clock hours, credit hours, or the equivalent established by a State, or a Federal agency, or the institution's accrediting agency. The commenter concluded that in this scenario, it is unclear how institutions will comply with this proposed rule, and it should be explained in the final rule.

*Discussion:* The Department disagrees with the commenter. The rule is not vague. The requirements for meeting this program participation provision are clearly spelled out in the regulatory text. If a State has established a clock hours, credit hours, or equivalent training requirement for licensure or certification in a specified occupation, then an institution cannot offer a program intended to prepare students for that occupation that is longer than the State-determined length except in the limited circumstance specified.

The regulation set forth in § 668.14(b)(26) has existed in some form, with only slight variation in its effect, since 1994, pursuant to well-established authority under the HEA.[27] We are only changing the what the maximum is, but we are not changing which programs would be subject to the regulation.

As explained previously, HEA section 498 describes the Secretary's authority relating to institutional eligibility and certification procedures, and HEA section 487(c)(1)(B) gives the Department the authority to issue regulations as may be necessary to provide reasonable standards of financial responsibility and appropriate institutional capability for the administration of title IV. Moreover, HEA section 498A(e) authorizes the Secretary to determine an appropriate length for programs that are measured in clock hours. Furthermore, the Department has authority under the HEA sections 101, 102, and 481(b) to implement and enforce statutory eligibility requirements, including those relating to GE programs. Such programs are those that ''provide training to prepare students for gainful employment in a recognized occupation.'' Similarly, as described in the recently-published regulations for Financial Value Transparency and Gainful Employment, various Federal statutes grant the Secretary general rulemaking authority, including section 410 of the General Education Provisions Act (GEPA), which provides the Secretary with authority to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operations of, and governing the applicable programs administered by, the Department, and section 414 of the Department of Education Organization Act (DEOA), which authorizes the Secretary to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department. These provisions, together with the provisions in the HEA regarding GE programs, authorize the Department to promulgate regulations that establish measures to determine the eligibility of GE programs for title IV, HEA program funds, including establishing reasonable restrictions on the length of those programs.

The Department originally implemented this provision in 1994 in an effort to target areas of past abuse such as course stretching, where institutions had extended the duration of, or number of hours required by, their programs to increase the amount of Federal student aid that the institution could receive as payment for institutional charges. The 1994 NPRM proposing this provision stated, ''The Secretary believes that the excessive length of programs requires a student to incur additional unnecessary debt.'' [28] Prior to the 1992 reauthorization of the HEA, the Department's Inspector General had told Congress that course stretching can result in students ''paying as much as 38 times the tuition charged'' for other programs providing the same training.'' [29]

When the 150 percent limitation was set in 1994, some commenters believed it was too lenient, but the Department had relied on the notion that the 150 percent limitation gave ''latitude for institutions to provide quality programs and furnishes a sufficient safeguard against the abuses of course stretching.'' [30] However, a program that exceeds length requirements by 50 percent is costing students and taxpayers a substantial amount for training that is not necessary to obtain employment.

We believe that revising the limit to 100 percent of the State's requirement for licensure is logical and appropriate. When a student seeks training for a specific occupation, their goal is to meet the requirements for that occupation.

*Changes:* None.

*Comments:* Several commenters stated that requiring program hours to be equivalent to the State minimum would limit educational opportunities for students and destroy critical pathways to employment. These commenters noted that students who would prefer to attend a longer program, up to 150 percent of the State minimum, would be denied the previously allowed student aid if they choose to do so. These commenters further explained that, in order to receive title IV aid, these students would now have to attend programs providing no more than the minimum hours, which may not include the experiences needed for that student to enter their desired employment. Some commenters also raised concern that this would limit the ability of students to relocate to another State and seek employment. Another commenter suggested that border States' graduates with lower hours would be held hostage to the State in which they graduated. According to another commenter, a number of their students may want to work in a neighboring State or even across the country in the future and they argue that limiting a student's education to a State's minimum lowers their chances for reciprocity in the

[27] 59 FR 22431, Apr. 29, 1994.

[28] 59 FR 9548, Feb. 28, 1994.

[29] ''Abuses in Federal Student Aid Programs,'' Report, Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 1991, *https://files.eric.ed.gov/fulltext/ED332631.pdf.*

[30] 59 FR 22431, Apr. 29, 1994.

future if the student decides they would like to work in a different State.

Another commenter insisted the proposed limitation on program length is unnecessary and potentially counterproductive in terms of helping meet the need for skilled workers to fulfill the urgent demand for individuals to meet our nation's infrastructure rebuilding efforts. A few commenters representing massage therapy institutions also argued that a reduction in program length would put the public at a dangerous risk due to under-qualified practitioners.

*Discussion:* We disagree with the commenters. We believe that it is important to ensure that students and taxpayers are not paying for training programs that exceed the program length required for State licensure. Programs that are unnecessarily long may interfere with a student's ability to persist and complete a course of study. Students in such programs not only pay more in tuition, in order to attend more courses, but also enter the labor market later than they would have if their program were no longer than necessary to satisfy State requirements. Research into the effects of higher hours requirements for the two types of programs most likely to be affected by this provision also finds that there is no connection between more hours and higher wages. A January 2022 study looking at variations of training hours found a lack of any correlation between setting higher hours requirements in massage therapy or cosmetology and increased wages.[31] A 2016 study focused on cosmetology similarly found no correlation between curriculum hours and wages.[32] That same study also found no correlation between training hours and safety incidents or complaints. We also are not persuaded that this provision will deny opportunities for students, as the regulation aligns program length with State licensing or certification requirements. Our goal is to ensure students seeking employment in a specific occupation can do so without incurring excessive debt and spending more time than needed out of the labor market.

We understand the concern of the commenters about students' ability to relocate, but research shows that most students seek or obtain employment close to where they live or attend school.[33] We have addressed such concerns by allowing institutions to prove that a nearby State's hours would be more appropriate to consider. We note that § 668.14(b)(26)(ii)(B) as written in the NPRM and continued in the final rule includes three scenarios in which institutions could use another State's program length in § 668.14(b)(26)(ii)(B). Specifically, that could occur if a majority of students resided in that other State while enrolled in the program during the most recently completed award year; if a majority of students who completed the program in the most recently completed award year were employed in that State; or if the other State is part of the same metropolitan statistical area as the institution's home State and a majority of students, upon enrollment in the program during the most recently completed award year, stated in writing that they intended to work in that other State. This flexibility mitigates the commenter's concern about students being unable to seek employment across state lines. States may also adjust their requirements for those with out-of-state training where they deem appropriate, and many do so through participation in licensure compacts and reciprocity agreements.

Finally, none of these commenters explained why the Department should not rely on States' judgments regarding the appropriate amount of training required for particular professions. The Department's proposed revision § 668.14(b)(26)(ii) reflects the concern that any debt incurred or lifetime student aid eligibility used beyond what a State requires is excessive and can hold students back. Programs with lower training requirements in particular tend to result in lower earnings for graduates, which means spending an additional few hundred or thousand dollars to attend an unnecessarily long program may be the difference between a positive and negative return on investment.[34] Such unnecessary expenditures may then lead to further negative financial impacts, such as the need to use an income-driven repayment plan or a higher risk of default from an unaffordable debt load. In order to avoid such unnecessary consequences and safeguard public financial investments, the revised provision ensures that programs funded in part by taxpayer dollars are no longer than necessary to meet the requirements for the occupation for which they prepare students.

*Changes:* None.

*Comments:* One commenter requested the Department reconsider this restriction if programs demonstrate with alternative criteria that they do deliver a specific border State's required educational elements in a shorter amount of time and need every additional clock hour they can get to do so. The commenter shared that Oregon's minimum number of clock hours for their skin care program is 484, while bordering Washington State requires a minimum number of 750 clock hours for the same program. The commenter stated that the two cities where the schools are located are less than 10 miles apart, less than a 30-minute drive in light traffic, but the commenter is concerned that they would not be able to meet the exception criteria provided.

*Discussion:* The Department believes the exceptions in § 668.14(b)(26)(ii)(B) account for the commenter's situation. If many students are indeed living, working, or plan to move to Oregon, the institution will be permitted to extend the program's length to Oregon's minimum number of clock hours. Furthermore, based on the distance mentioned in the comment, it is very likely that the institutions are within a metropolitan statistical area of the other State as provided in § 668.14(b)(26)(ii)(B)(*3*). The Department believes it is appropriate to determine this using the institution's compliance audit report with its most recent completed award year.

*Changes:* None.

*Comments:* One commenter suggested that the Department simplify the proposed language for § 668.14(b)(26)(ii) and lower the threshold from 150 percent to 125 or 115 percent or some carefully considered margin for exceptions, because they assert that not all programs are exploiting students or the intent of the title IV, HEA programs.

*Discussion:* We appreciate the suggestion from the commenter but do

[31] *https://www.peerresearchproject.org/peer/research/body/2022.2.17-PEER-Occupationa-Licensing-Final.pdf.*

[32] *https://web.archive.org/web/20210620203106/https://www.ncsl.org/Portals/1/Documents/Labor/Licensing/Reddy_PBAExaminationofCosmetologyLicensingIssues_31961.pdf.*

[33] For example, Conzelmann et al. (2022) find that about two thirds of students live and work in the state in which the institution they attended is located. See Grads on the Go: Measuring College-Specific Labor Markets for Graduates, available at *https://www.nber.org/papers/w30088.* Other research highlights the tight relationship between local communities and postsecondary institutions particularly in the 2-year sector (see for example, Acton (2020). Community College Program Choices in the Wake of Local Job Losses in the *Journal of Labor Economics*), and based on IPEDS data in recent years, over 90 percent of first-time, degree seeking students enrolled at 2-year and less than 2-year institutions did so in the state in which they are a residence.

[34] Cellini, Stephanie R., Blanchard, Kathryn J. ''Quick college credentials: Student outcomes and accountability policy for short-term programs,'' Brookings Institution. Washington, DC. 2021. *https://www.brookings.edu/articles/quick-college-credentials-student-outcomes-and-accountability-policy-for-short-term-programs/.*

not believe we have a reasoned basis for any of those suggested lengths. We believe that 100 percent is the most sensible and defensible program length as it reflects a determination by the State of the minimum program length needed for licensure or certification. As previously discussed, course stretching, where schools deliberately stretch the length of a course or program beyond what is required for employment, imposing increased costs on students and taxpayers, has been a problem that the Department and Congress have worked to address for decades.

Aside from the circumstances addressed in § 668.14(b)(26)(ii)(B), discussed above, commenters have not demonstrated that allowing institutions to offer programs with hours exceeding State minimum requirements for licensure confers sufficient value to offset the potential harm to students resulting from additional borrowing, or reduced Pell Grant lifetime eligibility to pay for the additional hours.

*Changes:* None.

*Comments:* Several commenters noted that institutions know best when deciding how many hours within the 100 to 150 percent range are needed to help students obtain jobs. Several commenters specified that their programs are more than 100 percent but less than 150 percent of the threshold, which is in line with the requirements of most employers and therefore allows more flexibility for job placement. Commenters did not provide great detail of occupations that are affected by such additional requirements, but mentioned them in reference to some pipeline programs.

*Discussion:* States establishing licensure or certification requirements for specific professions carefully consider their hour requirements, which are often set through a body convened for this purpose. We believe it is appropriate to rely on States' determinations regarding the proper length of the program, rather than on institutions' preferences. As noted above, the research on earnings for cosmetology and massage therapy professionals has not found a connection between higher numbers of hours and increased earnings. We cannot speak to the preferences of individual employers, but overall, the studies the Department has seen show that requiring more hours of training, beyond what a State requires, does not translate into better economic results for borrowers. We believe it is appropriate to follow State requirements. If employers are requiring additional training beyond what is required for licensure in an occupation in order for a student to obtain employment in that occupation, employers and institutions should work with their States to update the minimum requirements.

*Changes:* None.

*Comments:* One commenter expressed concern that the proposed rule would disqualify financial aid for programs equal to the level of the State's requirement for licensure. The commenter noted that massage therapists in some States may only require 500 hours to get licensed and the minimum hour requirement for title IV, HEA program eligibility is 600 hours. For example, several commenters noted that the State of Florida has the lowest minimum clock-hour requirements for cosmetology, skin, barbering, and massage programs in the United States. Florida's State minimum for Massage Therapy is 500 hours; for Full Specialist it is 400 hours; and for Electrolysis, Laser Hair Removal and Skincare the State minimum is 540 hours. Since a program must include at least 600 hours to qualify for Federal funds, this would make programs in Florida ineligible. These commenters warned that this proposed rule would lead to school closures.

Several other commenters similarly stipulated that institutions rely on the 150 percent rule to qualify their programs for title IV, HEA participation and that if the rule is amended from 150 percent of a State's minimum to 100 percent, they would lose eligibility for title IV financial aid. One commenter suggested that if the Department retains this provision, it should also reduce the minimum number of hours required for title IV, HEA eligibility. The commenter stressed that only 21 States require 500 hours to become licensed in massage therapy. The commenter recommended that the Department conclude that the States' requirements adequately determine the minimum program requirements for purposes of title IV, HEA eligibility.

*Discussion:* We agree with the commenters' premise that a State's requirements for program length are adequate for a student seeking employment in a licensed or certified occupation in that State. That is why we are limiting the maximum program length for GE programs to 100 percent of the respective State's minimum for licensure or certification in a given occupation for which the program trains students. The Department defers to State authorities regarding the appropriate number of instructional hours required to qualify to practice in a given profession. If a State has set a minimum requirement that is lower than the minimum number of hours required to qualify for title IV, HEA eligibility, it would be inappropriate to allow such a program to qualify for aid that Congress intended to support students enrolled in longer programs. Institutions offering programs longer than the State minimum licensing requirements may have engaged in course stretching and designed the programs to obtain title IV, HEA aid, resulting in increased costs to taxpayers and students. To the extent commenters seek to criticize State licensing requirements, such concerns should be directed to the States and respective licensing bodies.

Furthermore, we cannot change program eligibility thresholds for title IV programs as those are minimum statutory requirements provided in HEA section 481(b), which require programs to provide 600 clock hours of instruction to be eligible. However, the 600-hour threshold referenced by the commenters is applicable only to program eligibility for Pell Grant assistance, not Direct Loans. Programs comprising between 300 and 600 clock hours, such as those referenced by the commenters, can access Direct Loans if they meet the other requirements in HEA section 481(b)(2) (20 U.S.C. 1088(b)(2)) and in the Department's regulations under § 668.8(d)(2).

*Changes:* None.

*Comments:* Several commenters pointed out that the proposal to limit excessive length of GE programs does not result in a uniform application across all States, given that the States set the minimums. For example, one commenter opined that it is unfair that a massage therapy student in a State where the State minimum is 750 hours qualifies for title IV, HEA funds, but a similarly situated student in a State with a minimum of 500 hours does not.

*Discussion:* This issue is an unavoidable effect of the decentralized higher education system that exists. For instance, differing program lengths across States also result in students receiving different amounts of total aid depending on the duration of a program. Aid amounts received for students at public institutions vary depending on the amount of investment the State makes in its public institution and the corresponding tuition then charged to students. The Department is not dictating the number of required hours to States. We are committed to not overpaying for programs beyond what the State requires for licensure or certification. This is particularly important for programs that prepare students for occupations that only require a short amount of training, as the financial returns for these programs are often quite low and the additional

cost of hours beyond what a State requires may further reduce the return-on-investment, or even make them negative.

*Changes:* None.

*Comments:* Another commenter argued that the proposed rule confers too much control over program length on the Department by virtue of its authority over title IV, HEA administration.

*Discussion:* The Department is not dictating how long programs must be. The Department is deferring to the judgment of States regarding the minimum time someone should be in a program to obtain licensure or certification. As discussed above, the revised maximum program length adopted here reflects our conclusion that it is inappropriate to expend taxpayer resources to fund coursework beyond what the State deems necessary. Institutions are always free to offer programs outside of title IV, HEA.

*Changes:* None.

*Comments:* A few commenters questioned why the Department would mandate all GE programs to be the same length. The commenters opined that many programs go beyond core skill curriculum and teach service writing, technical writing, or business math skills. These commenters argued that additional classes are related, desirable, and beneficial to the graduate. Many of these commenters also argued that reducing these classes would result in disadvantaged or harmed students, deteriorated programs, ceasing participation in the title IV, HEA programs, and widespread school closures.

*Discussion:* The Department is not mandating uniform program length. The regulatory change will specify that if a State dictates the number of hours needed for licensure or certification, we will not provide taxpayer funding for programs that exceed that number. If commenters believe these additional hours are critical for success, we suggest they approach their State about revising the program length requirements or offer the coursework outside of the title IV, HEA programs.

*Changes:* None.

*Comments:* Several commenters shared their concern about accrediting agencies and State agencies approving changes in program length and the time needed for these actions. These commenters suggested that the Department accommodate all current GE programs and develop a gradual transition period to bring all GE programs into compliance.

*Discussion:* The Department does not think an extended legacy eligibility period is appropriate given our concern about the effects of excessive debt on students. As already noted, we will apply this provision to new program enrollees following the effective date of these regulations, so that no currently enrolled student would be negatively affected.

*Changes:* None.

*Comments:* Several commenters argued that reducing program length to the minimum required by the State would result in a lower pass rate for State licensing examinations. These commenters predicted that there would be a close correlation between the reduced passing or licensure rate and the reduced program length.

*Discussion:* If the commenters believe that graduates cannot pass the State licensing exam following completion of a program that complies with State training requirements, we suggest they discuss with the State whether the hours required are appropriate. We note, in any case, that the commenters did not establish any correlation or causal relationship between longer programs and passage rates.

*Changes:* None.

*Comments:* A few commenters argued that reducing the allowable program length would not reduce the institution's overhead expenses but would reduce the amount of title IV, HEA aid received by students. These commenters insisted that many students, especially female, low-income, and minority students, could not afford such a reduction in aid and would withdraw.

*Discussion:* The Department disagrees with commenters that this provision would result in an unfunded gap for students. Institutions would not be able to offer a program qualifying for title IV, HEA funds if it is longer than the State minimum, so the program would either have Federal aid for the full program length, assuming it otherwise remained eligible, or not at all. Institutions that stay within the minimum course length would likely have reduced costs from providing less instruction. We note again that this provision will apply to new program enrollees on or after the effective date of these regulations.

*Changes:* None.

*Comments:* One commenter stressed that many State regulators are slow to update licensure requirements and this may hurt students. The commenter explained that obtaining support from various State legislators or regulators to promptly update existing, obsolete requirements is a process that can span several years, thus inhibiting students from obtaining the most up to date education in the occupation. The commenter recommended that the Department continue the existing GE program length limit at no more than 150 percent of an existing State requirement.

*Discussion:* The Department cannot speculate on how quickly or slowly licensing bodies may update licensure requirements. However, States are the ones tasked with determining whether certain occupations require licenses or certifications and what standards apply to such licenses or certifications. The Department has no way to verify the commenters' claims. However, we note that by statute, regulations regarding title IV, HEA funds are subject to the master calendar deadline, which includes at least seven months between a regulation's finalization and effective date.

*Changes:* None.

*Comments:* One commenter cited section 101(b)(1) of the Higher Education Act which defines an institution of higher education, in part, as any program that provides not less than a one-year program of training that prepares students for gainful employment in a recognized occupation, and urged the Department to not adopt any rule that would require eligible training programs to be at least one year. The commenter insisted that a one-year minimum would have an adverse impact on many massage therapy training programs.

*Discussion:* The Department is not requiring that programs be at least one year in length. We refer the commenter to section 103(c) of the HEA, which includes a definition for a ''postsecondary vocational institution,'' which does not contain a requirement related to program length. As noted in section 102(a)(1)(B), these institutions are eligible to participate in the title IV, HEA programs, if they meet other eligibility requirements. The minimum length for a program is found in section 481(b) and it is at least 300 hours offered over a minimum period of 10 weeks, along with some added criteria.

*Changes:* None.

*Comments:* One commenter noted that eliminating the 150 percent rule would be problematic because 21 States regulate the massage therapy profession with a 500-hour requirement for entry-level education, yet the average school operates at just over 625 hours. Additionally, the commenter said eliminating the 150 percent would severely undermine the massage therapy interstate compact, which set the requirement to mirror the industry average at 625 hours. Separately, a few commenters referred to other efforts of the Federation of State Massage Therapy

Boards (FSMTB) regarding the ''minimum clock hour pact.'' The commenters stated that institutions participating in this pact will be required to provide a minimum of 650 hours so that the graduates can seamlessly transfer their license among participating States. The commenters recommended that the Department consult with the FSMTB and set a minimum program requirement that best aligns with the massage therapy industry. The commenters insisted this approach would enable the graduates to be able to apply their education to other States and appropriately transfer their license to practice.

*Discussion:* As noted above, an institution in a State that increases or decreases its minimum hours for certain professions can adjust the lengths of corresponding training programs accordingly. Thus, if the States in this compact adjust the minimum hours for certain licenses, then the programs can adjust too. If a State chooses not to join the compact for whatever reason, we do not see why we should not respect their choice to keep hours shorter.

*Changes:* None.

*Comments:* Several commenters argued the proposed alternate State rule is too restrictive and impossible to meet. These commenters further stated the current adjacent State rule should remain in effect.

*Discussion:* The Department is concerned that the current rule, which simply allows a program to meet the adjacent State's requirement without justification, could be used simply to increase program length and take in more Federal aid even if no student from that institution works in that State after graduation. Given our concerns about the affordability of programs, we believe institutions should demonstrate there is an actual need to apply an adjacent State's higher hours due to the majority of the program's students residing, or the majority of graduates being employed, in the adjacent State. As stated in § 668.14(b)(26)(ii)(B), an institution will have to provide documentation that is substantiated by the certified public accountant who prepares the institution's compliance audit report to use an adjacent State's program length.

*Changes:* None.

*Comments:* A few commenters from Florida stated that the Florida State legislature relied on the 150 percent rule when deciding to reduce the State minimum program length. The commenter shared that the reduction in minimum clock hours would not have been adopted by the Florida State legislature if Florida students' Federal funding for these programs was going to be jeopardized.

*Discussion:* This rule does not prohibit any State from amending its own State laws. States can and do regularly amend their laws, on an ongoing basis, and this final rule would not interfere with their ability to do so. We cannot speculate on the reasons for a given State's decision to enact a specific requirement nor second guess a State's licensing determination when setting a Federal requirement.

*Changes:* None.

*Programmatic Accreditation, State Licensure/Certification, and State Consumer Protection Law Requirements (§ 668.14(b)(32))*

Overall

*Comments:* Commenters shared that although the proposed language was taken from the negotiated rulemaking process in 2022, the provisions related to State authorization reciprocity agreements, State consumer protection laws, and State licensure requirements are not suitable for this final rule. Commenters stated stakeholders interested in State reciprocity, consumer protection laws, and licensure were excluded from the original conversations and must be included for any proposed regulation. One commenter said that the Department did not follow established procedural mechanisms for rulemaking and stressed that the proposed rules were flawed due to a lack of adequate representation and feedback of stakeholders and said these topics should not be included in this final rule.

Many commenters argued that the section on consumer protection laws was particularly rushed during negotiated rulemaking and advised the Department to delay any changes pertaining to this issue and negotiate it when we discuss distance education and State authorization and include more qualified negotiators in the discussion.

One commenter added that because this issue was not properly addressed during the last negotiated rulemaking, the NPRM noticeably lacks the root problem that is trying to be solved, research on the scope of that problem, and economic impact on institutions and States of the proposed language. Another commenter stated that due to the broad implications of the proposed regulatory change, the subject of State authorization reciprocity agreements should have been an issue addressed by the Committee.

*Discussion:* We disagree with the commenters' concerns. Section 492(b)(1) of the HEA (20 U.S.C. 1098a(b)(1)) provides that the Secretary shall select individuals with demonstrated expertise or experience in the relevant subjects under negotiation, reflecting the diversity in the industry, representing both large and small participants, as well as individuals serving local areas and national markets. The Department identified the relevant subjects to be negotiated and invited the public to nominate negotiators and advisors. After reviewing the qualifications of the nominees, the Department made selections for Committee members. The Committee included negotiators representing accrediting agencies, institutions of higher education from multiple sectors, State attorneys general, other State agency representatives, among others. These negotiators had the proper qualifications to negotiate issues related to consumer protection and State authorization reciprocity agreements, particularly institutional and State representatives. We also disagree that these issues were not discussed during negotiated rulemaking. Versions of the language we are finalizing in § 668.14(b)(32) were included in issue papers submitted to negotiators. Non-Federal negotiators also submitted additional materials expressing thoughts on the issue. These items did not reach consensus and the Department is exercising its authority under the HEA to issue rules as we see fit, taking into account public comment as we move from the proposed to final rule.

Furthermore, the Department provided many opportunities for public comment throughout the negotiated rulemaking process. In response to the proposed rule alone, the Department received more than 7,500 comments.

We also disagree that the scope of the problem we want to solve isn't clear. As articulated throughout the NPRM and again in this final rule, the Department is concerned about the significant liabilities Federal taxpayers keep incurring due to discharges from closed schools or approved borrower defense to repayment claims. Closures also have very significant and concerning effects on students, as has been well documented by Government Accountability Office (GAO) and State Higher Education Executives Officers Association (SHEEO). To that end, the changes in this section are designed to strengthen the regulatory triad by allowing States to be stronger partners in addressing these problems if they choose to do so.

*Changes:* None.

*Comments:* Many commenters predicted that implementing proposed § 668.14(b)(32), the provision with

licensure and certification requirements and State consumer protection laws, would increase burden and cost to institutions. These commenters assert that institutions would pass these costs on to students or in some cases simply reduce their educational offerings, which would also be detrimental to students.

*Discussion:* The Department is concerned that a program tied to licensure or certification where a student cannot then work in that field will leave them with unaffordable debt burdens that they will struggle to repay. That also creates the risk for significant taxpayer losses if it results in approved borrower defense to repayment claims. As to the commenters' concern that institutions will pass these costs onto students, institutions will still need to consider pricing their programs so the return on investment is reasonable for students and competitive with institutions located in the student's home State.

*Changes:* None.

*Comments:* A few commenters raised a concern about the change of using the word ''ensure'' in the proposed regulatory text considered during negotiated rulemaking to ''determine'' in § 668.14(b)(32) in the proposed rule, which requires all programs that prepare students for occupations requiring programmatic accreditation or State licensure to meet those requirements and comply with all State consumer protection laws. One commenter opined that the word ''determine'' is no less a legal burden than ''ensure.''

*Discussion:* We changed ''ensure'' to ''determine'' in the NPRM to align with the relevant language in existing regulations in § 668.43 related to licensure and an institution's obligation to make a determination regarding the State in which a student resides. As discussed in greater detail in response to other comments on this provision, we believe the increased standard is appropriate and necessary so that students are not using Federal aid to pay for credits and programs that cannot help them reach their educational goals.

*Changes:* None.

*Comments:* One commenter questioned whether the Department evaluated the potential impact of the amendment to § 668.14(b)(32) to students and online programs.

*Discussion:* The Department recognizes that the implications of these changes will most likely affect institutions that offer online programs to students who live in States different from where the institution is located. But these are the exact situations we are concerned about addressing with these changes. The Department is worried that an institution enrolling students from another State may not be doing the work to ensure their programs have the necessary approvals for licensure or certification the way a school with a physical location would. Similarly, we are concerned that these institutions may not be doing as much to help provide transition opportunities for students. As discussed in the RIA, we recognize that this will create additional costs to these institutions, but we believe the benefits exceed those costs. In particular, we cite the benefits to the Department from shrinking the number of sudden closures that then result in closed school discharges and reducing taxpayer transfers to programs that cannot help students achieve their educational goals. Furthermore, institutions that participate in a reciprocity agreement could rely on that process to understand the different requirements of States and what provisions may require adaptations.

*Comments:* A few commenters shared concerns about a lack of clarity with the term ''at the time of initial enrollment'' and asked for clarification before any proposed regulation goes into effect. The commenters requested the Department share additional guidance on ''at the time of initial enrollment'' and a list of licensing bodies by profession and State.

Several commenters wondered whether the proposed requirement applied only to the State the student was in at the time of enrollment or if it also applied to any State the student might move to later. Some commenters wanted to know if program eligibility is specified at the time of initial enrollment, and whether the program remain eligible if the student moves to a State where the program does not meet prerequisites. Several commenters would also like to know if the proposed requirements only addressed incoming students, or would it also apply retroactively to students admitted to the program before the regulation became effective.

*Discussion:* The Department intends for institutions to use the provision in § 600.9(c)(2)(iii) to determine initial enrollment. This is a term that is already used in existing State authorization regulations and was cited in § 668.14(b)(32) in the proposed and now final rule. That establishes consistency across the regulations when this concept is applied.

The existing regulation, § 600.9(c)(2)(iii), provides that an institution must make a determination regarding the State in which a student is located at the time of the student's initial enrollment in an educational program and, if applicable, upon formal receipt of information from the student, in accordance with the institution's procedures, that the student's location has changed to another State. Institutions thus have flexibility to determine how to structure such a policy. This could allow them to make determinations around students who plan to move to a different State during the enrollment process, for example. Institutions collect a substantial amount of information in a student's application and when students enroll, and we hope that the information collected there will assist them in their determinations.

We recognize that institutions cannot predict if a student moves and do not think it would be reasonable to apply this criterion in a way that covers students even after they moved. We also recognize that this provision could affect the eligibility of some programs. Our goal is not to have it apply retroactively. As such, it would cover new program entrants on or after the effective date of these final regulations.

Finally, we are persuaded by arguments from commenters that it is possible a student may be currently living in one State but have concrete plans to move to another one. At the same time, the cost to the student and taxpayers of paying for a program that does not lead to licensure is so great that we think there needs to be sufficient proof from the student themselves of their plans. To that end, we are adding a provision that also allows an institution to offer a program to a student who currently lives in a State where the program does not meet requirements for licensure or certification if they can provide an attestation from the student about the specific State they intend to move to, and the program does satisfy the educational requirements for licensure in that State. If borrowers in this situation do end up filing borrower defense to repayment applications, the mere presence of such an attestation alone would not necessarily be proof the claim is not approvable. The Department would be looking for information about how the information about eligibility was conveyed to the borrower, such that they did understand their attestation.

*Changes:* We have modified § 668.14(b)(32) to include the phrase ''or for the purposes of paragraphs (b)(32)(i) and (ii) of this section, each student who enrolls in a program on or after July 1, 2024, and attests that they intend to seek employment . . .''

*Comments:* Other commenters noted that the proposed language said that the determination of an initial enrollment would be in accordance with existing regulations in § 600.9(c)(2)(iii). However, some expressed concerns that the time of initial enrollment seems to be inconsistent with § 600.9(c)(2)(iii). Other commenters pointed out that this could include prospective face-to-face students who will ultimately be located at the institution where the program meets State requirements at time of initial enrollment.

*Discussion:* We remind the commenters that § 600.9(c)(2)(iii) is in reference to students enrolled in distance education or correspondence courses. For face-to-face students, they would fall under the requirement that the institution's programs meet the requirements of the State in which the institution is located. However, to provide further clarification, we will add the words ''in distance education or correspondence courses'' after ''or in which students enrolled by the institution.

*Changes:* We have modified § 668.14(b)(32) to say, ''In each State in which the institution is located or in which students enrolled by the institution in distance education or correspondence courses are located . . .'' to clarify that the initial enrollment determination is regarding those students who will not be engaged in face-to-face instruction.

*Comments:* Many commenters asked how the Department would train on and enforce compliance for State licensure and certification requirements and State consumer protection laws. These commenters further asked what we would require as evidence of compliance for both provisions.

*Discussion:* With respect to closure, the Department would ask institutions to indicate which States have laws they are complying with, and we would look at how those reports vary across institutions. With respect to licensure and certification we would look for institutions to report what States a given program is not able to enroll students in. Institutions are already disclosing a lot of this information under § 668.43, which we are adjusting to harmonize it with this change in the certification procedures regulations, and we would look at how the disclosures align with the States where students are enrolling. We would also look at student complaints and borrower defense applications alleging that they are unable to work in the field tied to their program.

*Changes:* None.

*Comments:* A few commenters affirmed that the proposed regulation for State consumer protection does not account for the unique nature of medical education, which requires residencies and clinical rotations away from the school. These commenters were concerned that the changes might negatively impact students enrolled in graduate clinical degree programs by resurrecting pre-reciprocity barriers to participate in internships and clinical rotations at health care institutions in other States. These commenters stated that under the reciprocity agreement such barriers have been taken down, and this would be a reversal of that progress. Some commenters suggested that the Department exempt medical colleges from the new requirements or recommended that revised regulations state that students enrolled in out-of-State clinical education rotations are considered enrolled at the main campus of their medical institution rather than in distance education or correspondence courses. One commenter stated that if an exemption from the proposed State consumer protection law requirements is not provided to U.S. medical schools, the Department should clarify in the final regulation that medical schools should not face undue administrative burdens and fees that further complicate distance education requirements.

*Discussion:* The Department does not believe this language affects the concerns raised by commenters. The NPRM language did not cover issues related to education rotations, and the final rule's language narrows the scope of this provision even further. To the extent the commenters meant to discuss the provisions in administrative capability related to clinicals or externships, we note that those are experiences prior to completion of the credential.

*Changes:* None.

Programmatic Accreditation or State Licensure, and Disclosures (§§ 668.14(b)(32)(i) and (ii) and 668.43(a)(5)(v))

*Comments:* Several commenters opposed the regulation that requires all programs that prepare students for specific occupations requiring programmatic accreditation or State licensure to meet those requirements. The commenters stated that to comply with the proposed regulation, a distance education program that prepares students for an occupation that requires licensure would be required to confirm that the program satisfies licensure requirements for each State where they have students enrolled.

A few commenters requested that the Department add language that acknowledged institutions that may be unable to obtain the information necessary to comply with the provision. Several commenters wondered what the Department recommended to do when an institution cannot obtain affirmation or there is no available process to determine State educational prerequisites in a State. The commenters insisted the current State licensure environment does not have a process to allow distance programs to provide such confirmations. The commenters warned that the Department cannot compel State licensure agencies to create processes and procedures to provide the necessary determinations. A few commenters stressed that licensure requirements are subject to change and licensing bodies are under no obligation to communicate those changes to out-of-State institutions. A few commenters suggested the Department add language that provides an opportunity for exceptions concerning the State licensing boards because they argue that State professional licensing boards vary widely and that some have no mechanism or process for providing documented approval for an out-of-State institution's program.

*Discussion:* The Department is concerned that students who use title IV funds to pay for programs that lack the necessary approvals for licensure or certification in the States where the student wishes to work will end up incurring debt and using up lifetime eligibility for loans and grants that cannot be put toward the occupations for which they are being prepared. Given that licensure or certification outside of cosmetology is generally associated with higher wages, that also means that students may not receive the economic returns necessary to afford their loan payments.[35]

This provision is not dictating what requirements States do or do not set for licensure or certification. Nor is it dictating what States must provide in terms of information to institutions. It is simply saying that if such requirements exist, an institution must follow them with respect to the students attending from those States. That also means that if an institution cannot determine that its program meets the education requirements for licensure or certification, then it cannot offer the program to future students in that State.

[35] Kleiner, M.M. and A.B. Krueger (2013), ''Analyzing the Extent and Influence of Occupational Licensing on the Labor Market,'' Journal of Labor Economics, 31(2): S173–S202.

Furthermore, as noted elsewhere in this section, institutions using a reciprocity agreement for distance education can use that to streamline how they are able to understand the different requirements of States.

With respect to changes in State licensure requirements, we would not expect institutions to immediately discontinue programs for existing students when requirements change. However, we would expect the institution to come into compliance with the new requirements in short order or cease enrolling new students in that program. Institutions should reach out to the Department when such situations arise.

*Changes:* None.

*Comments:* A few commenters opposed this provision saying that it would unfairly limit the student's choices and mobility options, the student has a right to enroll in any program when they are fully informed, the missing requirements for licensure are usually minimal, information regarding requirements across States is inconsistent and the increased burden upon institutions would harm enrollment and outreach efforts.

*Discussion:* The Department disagrees with the commenters. Postsecondary education programs are significant investments for students, which can easily cost into the thousands or tens of thousands of dollars. When a student attends a program that is tied to a profession that requires licensure or certification, they should have a reasonable expectation that the Federal Government will only allow them access to a program that will allow them to meet their professional goals. Any burden to institutions here is outweighed by the benefit this final regulation will have on students and taxpayer investments. If the commenters believe the differences in requirements are minimal, then we suggest they take steps to make their programs compliant with the necessary requirements.

*Changes:* None.

*Comments:* A few commenters shared concern about the lack of clarity with the term ''satisfies.'' The commenter asked for clarification before any proposed regulation goes into effect.

*Discussion:* Under § 668.14(b)(32)(ii), the term ''satisfies'' means that were someone to graduate from that program they would have met whatever educational requirements the State sets for obtaining licensure and certification. That does not cover post-completion assessments that institutions do not administer. The Department is concerned that in the past institutions have told prospective students that programs would obtain necessary approvals for licensure by the time students graduated, but then they never did. Those students were then left with what were essentially worthless credentials.

*Changes:* None.

*Comments:* A few commenters suggested the Department add language that provides an opportunity for exceptions concerning the State licensing boards because they argue that State professional licensing boards vary widely and that some have no mechanism or process for providing documented approval for an out-of-State institution's program.

*Discussion:* The Department notes that institutions are the ones making the certification to the Department. If they cannot determine it based upon the State licensing board, they could also look at the experiences of their graduates and document confirmation that those graduates all met the educational requirements for licensure or certification. We do not, however, believe an exemption is appropriate. The cost in terms of dollars and time in postsecondary programs is too great for the Department to presume that a program that an institution is unsure meets the licensing requirements will qualify. Moreover, sorting through licensing requirements can be a challenging and time-consuming task. We believe the burden of that task should be placed on the institution that will be making determinations again and again for students across multiple States instead of placing it onto the individual student.

*Changes:* None.

*Comments:* Several commenters observed that the proposed regulation for institutions to satisfy the educational prerequisites for State licensure or certification requirements would impose an infeasible burden for both schools and State licensing boards.

Many commenters reported that in previous determinations of licensure compliance, such investigations were time-consuming and costly and often yielded no definitive answer. According to these commenters, inquiries to State bodies frequently resulted in no reply. The commenters further explained that State rules vary widely and are subject to frequent changes. For institutions offering distance education to have legal certainty that a program provides such prerequisites, the commenters stated that they would need to confirm that information with each State or territory where they offer the program and vary in operation. For example, some licensing boards do not have a procedure for validating out-of-State programs, or they may lack the legal authority or sufficient personnel to make such evaluations. The commenters asked how the Department could impose this requirement given that we cannot guarantee the necessary State cooperation.

*Discussion:* When a student enters a program that prepares them for an occupation that requires licensure or certification, they should have the expectation that finishing that program will allow them to fulfill the educational requirements necessary for getting the necessary approval to work in that field. We are concerned that students attending programs that do not have those necessary approvals will not only fail to achieve their educational goals but may also end up with earnings far below what they expected. Such programs also represent a waste of taxpayer money, as the Federal Government is supporting credits that cannot be redeemed for their stated purpose. The Department agrees that complying with this requirement will create costs for institutions, but we also believe those costs are worthwhile to protect student and taxpayer investments. Institutions are not required to participate in the title IV programs, both overall and on a programmatic basis. If they do not want to take the necessary steps to protect against wasted investments, then they can choose to make these programs not eligible for Federal aid.

The Department cannot speak to how States vary in terms of commitments made to institutions. It is reasonable to presume however, that they all explain the rules around what it takes to obtain a license or certification and we believe it is far more appropriate to place this burden on the institution rather than the student. The institution can use the information determined again and again as it enrolls additional students and employ people with experience understanding licensing rules. It is unreasonable to expect the student to be as knowledgeable about licensing and certification requirements as institutional employees.

Regarding changes in State licensure, we do not expect a program to suddenly cease its offerings to currently enrolled students. However, we expect the institution to take swift action to come into compliance for new enrollees.

*Changes:* None.

*Comments:* One commenter remarked that there is burden associated with contacting out-of-State entities, and that they particularly did not like that regulations require institutions to treat territories and freely associated states in the same way that they treat States.

While the commenter agreed with this in principle, they stated that applying this proposal would be challenging because not all territories have boards for evaluating disciplines. In addition, the commenter mentioned that some boards do not have internet presence, which would make the proposal to treat territories the same as States improbable. According to this commenter, institutional size causes burden because these regulations do not fall evenly on all institutions. The commenter mentioned that their institution does not have the luxury of State and large private institutions, who have multiple staff members to work on these issues. The commenter stated that their faculty spend countless hours completing tasks for States and territories in which they have no student inquiries or enrollment. The commenter argued that these policies are anti-competitive, in the sense that they favor institutions with the footprint to be able to manage massive compliance operations, and anti-student because they limit student choices needlessly.

*Discussion:* This requirement only applies to the States where institutions are enrolling students and where they are either living at the time of initial enrollment or where they attest that they wish to live. If an institution is not enrolling students from a given State, it is not obligated to determine anything regarding that State; it just cannot offer the program to anyone in that State.

We disagree with the framing of anti-competitiveness. A student who has a credential from a program that does not allow them to be licensed or certified in their State is not just at a competitive disadvantage in the workplace, they are disqualified from competing. Allowing institutions to put the burden and risk on the student that a multi-thousand-dollar credential may put them on the road to nowhere is an unacceptable outcome. The purpose of the title IV aid programs is to provide opportunity for students. Institutions should have the resources to operate the programs they wish to offer.

*Changes:* None.

*Comments:* Many commenters noted that it is not reasonable to presume that students will necessarily pursue their career in the State in which they initially enroll in their program. For example, several commenters offered that the students might be members of the military or family thereof and only be temporarily located in that State, or they might live near a State border and intend to find employment in a neighboring State or move to a State where jobs are more available.

Several other commenters added that students might want to enroll in a specific program based on the strength of its reputation, or because their desired program may simply lack certain State-specific courses, such as State history, that the State that they intend to move to may require. These commenters also noted that students may simply want to enroll in a program that requires licensure but have no intention of pursuing that license. Several commenters argued that it should be sufficient for institutions to inform student prior to enrollment about possible licensure or certification issues they may need to consider.

*Discussion:* We disagree with the suggestion that students may simply not be interested in the license. Overall, it is reasonable to assume that a student who enters a program that prepares students for an occupation that requires licensure or certification wants to work in that program. We also believe it is too easy for institutions to tell students information verbally about whether they could be licensed or certified that will then result in the potential for the filing of a borrower defense to repayment claim that will be challenging to adjudicate.

However, we do agree that there are instances in which a student, such as a military-connected student, might plan to leave the State they reside in and intend to seek employment in another State. Therefore, we have added language to § 668.14(b)(32) to say that an institution can consider the State a student is in at their time of initial enrollment, or the State identified in an attestation from a student where they intend to seek employment in another State. We would note that the student must identify a specific State and the institution's program must meet the requirements of that State.

Programs must meet the requirements for licensure in the relevant State. We are worried that a program that leaves a student just shy of that finish line still represents potentially added costs for students and a roadblock that could prevent them from earning their license or certification.

*Changes:* We have modified § 668.14(b)(32) to cover States in which students enrolled by the institution in distance education or correspondence courses are located, as determined at the time of initial enrollment in accordance with 34 CFR 600.9(c)(2); or, for the purposes of paragraphs (b)(32)(i) and (ii), each student who enrolls in a program on or after July 1, 2024, and attests that they intend to seek employment.

*Comments:* Several commenters encouraged the Department to add language in proposed § 668.14(b)(32)(ii) that acknowledged institutions that may be unable to obtain the information necessary to comply with the proposed provision of satisfying the applicable educational prerequisites for professional licensure or certification requirements in the State. One commenter pointed out that during the negotiated rulemaking, suggested language that accounted for institutions in this situation was proposed.

Several commenters also encouraged the Department to allow case-by-case waivers of the licensure and certification requirements for students who knowingly enroll in programs that fail licensure requirements in their current State because they know students who plan on moving to different States, States in which their licensure and certification would be accepted. These commenters claimed that such waivers would allow for students to acknowledge, as has previously been the case, that they are aware of limitations of the program they are about to enroll in.

*Discussion:* The Department declines to adopt the commenters' suggestion. We are concerned that such waivers could be exploited by institutions that do not want to engage in the necessary work to determine if their programs have the necessary approvals. We are not convinced that students would be fully informed as to what they are or are not agreeing to and this could instead be used by institutions to attempt to avoid other potential consequences, such as approved borrower defense to repayment claims. However, we would note that, as discussed previously, we will allow students to attest that they intend to seek employment in another State, but the institution would still be required to determine that their program meets the requirements of that State.

*Changes:* None.

*Comments:* One commenter predicted that because students can complete educational prerequisites for licensure or certification at the undergraduate level, the proposed change would require an institution offering a graduate level program preparing students for licensure or certification to offer the same course. According to this commenter, this provision could require students to take the same course twice if they did not complete the educational prerequisites from the same institution offering the licensure preparation program. Finally, one commenter pointed out that § 668.43(a)(5)(v) refers to ''educational requirements'' whereas § 668.14(b)(32)(ii) refers to ''educational

prerequisites.'' The commenter asked for clarification and consistency on these terms.

*Discussion:* The regulatory requirement relates to institutions ensuring their programs have the necessary approvals for licensure or certification. We do not believe that our regulation is written in a way that would require what the commenter described, but we have changed ''prerequisites'' to ''requirements'' for clarity and to align with the regulations related to disclosure requirements. This provision concerns whether the program meets the requirements for licensure or certification. If the program does overall but there is a difference in the student's educational trajectory that means they might have to do some additional coursework we would not consider that individual circumstance to be a violation. However, we do note that institutions separately must be aware of rules around false certification discharges, which capture situations such as when an institution enrolls someone in a program that prepares students for an occupation that requires licensure when they know that person has a criminal conviction that would make them ineligible for licensure.

*Changes:* We have modified § 668.14(b)(32)(ii) to replace ''prerequisites'' with ''requirements.''

*Comments:* A few commenters objected to the public disclosure requirement in proposed § 668.43(a)(5)(v) if an institution is also subject to § 668.14(b)(32)(ii). The commenters argued that these rules are redundant and impose unnecessary, costly, and overly burdensome requirements on institutions. Some of these commenters pointed out the wording change in § 668.43(a)(5)(v) in that an institution's obligation is limited to those States where the institution is ''aware'' that a program does or does not meet a State's educational requirements. The commenters suggested that this change lessens an institution's obligations. The commenters stated if this is not the Department's intended result, then they oppose the language as it removes the current option to indicate that an institution has not made a determination. A few commenters were concerned that the institution may not address each State as is currently required in proposed § 668.43(a)(5)(v).

Several commenters suggested that instead of pursuing the proposed regulation in § 668.14(b)(32), the Department should simply continue enforcement of the current regulations directing institutions to offer public notifications addressing all States regardless of student location and individualized notifications to prospective and enrolled students as provided in § 668.43(a)(5)(v) and (c). A few commenters remarked on how the proposed regulation seems to be at odds with the current regulations pertaining to individual notifications and recommended that these discrepancies be fixed.

Another commenter urged the Department to withdraw proposed § 668.14(b)(32)(ii) in favor of continued institutional implementation and the Department enforcement of the current regulations. According to the commenter, the current rules requiring institutions to offer public notifications addressing all States and individualized notifications to prospective and enrolled students is adequate.

*Discussion:* We believe this requirement in certification procedures complements the disclosure requirements described by commenters but are making some alterations to § 668.43(a)(5)(v) to address areas of confusion. The requirement in § 668.14(b)(32)(ii) protects students from enrolling in programs that cannot meet their educational goals and stops the expenditure of taxpayer resources for such programs as well. The disclosure requirements are also important because they send information to students prior to enrollment about where they will or will not be able to have a program meet educational requirements for licensure or certification. Without such disclosure requirements, a student could enroll and be told by an institution that they are not able to study in their preferred program because they would not be eligible for title IV funds to do so. This could result in students wasting time and money on programs they do not desire when they could have enrolled at another institution that has a program that meets the necessary requirements for them to obtain employment in their home State.

We agree with the commenter that the change from ''determine'' to ''aware'' is confusing and conflicts with the language in § 668.14(b)(32) and other language in § 668.43. We will change ''is aware'' to ''has determined'' and add a cross reference to § 668.14(b)(32). Additionally, we will make other conforming changes in § 668.43(c).

*Changes:* We have modified § 668.43(a)(5)(v) to say, ''. . . where the institution has determined, including as part of the institution's obligation under § 668.14(b)(32) . . .'' Additionally, we have modified § 668.43(c)(1) to say, ''. . . provide notice to that effect to the student prior to the student's enrollment in the institution in accordance with § 668.14(b)(32).'' We have modified § 668.43(c)(2) to remove the reference to paragraph (a)(5)(v)(B) since that paragraph no longer exists. It now only references paragraph (a)(5)(v).

*Comments:* A few commenters predicted that the proposed changes in § 668.14(b)(32) would have an inordinate effect on the people-helping professions, such as behavioral and mental health services. One commenter was concerned that the proposed changes in § 668.14(b)(32) did not appear to consider multi-jurisdictional institutions and programs, programs which are largely offered through distance education.

*Discussion:* The Department is concerned that someone who wants to work in a people-helping profession will not be able to do so if they attend a program that lacks the approvals necessary for licensure or certification in the student's State. As noted, the institution has discretion to decide which programs they offer, and from which States they recruit students.

*Changes:* None.

*Comments:* Many commenters pondered how the Department reconciled the limitation on institutions and students from meeting State educational prerequisites for Teacher Preparation Programs that often include only a course or two in the program addressing State specific history or culture even though, there is a pathway to licensure through State reciprocal agreements and the new Teacher Education Compact for license mobility.

*Discussion:* The Department's concern is that a student who completes a program be able to meet the educational requirements for licensure or certification in their State. We are persuaded by commenters that the way to meet this requirement can take a few forms. While the most straightforward would be to simply get licensed in the State they are living in, there are options for some occupations like teaching to obtain a license in their home State through reciprocity. In such situations the student obtains a license in a different State, but there is an agreement that allows them to use that license elsewhere. We believe that such situations would address the Department's policy concern, provided that the student obtain a license that through reciprocity allows them to work in the State covered by the requirements in § 668.14(b)(32)(ii). This could include both a full license as well as a provisional one. Because these are all forms of licensure we do not think a regulatory change to capture this concept is necessary.

*Changes:* None.

*Comments:* Several commenters pointed out that the changes to § 668.14(b)(32) will be done to regulations that reached consensus during negotiations a few years ago. Commenters emphasized that consensus is hard to achieve, and that it should not lightly be set aside, especially in favor of changes that are strenuously disputed.

*Discussion:* Since that consensus language was reached, the Department has approved multiple claims related to borrower defense to repayment for programs that made promises or claims about State approval that were not true. The review of those claims has taken extensive amounts of resources to verify and even then, not every borrower who was harmed from those false statements has applied for relief and even when the loans are discharged the Department cannot make up for the borrower's lost time. This is particularly worrisome since many of these individuals likely cannot find the time to go back and enter a program that would let them work in their desired profession. As such, the Department is concerned from its practice administering the aid programs that disclosure alone is insufficient. It creates too many opportunities for institutions to disclose one thing on paper but then try to convince the student of something else verbally. We also believe that putting the burden on an individual student is the incorrect policy when the institution is receiving significant sums of Federal resources to administer the Federal aid programs.

*Changes:* None.

*Comments:* A few commenters suggested that the Department meet with members of State licensing boards and educators to become more informed about what is required for the licensure process. Another commenter suggested that the Department maintain a website that would allow students to easily find the State requirements for licensure for each profession.

*Discussion:* The Department believes that a website-based approach would still have the limitations that come from disclosures that we think are insufficient. As noted earlier in this section, the Department has determined that the institutions should be the ones to work with States to determine if their programs have the necessary requirements for licensure or certification since they know their content and curricula. In making this regulatory change, the Department sought comment from all interested public stakeholders, and received and considered over 7,500 comments on these final regulations.

*Changes:* None.

*Comments:* One commenter opined that occupational licensing requirements limit employment opportunities with little benefit and that the proposed regulation would further entrench State licensing requirements when Federal policymaking should be encouraging States to reverse the proliferation. The commenter continued that similar to actions by the Trump administration, the Executive Order on Promoting Competition in the American Economy from the Biden administration, called for banning or limiting cumbersome occupational licensing requirements that impede economic mobility. The commenter asserted that there are better proxies for program quality than a program meeting State licensing standard, and the Department should not impede States as they reconsider current licensing standards.

*Discussion:* This rule, among other things, requires institutions to determine that each program eligible for title IV, HEA program funds meet the requirements for professional licensure or certification in the State it is located or where students in distance education or correspondence courses are located, as determined at the time of initial enrollment in accordance with 34 CFR 600.9(c)(2). This rule is not requiring States to set up licensing or certification requirements. Whether they have such requirements or what they put them in is up to the State. Instead, § 668.14(b)(32) is focused on not using government resources to support programs where the graduates will not be able to work in the field for which they are prepared.

*Changes:* None.

*Comments:* One commenter encouraged the Department to maintain current consumer protection requirements at the institutional level and not extend them to the program level because that has the potential to create a mix of compliant and noncompliant programs within an institution.

*Discussion:* Issues applicable to licensure or certification occur at the programmatic level because they are occupation specific. The advantage of such an approach is that institutions can continue to offer compliant programs while they work to correct deficiencies with non-compliant programs. This situation already commonly exists today. Institutions may have some programs eligible for Federal aid while others are not. They may seek approvals for some programs but not others.

*Changes:* None.

State Consumer Protection Laws (§ 668.14(b)(32)(iii))

*Comments:* Several commenters supported proposed § 668.14(b)(32)(iii) and agreed that the current regulations were not sufficient to protect students. For example, attorneys general from 20 States and the District of Columbia stated that students are entitled to the protection of consumer protection laws in their State, no matter if they attend a school located in their State or if they attended an online program offered by an out-of-State institution.

However, many of these commenters also thought that the proposed regulations in § 668.14(b)(32)(iii) did not go far enough; particularly that limiting the discussion to closure, recruitment, and misrepresentation leaves out other consumer protection laws, which generally need to be affirmed. One commenter suggested a list containing, for example, disclosure requirements, laws creating criminal liability for violations of education-specific or sector-specific State laws, and laws related to school ownership and record retention. Another commenter asked that the list include, among other things, enrollment cancellations and agreements, incentive compensation, and private causes of action.

*Discussion:* We appreciate the commenters' support but decline to broaden this provision. Many of the issues raised by the commenter get at broader questions of State authorization and reciprocity, which we think are better addressed in a future regulatory package. We do, however, remind the public that this language in no way eliminates the requirement that institutions abide by laws not related to postsecondary education from a given State, as provided in § 600.9(c)(1)(ii). This includes unfair and deceptive acts and practices (UDAP) laws.

*Changes:* None.

*Comments:* In addition to the broader concerns some commenters shared about the inclusion of the requirement for compliance with States' consumer protection laws related to misrepresentations, some commenters said that the definition of misrepresentation was unclear. Some suggested aligning the definition with the misrepresentation definition in § 668.74. Other commenters said that misrepresentations are covered under other laws because they are considered UDAP laws. Commenters also said that State attorneys general are already authorized to act upon misrepresentation claims that institutions have against them. Other commenters said that the inclusion of

misrepresentation specifically could unintentionally imply that the Department was narrowing the scope of the existing requirement that institutions are not obligated to comply with other general-purpose laws of other States beyond misrepresentation.

*Discussion:* We are persuaded by the commenters that the language related to misrepresentations is capturing many situations that institutions are still subject to even if they are part of a reciprocity agreement. As noted by commenters, most State laws related to misrepresentations fall under UDAP laws. Those are generally applicable laws and thus apply to institutions of higher education in all circumstances because they are not specific to postsecondary education. Given that many of the borrower defense to repayment regulations are informed by State UDAP laws, we think that continuing to rely on them here rather than a separate call out for misrepresentation is sufficient.

*Changes:* We have removed the reference to misrepresentation in § 668.14(b)(32)(iii).

*Comments:* Many commenters said the language in this section is vague. These commenters pointed out that the terms closure, recruitment, and misrepresentation have different meanings from State to State and are used in different contexts. For example, commenters wanted to understand what is meant by closure, specifically if it refers to programs, schools, or locations. These commenters would also like to know who will determine what are consumer protection laws, will it be the Department or each State. If it would be determined by the Department, commenters asked for guidance, and if determined by the State, commenters warned that the result could be an uneven patchwork of protection. One commenter provided examples of ways in which States differ with their handling of closure (*e.g.,* how prescriptive teach-out requirements are), recruitment (*e.g.,* whether it includes advertising) and misrepresentation (*e.g.,* vast differences in how fraud is dealt with).

*Discussion:* The Department agrees with the commenters and is both removing some provisions that are unclear and providing a more precise definition of the remaining term. As discussed above, we are removing misrepresentation because it is already going to be covered by State UDAP laws. We are also persuaded that the coverage of recruitment is hard to separate from marketing. We also think that from a State perspective many of the issues related to recruitment would fall under UDAP so believe it is an acceptable tradeoff to rely on UDAP laws for this purpose as well. In terms of closure, we added clarification that this includes requirements related to record retention policies, teach-out plans or agreements, and tuition recovery funds or surety bonds. This includes both programmatic and institutional requirements. These items are the four key types of tools that States have to address closures and we think giving a concrete and limited list will remove any ambiguity as to what does or does not apply.

The Department notes that these concepts are also supported by August 2023 research from SHEEO that talks about common policies related to closure.[36] That research notes a short-term benefit for re-enrollment from teach-out and record retention policies. The findings for tuition recovery and surety bonds are more complicated because those policies tend to be about making students whole for losses instead of encouraging continuation.

Tuition recovery funds were discussed by the Department during the NPRM as falling under this requirement. Relatedly, we would also consider surety bonds required by States. We did not call out teach-outs or record retention policies by name but are persuaded that those are related to this issue. As noted in the discussions for financial responsibility and provisional certification, teach-outs are an important tool to helping students complete their degree when an institution closes.

*Changes:* We have revised § 668.14(b)(32)(iii) to read ''Complies with all State laws related to closure, including record retention, teach-out plans or agreements, and tuition recovery funds or surety bonds.''

*Comments:* Another commenter believed that the proposed rules would lead to decreased access for out-of-State students due to uneven protection rules. To avoid this, the commenter stressed that the terms closure, recruitment, and misrepresentations must be defined precisely so that they will be interpreted consistently across State lines and as desired by the Department. The commenter recommended the Department engage with organizations who best understand State reciprocity agreements to address this topic.

*Discussion:* We disagree with the commenter. Students enrolling in distance education programs have many options and requiring institutions to comply with State consumer protection laws when a State seeks to enforce them only helps students have better protections from bad practices by institutions. The Department believes that the greater specificity around policies related to closure and the removal of misrepresentation and recruitment will address the commenter's concerns. These are all clear policies, the terms of which will vary across States but the nature of what these terms capture will not.

*Comments:* Several commenters pointed out that National Council for State Authorization Reciprocity Agreements (NC–SARA) has a new Policy Modification Process that launched in January 2023 and would conclude by the end of October 2023. According to the commenters, this process covers multiple topics, including student consumer protection, and commenters argued that this Policy Modification Process should serve as some justification for the adequacy of NC–SARA as well as justification to delay consideration of this issue until the next round of rulemaking.

*Discussion:* The Department disagrees with the suggestions from the commenters. There are specific and limited windows for the Department to issue regulations that abide by the master calendar dates. Given ongoing issues with closures and approval of borrower defense to repayment claims, we do not think it would be appropriate to wait for a non-governmental entity to instead play a role we can address through regulations now. Further, we have no ability to know what the outcome of that process will be.

*Changes:* None.

*Comments:* Another commenter shared their concern in that the proposed language could be interpreted to say that institutions authorized to operate in multiple States pursuant to a reciprocity agreement are not required to comply with all generally applicable State laws. The commenter recommended the provision be revised to clarify that institutions that are authorized to operate in multiple States pursuant to a reciprocity agreement must follow all generally applicable State laws and those education-specific State laws that relate to closure, recruitment, and misrepresentations. The commenter also recommended broadening the provision to require institutions authorized pursuant to a reciprocity agreement to comply with all consumer protection laws in States where programs are offered.

*Discussion:* The Department agrees with the commenter that this language does not affect the applicability of generally applicable State laws. This provision concerns the certifications the

[36] *https://sheeo.org/college-closure-protection-policies/.*

institution will make to the Department and confirming to us that they are complying with all State laws related to closure of postsecondary institutions. Institutions can and should be subject to laws beyond the specific types that institutions are certifying to us. That includes generally applicable State laws and what other laws specific to postsecondary education that apply for institutions that do or do not participate in a reciprocity agreement.

*Changes:* None.

*Comments:* Many commenters asserted that the requirement to observe individual States' consumer protection laws pertaining to closure, recruitment, and misrepresentations, including both generally applicable State laws and those specific to educational institutions, will eliminate most or all of the advantage that derives from subscribing to NC–SARA. These commenters remarked that NC–SARA was created to streamline compliance with the patchwork of State laws, and that these proposed regulations on State consumer laws would move us in the opposite direction, and problems that have been addressed in the past would return. Commenters argued that State authorization is a State prerogative and outside the purview of the Department, which risks assuming State authority in what it proposes. States have the right to authorize the operation of institutions of higher education and to enter into reciprocity agreements that are not rendered ineffective by the Department.

Commenters also stated that NC–SARA adequately addresses problems that students might encounter as well as concerns the Department wants to address. These commenters also asserted that this requirement would impose a costly, time-consuming burden on institutions offering distance education to track and adhere to the various State consumer protection laws. These commenters concluded that this regulatory burden would mostly negatively target the smaller, less affluent institutions that do not have the same staffing and resources of larger schools. Similarly, other commenters said the provisions in the proposed rule were vague and redundant to work carried out by NC–SARA.

Other commenters remarked that there are other consumer protections available to students outside of NC–SARA, for example, that can be found in State laws that are enforceable, in the governing boards of higher education institutions, and in the requirements of accreditors. As one commenter put it, safeguards for distance education students are currently in place not only through NC–SARA but also through the regulatory triad of accreditors, State agencies, and the Department.

*Discussion:* The three provisions in § 668.14(b)(32)(iii)—consumer protection laws related to closure, recruitment, and misrepresentation—that the Department outlined in the NPRM are the biggest sources of taxpayer liabilities generated by institutional actions. We have removed the issues related to misrepresentation and recruitment because we are persuaded those can be largely addressed by generally applicable State laws. We are unpersuaded, however, that reciprocity agreements would be undermined by asking institutions to take steps requested by a State to protect students in case of a closure. As 21 State attorneys general also noted, complying with State consumer protection laws does not impede the purpose of reciprocity agreements.[37] The attorneys general explained that institutions would still be exempt from State authorization requirements, like submitting an application or paying a fee to a State authorization agency.

We disagree that our proposal renders reciprocity agreements ineffective. Institutions will still have the many benefits that such agreements offer, including reduced burden and fees. States are a key part of the regulatory triad of postsecondary education. We believe that if States wish to create laws to protect their students from closure, they should be able to do so. This language preserves State flexibility on how they wish to write their laws.

Research demonstrates how closures can be incredibly disruptive to students' educational journeys, many of them never re-enroll, and those with student loan debt have very high default rates.

In response to the rule creating burden on institutions that offer distance education, we believe it is reasonable for an institution that chooses to offer distance education adhere to State laws where the student they enrolled is located. The burden on the institution is far outweighed by the benefits for students of not taking on debt or using up lifetime Federal aid eligibility for programs that cannot help them meet their educational goals.

The Department also rejects the zero-sum framing that suggests this change is not necessary because of the presence of other parts of the regulatory triad. The existing regulatory triad work has not prevented numerous closures, particularly sudden ones. The Department is improving its work in this space and believes other parties should do the same. We believe the aforementioned changes to § 668.14(b)(32)(iii) of the final rule to focus explicitly on closure addresses the concerns of vagueness and redundancy.

*Changes:* None.

*Comments:* One commenter mentioned how States could be inundated with burdensome compliance actions if the proposed language under § 668.14(b)(32) moves forward. For example, this commenter mentioned that Colorado is the home State to 42 Colorado-based institutions that participate in NC–SARA, and that 1,166 institutions from other States, through NC–SARA, also serve students in Colorado. These 1,166 institutions are annually approved to participate in NC–SARA by each of their home States. The commenter is concerned that under the proposed regulation, Colorado may need to manage the NC–SARA compliance of not only their 42 in-State institutions, but also the additional 1,166 institutions that serve students in Colorado based on Colorado's unique requirements for recruiting, closure, and misrepresentations.

*Discussion:* The Department believes limiting this provision to only closure and spelling out specific areas underneath it addresses the concerns of commenters. Moreover, the extent to which these closure provisions apply to out-of-State schools will depend on underlying State law. For example, some tuition recovery funds specifically exclude out-of-State institutions.

*Changes:* None.

*Comments:* A few commenters believed the success of State-led reciprocity agreements are clear from the extraordinary speed with which the legislatures of nearly every State and territory adopted new legislation for the purpose of joining the State authorization reciprocity agreement administered by the NC–SARA. According to these commenters, NC–SARA's success demonstrates the overwhelming approval of the existing reciprocity framework by the directly elected representatives of those States. These commenters concluded that the State legislatures, controlled by both Democrats and Republicans, signaled their strong belief in a system of reciprocity that would eliminate the very bureaucracy and administrative burden that the Department, with no mandate from Congress, now proposes to reinstate.

A few additional commenters also added that although the Department would be reintroducing a problem previously deemed so serious that every State, but one acted with unprecedented

[37] ED–2023–OPE–0089–2975; *https://www.regulations.gov/comment/ED-2023-OPE-0089-2975*.

speed to address it, the agency does not seem to be solving any particular problem in return. These commenters stated that if there were no tools available to manage issues relating to closure, recruitment, and misrepresentations, they would understand the argument for taking such an extraordinary step, but they do not believe this to be the case. These commenters pointed out that every State has general consumer protection laws that may be invoked to address such concerns involving students, and every State has created new laws outside their State authorization framework if they feel additional tools are required. These commenters believe the Department has an extraordinary array of statutes, regulations, and guidance at its disposal for assisting students with matters involving closure, recruitment, and misrepresentations. Moreover, commenters recognized that this administration has dedicated the better part of its regulatory agenda to expanding and strengthening such provisions. Accordingly, these commenters concluded that there is no reasonable justification for requiring students, employers, and institutions to pay the extreme cost that would be associated with this proposed rule.

*Discussion:* The Department is clear about the problems we are concerned with—the disruptive nature of closures and how they affect students' ability to complete and generate costs for taxpayers in the form of loan discharges. Joining a reciprocity agreement should not absolve institutions from doing a better job at managing closures. The removal of misrepresentation and recruitment addresses the confusion about generally applicable State laws.

*Changes:* None.

*Comments:* A few commenters asserted that the Department knows who the bad actors are and who are causing harm to students as they pursue their higher education. These commenters stated that rather than implementing changes that would affect many schools in costly, burdensome ways, the Department should instead target the bad actors with more tailored rules or otherwise deal with them appropriately.

*Discussion:* The Department identifies institutions it is concerned about through its various oversight authorities. But not all institutions that suddenly close were easily identifiable as a problem right before the moment of closure. Instead, we think normalizing steps to prepare for closures would leave students, taxpayers, and institutions in a stronger position.

*Changes:* None.

*Comments:* One commenter predicted that implementing proposed § 668.14(b)(32)(iii) would subject institutions to inconsistent, costly, and unnecessary State-by-State laws, such as required contributions to numerous and varying State tuition recovery funds, numerous and varying bonding requirements, requirements to register recruiters, and restrictions on recruiting practices and methods.

*Discussion:* We disagree with the commenters. The removal of recruitment and misrepresentation address the concerns raised about registering recruiters. If institutions seek to benefit from enrolling out-of-State students, we think it is reasonable they contribute to the costs of protecting them in case of a closure. We note that many States exempt closure requirements for institutions of certain sectors, students attending out-of-State institutions through distance education, institutions under a reciprocity agreement, or a combination of those factors. And while institutions could make changes to their policies related to closure, that is also true regarding their participation in reciprocity agreements.

*Changes:* None.

*Comments:* One commenter agreed that the Department should pay close attention to the issue of State consumer protection because States have concerns about out-of-State schools taking advantage of students. The commenter cited an August 2021 letter by State attorneys general and several higher education consumer protection groups. However, the commenter pointed out that State attorneys general are only one entity. The commenter further noted that all States except California have chosen to enter NC–SARA, which in most cases involved a bill passed by State legislature and signed by the governor voluntarily. On this same point, another commenter affirmed that if any State has sufficient concerns, it could affect remedies under NC–SARA policies or simply depart NC–SARA and enforce any laws it wishes.

*Discussion:* The Department is not telling States how to structure their laws related to closure. We are requiring institutions to certify to us that they are complying with all laws related to closure in the States where they operate. This is critical because we are concerned about the disruptions and costs associated with closure.

*Changes:* None.

*Comments:* One commenter reported that there seems to be three possible interpretations of the Department's suggested language in § 668.14(b)(32)(iii), one being that institutions are currently non-compliant, the second being that the Department's proposal supersedes NC–SARA policy, and the third interpretation being that the Department's proposed rule does not affect NC–SARA policy. The commenter offered extensive reasons why each of the three interpretations were problematic, namely that the Department did not offer any research backing that if its policies are implemented, it would provide relief. The commenter cited research of a large student tuition recovery fund that, though students paid into it for years, made payouts to only a tiny fraction of students who were harmed by closing institutions. The commenter also reported that they commissioned a law firm to examine State legal enforcement actions against high-profile institutions that often led to closure. The commenter stated that that assessment showed that State attorneys general have almost exclusively used general purpose fraud and misrepresentation consumer protection statutes when filing claims against institutions they believe are serving students poorly. The commenter then mentioned that as the Department is likely aware, NC–SARA policy does not prevent States from enforcing these statutes. The commenter concluded that this analysis, at the very least, raises substantial questions about whether the concerns noted by the Department could be addressed through other means.

*Discussion:* The Department is persuaded by the commenter, in part. As already noted, we have removed the language related to misrepresentation and recruitment as we believe those issues would be largely covered by State UDAP laws, which generally apply. However, in addition to tuition recovery funds, we are concerned about requests for teach-outs and provisions for record retention. The Department agrees that tuition recovery funds or surety bond requirements in many States may not be as effective as possible, which recent SHEEO research confirms.[38] However, given the continued presence of closures and their disruption, every part of the regulatory triad must do all it can to help minimize the negative effects from closures.

*Changes:* None.

*Comments:* Many commenters advised the Department to work with NC–SARA as well as consumer protection groups and relevant higher education associations to create a process that would protect students more uniformly. These commenters are concerned that the proposed regulations on State consumer protection laws

[38] *sheeo.org/college-closure-protection-policies.*

would leave protection up to each State and likely cause it to have uneven protection. However, if the Department is determined to implement the regulations, one commenter proposed that the Department limit the language to two issues of concern, tuition recovery funds and aggressive student recruiting, which would align with how it is addressed elsewhere in the NPRM.

*Discussion:* As discussed above, the Department has limited this language to include tuition recovery funds as well as three other areas specifically related to closure. We will continue to identify opportunities to improve joint oversight of institutions of higher education.

*Changes:* None.

*Comments:* Several commenters suggested the Department reconcile the proposed language in § 668.14(b)(32)(iii) with the existing definition of State authorization reciprocity agreement in § 600.2.

*Discussion:* We disagree. This regulation concerns what institutions will certify to the Department. It requires that they certify compliance with all requirements related to closure in any State in which they operate. It does not adjust the definition of a reciprocity agreement, but institutions will have to ensure they are being accurate in their certifications to the Department.

*Changes:* None.

*Comments:* One commenter opined that the proposed regulation for State consumer protection contradicts the Department's stated goals of promoting innovation and flexibility in distance education because it imposes rigid, prescriptive requirements that stifle creativity and diversity in instructional design and delivery.

*Discussion:* The Department does not think creativity in avoiding the costs of closures is a good avenue for innovation. This provision does not affect modes of instructional design and delivery. Instead, it seeks sensible protections for students to try to minimize the costs and disruption from closures.

*Changes:* None.

*Comments:* One commenter requested that the Department clarify what it means that institutions are only required to comply with State laws to which they are subject. For example, the commenter wants to know if the Department means to say that if a State's consumer protection laws explicitly state that they apply only to institutions operating with a physical presence in the State, an institution operating under a reciprocity agreement without a physical presence should not be required to comply with a law from which it is exempt.

*Discussion:* This certification requires institutions to affirm that they are complying with applicable State laws related to record retention, teach-out plans or agreements, and tuition recovery funds or surety bonds. Institutions would have to affirm they are complying with those applicable and relevant State laws. For instance, if a State's tuition recovery fund law exempts out-of-State institutions, those institution would not have to abide by it. This provision does not speak to generally applicable State laws, which apply to institutions.

*Changes:* None.

*Comments:* One commenter worried that the proposed regulation for State consumer protection would create conflicts with NC–SARA protocols to the point that there would be confusion and consumer protection would be weakened rather than improved oversight. The commenter added that potential conflict with the rules of accrediting agencies could also increase. In addition, the commenter pointed out that many States have difficulty maintaining and implementing their own policies and that adding new, complicated Federal requirements for them to comply with will result in those regulations being implemented ineffectively or not at all.

*Discussion:* We disagree with the commenters. The situation of decreased oversight suggested by the commenter would have been most likely to arise when there is ambiguity or a lack of clarity as to what is or is not covered by this requirement. The changes to this provision in the final rule remove that ambiguity and will make it easier for all parties to understand what is covered. We also do not think this provision will create conflicts with accreditation agencies, as they cannot dictate State laws. This provision also does not tell States how they can or should structure their laws related to closure of postsecondary institutions and the four areas underneath that. They can continue to structure such laws, if they have them, as they see fit.

*Changes:* None.

*Comments:* One commenter asserted that the current definition of State authorization reciprocity agreement allows agreements that prohibit States from enforcing their education specific consumer protection laws against member schools. As a result, the commenter states that the NC–SARA agreements prohibit member States from applying or enforcing their education-specific consumer protections to member out-of-State schools, which has created an unfair two-tier system that leaves millions of online students unprotected by State law and vulnerable to fraud and financial ruin.

*Discussion:* The Department believes that we need to protect students from the most concerning outcomes in postsecondary education. We added § 668.14(b)(32)(iii) to remind institutions of the requirement to comply with State laws related to four key elements that relate to closure.

*Changes:* None.

*Comments:* Several commenters were concerned that the proposed language in § 668.14(b)(32)(iii) could be mistaken to imply that institutions that do not participate in a reciprocity agreement and that offer programs in multiple States, do not have to comply with State laws in each State where they operate, except for in the three specified areas. These commenters stated that in fact, institutions that operate in multiple States without participating in a reciprocity agreement must comply with all applicable State and Federal laws. The commenters urged the Department to revise the proposed regulations to make clear that institutions that do not participate in a reciprocity agreement, must comply with all applicable State laws in the States where they offer programs.

One commenter recommended that the Department revise the proposed language in § 668.14(b)(32)(iii) because as it is, it runs the risk of inadvertently suggesting that title IV schools are not required to comply with generally applicable State consumer protection laws. This commenter emphasized that no such exemption exists and, notably, that State authorization reciprocity agreements do not exempt institutions offering distance education from compliance with such generally applicable laws. This commenter suggested that the Department clarify this language to prevent any possible misinterpretation. This commenter also observed that requiring schools that offer programs in multiple States to comply with all State consumer protection laws in each State where the school enrolls students would not impede the purpose of reciprocity agreements, which seek to reduce the cost and burden of compliance with multiple States-authorization requirements. This commenter argued that schools can be required to comply with all applicable consumer protection laws, while still being exempt from compliance with State-authorization requirements, including, for example, requirements to submit an application or pay a fee to a State-authorizing agency.

*Discussion:* This language does not change the existing requirement that institutions must comply with generally applicable State laws. In fact, that is one of the reasons why we have removed misrepresentation and recruitment, as State UDAP laws would likely address those issues. Instead, this language specifically requires that institutions certify that they comply with relevant State laws related to the closure of institutions of higher education. We address our concerns by rewriting this language to address the types of closure-related requirements. Institutions would have to provide this certification regardless of whether they participate in a reciprocity agreement.

*Changes:* None.

*Comments:* One commenter recognized that the suggested language in the State consumer laws section is an attempt to give States back some of the authority they have lost, but the commenter believed that the changes might create unintended consequences by only focusing on the specific areas listed in the proposed language. To address the problem, the commenter suggested some language changes to alleviate some likely unintended consequences of the text as currently proposed. Namely, this commenter suggested to simplify that this provision would apply to all applicable State laws. In addition, this commenter suggested that this provision include that for institutions covered by a State authorization reciprocity agreement as defined in § 600.2, notwithstanding any limitations in that agreement, the institution comply with all State higher education requirements, standards, or laws related to risk of institutional closure, or to recruitment and marketing practices, and with all State general-purpose laws, including, but not limited to those related to misrepresentations, fraud, or other illegal activity.

*Discussion:* The Department appreciates the suggestion from the commenter, but we think making this language clearly about four key items related to closure clarifies that it applies to all institutions regardless of whether they participate in a reciprocity agreement.

*Changes:* None.

*Transcript Withholding (§ 668.14(b)(33))*

General Support

*Comments:* Several commenters appreciated and supported the Department's proposal to prohibit transcript withholding or take any other negative action against a student related to a balance owed by the student that resulted from an error in the institution's administration of the title IV, HEA programs, returns of funds under the R2T4 funds process, or any fraud or misconduct by the institution or its personnel.

Commenters cited a range of reasons for the support. Several commenters noted that transcript withholding is most likely to affect low-income and first-generation students, students most at risk of not finishing their programs, as well as students of color, and thus limiting the practice is particularly important for students seeking educational opportunity. For instance, one commenter cited a study that found that low-income students, as measured by their eligibility for a Federal Pell Grant, only make up 30 percent of enrollment at Virginia's two-year public colleges but comprise 63 percent of those students who owe debts to those schools. That same commenter provided similar statistics showing that although Black students comprise only 17 percent of enrollment in Virginia's two-year public institutions, they account for 40 percent of the students who owe debts to those schools.

Several commenters provided detailed stories about how transcript withholding had stymied students' educational paths, including one student who was on a payment plan with a private university that would take 15 years to pay off.

A few commenters also noted that transcript withholding can be an enormous obstacle preventing them from securing employment and beginning their career. In fact, one commenter emphasized, in some States, graduates cannot sit for professional licensure exams without their transcript.

A few commenters also pointed to actions taken by States, such as New York, Washington, Louisiana, and California, in recent years to ban transcript withholding more broadly as further recognition that this is a problem that must be addressed. A few other commenters argued that transcript withholding frustrates the policy goals of Federal aid programs by preventing students from pursuing higher education at other venues.

Several commenters also cited findings by CFPB examiners that found transcript withholding under certain circumstances to be abusive and in violation of Federal consumer protection law. One commenter emphasized a phrase from CFPB's report which stated that institutions took unreasonable advantage of the critical importance of official transcripts and institutions' relationship with consumers. Several other commenters cited research by the Student Borrower Protection Center, which found that schools typically receive only cents on the dollar when they collect on institutional debts using transcript withholding. These commenters said they do not believe the benefits to the schools from the small amounts collected justifies the stress and delays transcript withholding places on students.

A different commenter raised concerns about how schools routinely charge the withdrawn student for amounts of returned title IV aid, creating an account balance for expenses that were previously covered by financial aid. The commenter believes this is a windfall for schools, which can collect for educational services that were never fully rendered to students.

Overall, several commenters argued that this provision has significant benefits that could help millions of students, including allowing students to continue pursuing their educational goals.

*Discussion:* We appreciate the commenters' support.

*Changes:* None.

General Opposition

*Comments:* Several commenters stated that this provision exceeds the Department's authority in the HEA by interfering with the normal operating business of the institution. They also said the Department has routinely stated that it is not within its authority to ban transcript withholding without due cause. The commenters pointed to discussions during negotiated rulemaking where the Department talked about difficulty in identifying any legal standing to engage on this topic. The commenters also noted that the Department acknowledged that the student has an agreement with the institution, which shifts the conversation from institutional error to a scenario of process, procedure, and institutional business, where the Department lacks the authority to intervene.

*Discussion:* We disagree with the commenters. While we agree that a student establishes an agreement with an institution when the student enrolls, we disagree with the commenters' characterization of the discussion of the rulemaking. The existence of an agreement does not mean that an institution is exempt from oversight. The Department has authority under HEA section 487 to establish its own agreement with an institution, setting the conditions for its participation in the title IV, HEA programs.

Additionally, HEA section 498 requires the Secretary oversee an institution's administration of title IV, HEA funds on behalf of students, ensuring that the institution is administratively capable and financially responsible. When an institution withholds transcripts from students that include credits that have been paid for or should have been paid for, even in part, using title IV, HEA funds, withholding of such transcripts due to a balance owed falls squarely under the Department's authority to oversee the administration of those funds. In such cases, the institution denies a student a substantial portion of the value of the service that the institution tacitly or explicitly agrees to provide when it enrolls a student, *i.e.,* authoritative confirmation of a student's academic progress. Such an action also undermines the express purpose of the title IV, HEA programs to support students' completion of postsecondary credential.

*Changes:* None.

*Comments:* Several commenters supported the Department's position that institutions should not prevent students from enrolling or re-enrolling in school because of small balances due. However, in the case of larger balances, many commenters stated that institutions have limited alternatives to collect past due debts.

Several commenters stated that they work with students that owe a balance by offering payment options that meet the individual's needs and asserted that one of their only means of leverage in many cases is withholding a transcript. Many commenters said transcript withholding is typically the only thing that would make a student want to pay their debt. One commenter said many students in their school do not respond to requests to repay debts because they simply stop attending classes and never officially drop out from the classes. These commenters indicated that in many cases, they would be unable to recoup the amounts owed from the students who intend to quit school entirely or attend another institution.

One commenter stated that they work diligently with students to keep their account balances in house to avoid collection fees and credit bureau reporting. This commenter also asserted that they charge no interest or plan fees on students who enroll in a plan, which is to the student's advantage since returned funds may reduce what the student owes in Federal loans. The same commenter questioned what an institution's incentive would be to continue working with students with outstanding balances when it could easily turn the accounts over to collections for more aggressive collection options.

Many commenters argued that arguments made by consumer advocates are anecdotal, limited in scope, and appear to neglect the greater consumer impact. These commenters said the CFPB's findings in its Fall 2022 Supervisory Highlights that institutions rarely, if at all, release transcripts to prospective employers were untrue. They said interviews with college officials would find that almost all of them disclose transcripts to potential employers. A few other commenters stated that for students that are in line for a job, trying to enter the military or need their transcripts to pass their boards, the school releases transcripts. These commenters reasoned that when the student becomes gainfully employed, they will be able pay the debt.

Another commenter argued that institutions would need to build infrastructure to manage the added costs of this provision, which would detract from funding for other core services. A separate commenter noted that transcript withholding is particularly important for private institutions that cannot rely upon collecting State tax refunds to pay institutional debts the way a public institution could.

A few commenters supported the Association of Collegiate Registrars and Admissions Officers' (AACRAO) and National Association of College and University Business Officers' (NACUBO) recommendations that were provided to the Department in April 2022, which allow the use of administrative process holds and student success holds while eliminating holds tied to trivial or minor debts.

Many of these commenters explained that without the option to withhold transcripts, institutions might resort to using collection agencies with more negative impacts on students than transcript withholding. One commenter warned that outside collection agencies could ultimately increase the amount a student owes to an institution.

*Discussion:* We appreciate the commenters' efforts to provide favorable repayment options to students and hope that institutions will continue to do so. We also appreciate that some institutions choose to provide transcripts to employers upon request, but the commenters do not provide conclusive evidence that this is true of all or even most institutions, whereas the CFPB provided a clear account of this problematic practice.

We disagree that withholding transcripts is the most appropriate way to get students to repay a balance owed. In fact, doing so can make it more difficult for students to repay if it affects their ability to obtain gainful employment, even for those students who have not yet completed a degree. Although we acknowledge that preventing institutions from withholding transcripts removes a key form of leverage that an institution has over a student to demand that the student repay a debt to the institution and could result in additional burden on the institution to collect that debt, we believe that trade-off is justified given the significant harm to students when they are unable to access their transcripts.

Finally, we note that the regulatory language prevents the institution from taking any other negative action against a student related to a balance owed by the student that resulted from the institution's own error. Because selectively referring a student to a collection agency would be a negative action, an institution would not be permitted to use a collection agency to have the student repay an amount owed specifically because of the error. In these cases, institutions will either need to find other methods of encouraging students to repay amounts owed or write off the balances entirely.

*Changes:* None.

*Comments:* Several commenters stated that before taking extreme measures such as employing outside collection agencies, their institutions use transcript holds as a means of encouraging communication with the student. One commenter noted that many students are unaware of how they finance their college education and even less are aware of general economic concepts, such as how to save, create a budget, and simple or compounding interest. Several commenters stated that through financial literacy discussions, they teach students and borrowers much needed skills related to financial literacy and work with them to find a debt solution that fits within their present financial capabilities. By taking away these tools, the commenters indicated, the institution loses the power to have discussions about financial literacy, which the commenter asserted ultimately hurts the students. Other commenters also pointed to financial literacy as a reason why students may end up owing balances.

*Discussion:* We appreciate the commenters' point that financial literacy efforts can help students repay debts. However, we disagree with the commenters that transcript withholding should be a tool to initiate such counseling. Institutions have many opportunities to work with students to

provide instruction and support regarding financial literacy prior to withdrawal, and we do not believe that the value of such education outweighs the significant negative impacts on students when they are unable to obtain transcripts and cannot demonstrate their other educational achievements to another institution or an employer. We also do not see how financial literacy would address some of the situations in which we are preventing transcript withholding, particularly as a result of an institution's actions. Financial literacy training can be useful if done well, but it is preventative process that does not obviate the problems that are caused when students already owe a balance to the institution and the institution withholds their transcripts.

*Changes:* None.

*Comments:* One commenter questioned why the Department would want students to continuously accrue more debt. The commenter is concerned that in the proposed requirement there is no verbiage regarding the Fair Credit Reporting Act and the student's responsibility to repay debt in a timely manner. They assert that this challenges the legality and liability for the university to report outstanding debt to credit bureaus for other creditors to be informed. The commenter argued that the proposed requirement regarding release of transcripts deserves more conversation because they believe, as written, it will cause more harm than good. The commenter pointed out that increasing a person's debt beyond their means creates a scenario where their debt-to-income ratio is unmanageable. The commenter asserted that it is unfair to students who have the right to know the damage that accruing more debt may cause and it is damaging to their credit and future capabilities when attempting to make purchases.

*Discussion:* We disagree with the commenters. The Department does not believe that students should continuously take on more debt, but we also are not persuaded by commenters that a regulation that prevents an institution from withholding transcripts will cause students to take on substantially more debt. This regulation does not relate to students taking on more or less debt. It only relates to the ability of an institution to withhold a transcript for credits already earned and paid for by the student. Although we acknowledge that some institutions may find it more difficult to recoup debts from students without withholding their transcripts, institutions have other methods of contacting students and persuading them to repay their debts.

As we describe below, although we have still broadly limited an institution's ability to withhold transcripts for payment periods that are fully paid for, we have limited the applicability of the regulation that prevents institutions from taking ''any negative action'' to only occasions where the balance owed is the result of institutional error, fraud, or misconduct. We believe that this is an appropriately narrow scope for the strict prohibition on taking negative action. Specifically, with respect to the Fair Credit Reporting Act, any institution that is reporting to the credit bureaus have an obligation to report accurate information. Where the derogatory reporting is on a debt that is due to institutional error, fraud, or misconduct, the derogatory reporting would not be accurate information that would be of value to other potential creditors.

*Changes:* None.

*Comments:* One commenter shared that their university currently places a hold on the student's account that prevents all services, including additional registrations, and places the student's account with third party collection agents if a student owes a balance, which they are concerned would be seen as a negative action if this provision is included in the final rule. This commenter worried that the proposed regulatory language would not allow the university to pursue debt collection or prevent the students with balances from future registrations.

*Discussion:* The commenter is correct that the actions described, including placing a student's account with third party debt collectors and preventing the student from registering for future courses, would be considered ''negative actions'' that are not permitted under these final regulations if the student's balance owed is due to school error. In these situations, we acknowledge that institutions may need to write off balances owed if the students do not agree to repay the funds to the institution. However, we do note that we have removed the provision that would also have prevented these actions for a balance owed due to an R2T4 process.

*Changes:* None.

Transcripts for All Paid for Credits (§ 668.14(b)(34))

*Comments:* Several commenters expressed support for the changes in transcript withholding but said the Department should go further. One commenter stated that colleges should be required to transcript every credit that title IV funds have paid for. This commenter argued that when institutions fail to do so they deprive students of the credits they've earned and diminish the value of the title IV programs. Several other commenters argued against this idea. They noted that students have a multitude of funds from various sources, for example, that Federal funds are intermixed with State, institutional, scholarship, and individual funds. These funds are combined to address all institutional charges and though Federal funds are usually the first dollar in, commenters stated that it is a stretch to argue that Federal dollars paid for the entire credits earned by the student. These commenters continued to say that it would be nearly impossible for an institution to deconstruct the credits paid entirely by Federal dollars and as a practical matter it would be impossible to parse out the amount on a transcript.

Another commenter urged the Department to categorically ban transcript withholding at title IV schools related to any debt, not just debt that accrues due to R2T4 and prohibit title IV schools from withholding any academic records as a form of debt collection, including diplomas, certificates, and any other document that a student or graduate may need to complete their education elsewhere or to enter the workforce.

*Discussion:* We are convinced by the arguments made by commenters who said that transcript withholding in general diminishes the returns to students and taxpayers from title IV funds by depriving students of the credits they have already paid for and earned and effectively preventing them from transferring to another institution without substantial loss of time and resources. While we disagree with the commenters who argued against this, we agree with their argument that determining which credits have been paid for with title IV, HEA funds is difficult because that money is fungible. For those reasons, we have added an additional paragraph requiring institutions to transcript all credit or clock hours for payment periods in which (1) The student received title IV, HEA funds; and (2) all institutional charges incurred for the payment period were paid for or included in an agreement to pay, such as a loan or a payment plan, when the request for the official transcript is made.

For purposes of these new provisions, we consider an institutional charge to be ''for a payment period'' if they are allowable charges for the payment period, as defined under § 668.164(c)(1). We consider all charges incurred for a payment period to be paid for when the

institution has credited the student's account for an amount sufficient to cover those charges Additionally, we consider charges to be paid sequentially as a student's account is credited, where the oldest charges are the first to be paid.

Regarding the commenter who asked the Department to categorically ban all transcript withholding at institutions eligible for title IV aid, we continue to believe that we do not have the authority to prevent an institution from withholding transcripts in circumstances where the student does not receive title IV, HEA funds, or in cases where the student has not paid for all the institutional charges associated with the credits they have earned. In those cases, the Department does not impose restrictions on an institution's ability to withhold transcripts or transcript credits from payment periods in which the student has not received title IV, HEA funds or has not paid for all institutional charges.

*Changes:* We have redesignated proposed § 668.14(b)(34) to (b)(35) and added an additional paragraph (b)(34) to establish a requirement for institutions participating in the title IV, HEA programs to transcript all credit or clock hours for payment periods in which (1) The student received title IV, HEA funds; and (2) all institutional charges were paid, or included in an agreement to pay, at the time the request is made.

Objections Tied to R2T4

*Comments:* Several commenters supported the Department's original language around transcript withholding for school error but were concerned with the Department's current proposal to expand the prohibition to R2T4. Other commenters specifically criticized the new R2T4 provisions.

Several commenters noted that when they return funds to the Department through R2T4, this creates a balance due to the institution. In these cases, the Department gets its money back, but the institution does not. The commenters asserted that this could affect as much as one-quarter of its students and that being unable to collect that much revenue due to a ban on transcript withholding would be a significant loss.

A few commenters raised concerns about the limit on transcript withholding due to R2T4 because of differential treatment between students who do and do not receive Federal aid. They said because schools are barred from having a separate policy for title IV and non-title IV students this requirement is attempting to dictate school policy for all students.

One commenter argued that attempts to have tuition refund policies closely mimic R2T4 requirements often resulted in balances owed. This commenter stressed that R2T4 is not a simple proration, but a complex three-page worksheet, and asserted that even the best aligned policy does not guarantee offsetting a student's credits and debits. Other commenters pointed out that page 32383 of the NPRM indicated uncertainty about the legal authority of these regulations by saying that institutional policies and R2T4 rules may not coincide and discrepancies between the two could result in a balance owed by the student after the student's withdrawal.

Several commenters argued that not allowing institutions to recoup these costs would have a range of negative consequences. One commenter said that universities could end up having to view Federal aid as ''bad money'' because they will no longer plan on receiving a substantial portion of the Federal funds promised ahead of a semester. A few other commenters warned that institutions would pass these costs on to future students in the form of higher tuition to offset the cost of more generous refund policies. One commenter argued that these unpaid balances would be paid for with institutional aid, which limits the availability of those funds for other students. A few other commenters, meanwhile, said institutions would reduce access, including through more stringent admissions practices focused on identifying students who would be better able to pay their university expenses without adequate Federal aid.

A few commenters raised concerns about withholding transcripts due to R2T4 calculations by pointing to Department rules on overpayments. One commenter stated that the HEA denies Federal student aid to students who owe overpayments on grants, including balances of more than $50 resulting from the R2T4 calculation, until the student repays those funds. According to this commenter, institutions frequently repay the Department for student balances owed because of the R2T4 calculation instead of reporting an overpayment to the Department. The commenter further explained that this keeps the liability with the school instead of the Department. This commenter argued that it is inconsistent for the Department to maintain such a strict policy for overpayments while holding schools to a different standard when students owe balances of title IV funds because of the R2T4 calculation. The commenter concluded that if this provision remains in the regulations, institutions will likely alter their practices and begin reporting overpayments to the Department instead of repaying them on the student's behalf, potentially leaving students worse off if they owed small balances.

Several commenters asserted that preventing transcript withholding related to R2T4 creates operational issues for institutions since they are unable to determine the exact amount of any debt that might come from the R2T4 money because funds are often comingled. The commenters stated that when title IV, HEA funds are returned, a student's balance owed increases, which is a challenge for institutional systems that can't tell the difference. Additionally, they said when the institution tries to only collect a percentage of the entire debt owed, this causes additional difficulty for the students.

Another commenter raised similar operational concerns, indicating that financial holds are often initiated via the bursar's office or office of student accounts. The commenter noted that leaders representing these offices have indicated that it would be challenging to pinpoint a debt—and its resulting hold—to a R2T4 calculation. The commenter mentioned that student's ledger account is a snapshot in time and that charges are continually added and removed from the account while payments are processed, and refunds are distributed.

One commenter stated that the transcript withholding provision would negate the terms of enrollment agreements or institutional tuition refund policies across all sectors of education, since it would essentially not permit an institution to obtain payment for tuition that is not refunded to a student under the institution's tuition refund policies.

Additionally, the commenter stated that many student account systems may not be able to automatically identify these holds/debts as R2T4-related. According to the commenter, staff would have to manually analyze the accounts of students with holds to determine if they were caused by return, and then release the hold. The commenter is unclear how staff would be required to handle a balance on a student's account that came from both an R2T4 calculation and some other source and may result in the elimination of a non-R2T4 hold.

Several commenters argued that the Department should not prohibit transcript withholding due to R2T4 because the institution is not solely at fault when a student owes a balance, such as students who withdraw due to

work, childcare, family, addiction, housing insecurity, or food insecurity. Commenters also cited students who failed all their classes or withdrew after receiving a refund check.

Along similar lines, one commenter argued that prohibiting institutions from withholding transcripts or taking any other negative action except in cases of student fraud would result in a ''free-for-all'' education system. This commenter asserted that students would be able to obtain educational credits, withdraw from the institution, and simply transfer those credits to another institution because the first institution was prohibited from withholding an academic transcript due to an unpaid balance.

Many of these commenters suggested either removing the ban on transcript withholding or taking other negative action due to R2T4 while a few others suggested removing this proposed provision until the next round of rulemaking, when discussions on R2T4 will take place.

*Discussion:* We are persuaded by many of the commenters who wrote in opposition to preventing institutions from taking negative actions against students who owed balances due to the R2T4 process. We continue to believe that balances owed due to the R2T4 process present impediments to a withdrawn student's eventual completion of a postsecondary credential, and as described in the NPRM, our data suggests that there is a relationship between returns under the R2T4 process and negative student outcomes. We were not convinced by arguments that the prohibition on transcript withholding due to R2T4 would cause institutions to lose substantial amounts of revenue, particularly when that revenue would have been owed in many cases for periods for which the student did not receive instruction. Nor were we persuaded by the argument that enrollment agreements would be violated, since such agreements could be renegotiated in light of new requirements, potentially to include more generous tuition refund policies. However, in light of the arguments presented by commenters regarding the administrative challenges to implementing the provision, concerns about students at open access institutions who enroll solely for the purpose of receiving a credit balance, and the fact that the broader prohibition on transcript withholding we are establishing will largely result in most withdrawn students receiving transcripts including credits for payment periods that are fully paid for, we believe it is reasonable to remove the provision regarding R2T4 from proposed § 668.14(b)(33).

We disagree with the commenters that the Department's policy preventing institutions from withholding a transcript or taking another negative action is analogous to its requirements regarding overpayments, particularly when the provision related to R2T4 is removed. Institutions are still permitted to withhold transcripts and take other negative actions against students when students owe a balance for payment periods in which they have not received title IV, HEA funds or have not fully paid charges, except in cases where an institution's error caused the account balance. The prohibition applies only in limited circumstances and is tailored to ensure that students do not lose the value of the educational experience that title IV, HEA funds supported.

*Changes:* We have struck the phrase ''or returns of title IV, HEA funds required under § 668.22 unless the balance owed was the result of fraud or misconduct on the part of the student'' from the end of § 668.14(b)(33).

Alternative Ideas

*Comments:* One commenter encouraged the Department to look for all opportunities to minimize or prohibit transcript withholding, including for institutions under provisional status, given the well-documented harm this practice inflicts upon students.

*Discussion:* The Department agrees with the commenter and has taken the strongest possible action within its purview to prevent such withholding by requiring institutions to transcript all credits that were paid for in periods where students received title IV, HEA funds.

*Changes:* None.

*Comments:* One commenter recommended limiting the prohibited actions for R2T4 debts to the withholding of transcripts because other actions, such as holding diplomas or holding future enrollment, do not impede a student from enrolling elsewhere if they can transfer their completed coursework and secure transcripts.

*Discussion:* The Department acknowledges this commenter's concern, and the elimination of the R2T4 provision resolves it. The intent of the remaining provisions in § 668.14(b)(33) is to prevent an institution from taking any negative action against a student for a balance resulting from its own error, fraud, or other misconduct, and we continue to believe this is appropriate.

*Changes:* None.

*Comments:* One commenter disagrees with the Department requiring schools sending funds back to the Department as part of R2T4, and instead recommended that the Department collect the debt from the student themselves.

*Discussion:* Although we have eliminated the R2T4 provision related to transcript withholding, the Department does not agree with shifting the substantial burden of returning title IV, HEA funds to the Department, from institutions to students. In addition, we do not have statutory authority to do so even if the Department agreed with the commenter.

*Changes:* None.

*Comments:* One commenter requested the Department allow campuses to retain Federal funds for students who withdraw if their R2T4 portfolio falls below a designated threshold (*e.g.,* average of 5 percent return over last three years) of their total Federal aid disbursements in a year. This commenter pointed out that campuses could continue to report the R2T4 calculations for the Department to assess this measure in future years to determine if they are exempt from returning these funds and thus prohibited from billing for the portion of the account paid by these Federal funds.

*Discussion:* Although we have eliminated the R2T4 limitation from the transcript withholding provisions, the Department disagrees with limiting the applicability of the other provisions to institutions that have a limited number of students who withdraw or a limited proportion of title IV, HEA funds that is returned through the R2T4 process. The Department intends for these provisions to apply to all institutions equally.

*Changes:* None.

*Conditioning Financial Aid (§ 668.14(b)(35))*

*Comments:* Several commenters stated that the proposed rules to prohibit any policy, procedure, or condition that induces a student to limit the amount of Federal aid they receive is vague and harmful. The commenters opined that the proposed rule would bar institutions from providing counseling services and forbids any policy or procedure that persuades students not to over borrow. The commenters stated the proposed rule would deprive students of valuable information that they need to avoid overborrowing. The commenters further stated that the proposed rule should be replaced with language that expressly authorizes institutions to engage in counseling practices aimed at discouraging over-borrowing, including consultations

aimed at discouraging students from borrowing more than amounts needed to cover school charges, except to the extent that the student has a demonstrable need for additional funds to pay for living expenses.

*Discussion:* We disagree with the commenters' concern that policies and procedures limiting the amount of Federal aid is harmful to students. As explained elsewhere in the rule, we believe it is critical that students have access to the Federal aid to which that are entitled, especially to cover necessities like food and housing. The final rule would allow institutions to provide counseling to students, but it would prevent institutions from establishing obstacles or inducements against borrowing as a matter of practice and policy.

*Changes:* None.

*Conditions for Provisionally Certified Institutions (§ 668.14(e))*

*Comments:* One commenter supported the Department's inclusion of a non-exhaustive list of conditions that the Department may apply to provisionally certified institutions. This commenter agreed that the list provides several tools that the Department can use in appropriate circumstances to protect students and safeguard the integrity of the title IV system. This commenter argued that it was important that the list be explicitly non exhaustive to preserve the Department's flexibility to impose additional conditions where appropriate to respond to the highly varied, situationally specific compliance issues faced by institutions seeking certification or recertification.

*Discussion:* We appreciate the commenter's support.

*Changes:* None.

*Comments:* One commenter cited recent research from the State Higher Education Executives Officers Association (SHEEO) to show the significant harm students suffer when their college closes suddenly. The commenter explained that the SHEEO report found that less than half of students impacted by a school closure ended up enrolling elsewhere and that less than half of those who did enroll completed their program of study. Given the significant threat that schools at risk of closure pose to students and taxpayers, the commenter supports the Department's proposal to set additional conditions on institutions deemed at risk of closure. However, the commenter is concerned that because closures can happen very rapidly, requiring schools at risk of closure to have just a teach-out plan is not enough. The commenter noted that teach-out plans require time, staff, and significant effort to convert into actual teach-out agreements, which are all things institutions at risk of closure often do not have at their disposal. Therefore, the commenter urged the Department to require institutions at risk of closure to submit teach-out agreements, and not only teach-out plans.

*Discussion:* The Department appreciates the commenter's support. As noted in the language, the Department has the discretion to request either a teach-out plan or agreement when we think that a provisionally certified institution is at risk of closure. This provides the flexibility to require either a plan or agreement depending on the level of concern.

*Changes:* None.

*Comments:* Many commenters asserted § 668.14(e) exceeds the Department's authority under section 498 of the HEA. These commenters claimed that although section 498(h) of the HEA provides the Department with limited authority to provisionally certify certain types of institutions, they argue that there is no corresponding authority for the Department to assert additional conditions on those institutions. These commenters argued that if Congress had intended to give the Department the authority to impose restrictive conditions on provisionally certified institutions, they would have made that clear in section 498(h) or in another provision of the HEA.

In conclusion, these commenters suggested that the Department clearly define its authority to apply conditions to provisionally certified institutions, specifically how the Department would determine what is necessary or appropriate for an institution, including the addition of criteria and a materiality standard. These commenters also would like the opportunity to converse with the Department about the imposition of such conditions, including appropriate appeal rights in the event of an adverse decision ensure this authority is used properly. These commenters claimed such checks on the Department's authority is particularly important if the Department's list of conditions remains non exhaustive.

*Discussion:* We disagree with the commenters. HEA section 498(h) provides that the Secretary may provisionally certify an institution's eligibility to participate in the Federal student aid programs. This provides for an alternative certification method compared to full certification. While the HEA does not provide for imposing conditions explicitly, it inherently provides the Secretary with flexibility in how the Department certifies those institutions where financial risks or administrative capability concerns are present. Furthermore, HEA section 498(h)(3) provides the Secretary with the authority to terminate an institution's participation at any time during a period of provisional certification if the Secretary determines the institution is unable to meet its responsibilities.

*Changes:* None.

*Comments:* While expressing disapproval of § 668.14(e), some commenters listed a few conditions they would like to see revised if the Department moves forward with this rule. Namely, the revision of limitations on the additions of new programs and locations and on the rate of growth of new enrollment by students, pointing out that these conditions may inhibit an institution's ability to provide high-quality educational programming or to secure funds sought by the Department to show financial responsibility, thereby making such conditions counterproductive for institutions and the Department. These commenters also claimed that the proposed conditions would impede the Department's goal of providing students with the best educational programs at the best possible prices by inhibiting an institution's ability to revise or introduce programs consistent with new trends and employer demands. These commenters highlighted that for career schools in particular, the ability to adjust and to adapt to new technologies is essential to prepare students for current job markets. These commenters are concerned that an institution could be prevented from making a necessary change to its programs due to Department imposed conditions, and students taking outdated programs may, unnecessarily, be at a competitive disadvantage when applying for jobs. These commenters emphasized that these concerns could lead to lower starting salaries or poorer career outcomes for students, both of which would be harmful to students, employers, and the taxpayers supporting title IV programs.

*Discussion:* The Department affirms the need for the ability to put conditions on a provisionally certified institution. A school in this position is exhibiting some concerning signs that merits additional oversight and work to protect taxpayer investments and students. We are concerned that allowing a risky institution to continue growing or adding new programs could increase the total amount of exposure to closed school discharges and result in greater disruptions for students. We believe addressing those concerns are more

important than the hypothetical benefits identified by commenters. The conditions laid out in this section would not prevent an institution from improving its existing programs, especially since the Department does not consider issues like curricula. The Department will consider which of these conditions are most appropriate for each provisionally certified institution it reviews.

*Changes:* None.

*Comments:* One commenter expressed concerns with the list of conditions for provisionally certified schools being prefaced with ''including, but not limited to'' as it would give the Department the discretion to impose virtually any condition it wants. The commenter stated this notion is further confirmed in the NPRM's preamble when it says the Department will add to this list of conditions at a later date. The commenter asserted that the potential conditions on provisionally certified schools will make it more difficult for institutions to enter transactions. This commenter emphasized that transactions often provide significant benefits to students as transaction partners can provide additional resources to improve or expand an institution's educational offerings. This commenter warned that if the proposed rules take effect, potential buyers or merger partners would be less likely to undergo transactions due to the risk that the institution, which would participate provisionally, would be subject to conditions that prohibit the very purpose of the transaction (*e.g.,* to invest in and expand educational offerings). Also, this commenter stated that the risk is exacerbated by the Department's non-exclusive list of conditions, as transaction partners would have to weigh the benefits of the transaction against unknown regulatory conditions. This commenter concluded that such uncertainty would make it very difficult for a rational business actor to enter a transaction.

This commenter is also concerned that the Department would, as a routine matter, impose all available conditions on all provisionally certified schools. This commenter believes the Department has recently started imposing growth restrictions as a consequence of all transactions when they were previously reserved for transactions involving buyers without one or two complete years of audited financial statements. This commenter agreed the Department should be required by regulation to identify a specific concern the Department has about a provisionally certified institution when imposing conditions on that institution. This commenter is concerned with the ease in which the Department could place an institution on provisional certification, coupled with the breadth of potential conditions and the risk that would be universally applied because the Department is essentially promulgating conditions that would be applicable to virtually the entire private postsecondary sector. This commenter urged the Department to revise the list of conditions that would be placed on provisionally certified schools by making the list exhaustive rather than non-exhaustive, requiring the Department to tailor conditions imposed on individual institutions and explain each condition and create a process for institutions to appeal the imposition of one or more conditions.

*Discussion:* The Department affirms the importance of a non-exhaustive list. Proper oversight of institutions of higher education necessitates flexibility to apply conditions that the Department deems critical to address specific issues identified at institutions. With thousands of institutions to oversee, it would not be possible to anticipate every single situation the Department might uncover that requires addressing. Providing the non-exhaustive list of conditions provides some important clarity to the field about the general types of conditions the Department would consider. This helps them know the most common types of conditions that might be employed.

With respect to growth conditions, the Department includes this condition currently when we are worried about the condition of the institution following a change in ownership. This growth condition is not applied universally. It is possible that the commenter is simply more aware of riskier changes in ownership.

*Changes:* None.

*Comments:* Two commenters raised concerns about proposed § 668.14(e)(9). One commenter raised concerns that the provision lacks sufficient definition, violates First Amendment protections, and grants the Secretary sweeping authority to impose burdensome restrictions on an institution that may interfere with the institution's ability to timely deliver necessary information to the student.

Two commenters raised concerns that this proposal would allow the Secretary to rely on mere allegations, which may include speculative and unreliable information without providing those institutions access to due process or testing before a judge or regulatory authority.

One of the commenters objected to basing this provision on misrepresentations instead of substantial misrepresentations. The commenter said this distinction is particularly important because only substantial misrepresentations are a ground for borrower defense, while a misrepresentation may be an inadvertent or immaterial statement.

Third, one of the commenters said it would be unreasonable for the Department to review all the marketing and other recruitment materials. They noted that any delay caused by reviewing these materials would harm the ability of students to make informed enrollment decisions and achieve academic success. Further, this commenter is concerned with the proposal being silent on what the Secretary would be reviewing in the materials submitted to them, which would open the door to the Department interfering with aspects of the materials that have no connection to delivering accurate, non-deceptive information to students.

The same commenter also said the provision runs afoul of well-established First Amendment jurisprudence designed to prevent unjustified government interference in commercial speech. The commenter noted that before commercial speech can be subject to prior restraint, the Supreme Court requires a determination that the speech is false or misleading. The commenter argued that the proposal ignores this requirement and instead mandates review of any alleged misrepresentation, failing to provide any determination that the speech is false or misleading. The commenter claimed this unfettered discretion is impermissible because virtually any amount of discretion beyond the merely ministerial is suspect and standards must be precise and objective. Moreover, the commenter stated that regulation of commercial speech must not be more extensive than is necessary to serve governmental interest. The commenter stated that this requires narrow, objective, and definite standards which are necessary to cure the problem of unbridled discretion characterizing prior restraints. The commenter noted that the absence of a final deadline constitutes a prior restraint of unlimited duration that would not pass constitutional muster.

*Discussion:* The Department agrees with the commenter in part. First, we agree that it would be prudent to align the standards for misrepresentation to what is under part 668, subpart F, as that provides the basis for why the Department would be concerned about the misleading nature of statements. That means clarifying this provision is

related to substantial misrepresentations.

Second, we agree that allegations are not a sufficient bar for applying this condition as it would not be consistent with how the Department has constructed other parts of this rule, such as the financial responsibility triggers. To address this, we have removed allegations and instead focused it on when an institution is found to have engaged in substantial misrepresentations.

We believe these two changes address the other concerns raised by the commenter. In this situation the Department would be responding directly to a finding that the institution engaged in substantial misrepresentations, aggressive and deceptive recruitment as defined under part 668, subpart R, or the incentive compensation rules, which are in § 668.14(b)(22). As the Department's review would be directly related to the issues identified we believe the nexus sought is clear.

With regard to the burden of submitting materials for review, the Department believes reviewing marketing and recruitment materials is a reasonable step for institutions in this situation. The schools affected by this provision will have been found to have engaged in violations directly related to their recruitment processes. Two of the three provisions also potentially have a direct connection to borrower defense to repayment, which means those actions may have resulted in approved discharges for borrowers that have to be reimbursed. When such situations occur, the Department must have confidence that the concerning behavior has been remedied. Receiving these materials allows the Department to ensure that the institution has corrected its issues. Absent such abilities, the Department may otherwise have to consider terminating the institutions if we are not confident it can recruit students without resorting to activity that runs afoul of the HEA and its regulations.

*Changes:* We have revised § 668.14(e)(9) to say, ''For an institution found to have engaged in substantial misrepresentations.''

*Comments:* See earlier comments related to the directed question for financial responsibility triggers in § 668.171.

*Discussion:* In the NPRM, the Department included a directed question asking about whether there should be a financial responsibility trigger in § 668.171 related to when an institution receives a civil investigative demand, subpoena, request for documents or information, or other formal or informal inquiry from any government entity (local, State, Tribal, Federal, or foreign). While the Department did not include a trigger for this issue in the regulatory text, it did include a reporting requirement for it in proposed § 668.171(f)(1)(iii).

In response to comments provided in the financial responsibility component of the regulations, the Department is persuaded that it would not be appropriate to include a trigger related to just the receipt of such requests as they may not ultimately result in actions by government authorities. Absent a trigger, it is thus not appropriate to have a reporting requirement for those items in the financial responsibility section. However, the Department does think having institutions report this information to us is important, as it can help identify issues that might need further monitoring. Accordingly, we have relocated the provision that was in § 668.171(f)(1)(iii) to a new § 668.14(e)(10). We believe that applying this to institutions that are at risk of closure is appropriate as the Department has in the past seen institutions suddenly close following years of government investigations at the State and Federal level.

In moving this provision, the Department also considered comments received on this language when it was a financial responsibility reporting requirement. In particular, we were persuaded by concerns that the language was too broad or confusing. For those reasons, we have removed informal requests from this language, since the standard for what is an informal request is not clear. We have also further clarified that the types of requests that would be reported should be related to marketing or recruitment of prospective students, the awarding of Federal financial aid for enrollment at the school, or the provision of educational services for which Federal aid is provided. We chose these areas because they are ones that relate to the possibility of borrower defense to repayment claims, which can be a source of liability, as well as the Department's rules on misrepresentation and aggressive and deceptive recruitment in part 668, subparts F and R. We think these are appropriate to request of institutions that are at risk of closing because we are concerned about potential liabilities from such institutions and whether they would be repaid.

*Changes:* We have added new § 668.14(e)(10) as described.

*Change in Ownership From For-Profit to Nonprofit Status (§ 668.14(f))*

*Comments:* Several commenters agreed with the Department's proposed § 668.14(f) and the rationale that the changes would allow for more rigorous oversight of institutions that as a group have had problematic conversions and that have been at heightened risk of harming students and taxpayers.

One commenter supported the change in ownership provisions included within certification procedures. This commenter cited a recent GAO report that suggested a former owner or other senior institutional official played an inappropriate insider role in the transaction in a third of the conversions it reviewed. The commenter asserted that given these findings, the requirements that any institution attempting a conversion must continue to comply with the 90/10 rule, comply with restrictions on advertising itself as a non-profit, and provide reporting on any relationship between a former owner and the new entity are vital protections.

*Discussion:* We thank commenters for their support.

*Changes:* None.

*Comments:* One commenter suggested that as the Department oversees schools changing from a for-profit to nonprofit status, that it also considers that such schools typically maintain high tuition when compared to State and community colleges that offer similar programs. This commenter believed that if the new regulations allow this, that loophole should be closed, or the new rules would be worthless.

*Discussion:* We are expressly prohibited from regulating postsecondary institutions' tuition. Currently the HEA regulates the amount of money an individual can receive, not how much an institution can charge.

*Changes:* None.

*Comments:* One commenter said they submitted extensive material and recommendations for the proposed GE regulations in subpart S and advised that institutions undergoing the conversion to a nonprofit status not be required to adhere to subpart S as proposed in § 668.14(f) until the Department revises its framework in accord with the commenter's GE recommendations.

*Discussion:* The Department addressed the comments related to GE in the separate final rule related to this topic. Conversions are an ongoing concern for the Department. We do not think it would be appropriate to delay our review of that issue, because it encompasses issues that go above and beyond items related to GE.

*Changes:* None.

*Comments:* One commenter argued against the proposed changes for schools undergoing a conversion to nonprofit status because they believed the rules the Department has already implemented with the final regulations of October 2022 ensure that nonprofit buyers are legitimate, and that requiring monitoring or prohibiting relationships with the institution's prior owner is sufficient. This commenter also asserted that the proposal to require the submission of two complete fiscal years of compliance audits and financial statements imposes an unnecessary waiting period on schools. The commenter is concerned that given that the Department has taken a long time, more than a year in some cases, to complete its review of audits and statements, that could mean that a school seeking approval would have to continue to comply with GE and 90/10 rules for several years after the purchase and conversion took place. Instead of allowing for such delays, the commenter suggested that once the Department has approved the transaction and related conversion, it should regulate the school as a legitimate nonprofit entity.

*Discussion:* We disagree with the commenters. The regulations here give the Department the ability to monitor risks associated with conversions from proprietary to nonprofit status, including but not limited to improper benefit to former owners of the institution or other affiliated individuals or entities. The requirement for continued 90/10 and GE reporting is included so that conversions cannot be used to circumvent those rules.

*Changes:* None.

*Comments:* Several commenters approved of the Department's rigorous review of changes in institutional ownership to convert to non-profit status in § 668.14(f) and (g). One commenter agreed that an enhanced review of conversion attempts, including, as noted in the NPRM, monitoring IRS-institution communications, would alert the Department to covert conversion attempts.

Another commenter supported the Department's proposal to set out PPA conditions for institutions converting from for-profit to nonprofit status, stating that this proposal will protect consumers and will strengthen the Department's ability to monitor converted for-profit institutions. This commenter agreed that the proposed rule would add important safeguards to the conversion process by requiring institutions seeking to convert from for-profit to nonprofit status to continue to meet all the of regulatory requirements applicable to for-profit colleges for a period of the later of years under the new ownership, or until the Department approves the institution's request to convert to nonprofit status. This commenter argued that in recent years, several for-profit colleges have purported to convert from a for-profit to a nonprofit, sometimes while maintaining financial arrangements that continue to benefit the previous for-profit owner, calling into doubt whether the nonprofit label really fits. This commenter also supported this provision requiring converting institutions to submit regular reports on agreements entered with a former owner of the institution or a related person or entity. This commenter asserted this would help the Department monitor and assess whether the converted nonprofit's arrangements with the former owner are appropriate and whether the institution is in fact operating as a nonprofit. This commenter also strongly supported the provision that would prohibit an institution from advertising that it operates a nonprofit until the Department approves the institution's request to convert to a nonprofit institution.

*Discussion:* We appreciate the commenters' support.

*Changes:* None.

*Comments:* One commenter argued that requiring extended compliance in § 668.14(f) and (g) will limit buyers who are legitimate nonprofit entities. This commenter noted that the Department's soon to be effective change in ownership regulations already address the Department's underlying concerns by ensuring nonprofit buyers are legitimate and monitoring or prohibiting (in some cases) relationships with the institution's prior owner. The commenter therefore believes there is no need for the Department to require a converting institution to comply with regulations applicable to for-profit schools after the Department has approved the conversion. As written, the commenter stated, converting institutions would have to continue to comply with the gainful employment and 90/10 rules for the later of the Department's approval of the conversion to nonprofit status and the Department's acceptance, review, and approval of financial statement and compliance audits covering two full fiscal years under the new nonprofit ownership. They mentioned that this second prong related to acceptance of financials could greatly extend the post-transaction compliance period. The commenter explained that for example an institution with a calendar year fiscal end undergoing a change in ownership and nonprofit conversion in March 2025 would not submit the second full fiscal year of financials to the Department until mid to late 2028. According to the commenter, the Department has recently taken an increasingly long time (including well over a year) to review and approve financial statement submissions, so it is very possible the institution would have to comply with the gainful employment and 90/10 rules until well into 2029 which would be over four years after the transaction occurred. The commenter stressed that the Department has already promulgated regulatory changes to ensure that converting institutions involve legitimate nonprofit entities so they are unclear why the Department feels such institutions should also comply with for-profit regulations for such an extended period of time. The commenter emphasized that this timeframe would make legitimate nonprofit entities reluctant to acquire for-profit institutions and ensure they operate on a nonprofit basis. The commenter recommends the Department revise the proposed regulatory language to require converting institutions comply with the gainful employment and 90/10 rules only until the Department has had a chance to approve the transaction and related conversion. The commenter argued that once the Department has made a determination that the institution and/or its new owner is a legitimate nonprofit entity, it should be regulated as such.

*Discussion:* The Department disagrees with the commenters. It is true that the regulations related to change in ownership that went into effect on July 1, 2023, addressed the process for reviewing attempts to convert from a for-profit to a nonprofit status in ways that will identify unacceptable continuing relationships with former owners. However, we also do not want institutions engaging in conversions solely as a means of evading accountability provisions that are specific to either for-profit institutions or certain programs they offer, such as the GE requirements. Accordingly, continuing to have an institution abide by GE and 90/10 requirements will reduce the likelihood that an institution converts solely to avoid accountability consequences. We note this approach is similar in concept to how the Department monitors an institution's finances more carefully for multiple years after a change in ownership occurs.

The Department disagrees with concerns about the timelines and their effect on nonprofits purchasing for-profit institutions. Keeping institutions subject to these provisions for a few more years serves as an added protection that institutions will be operating legitimately as nonprofits. Absent this condition the Department is concerned that institutions would simply convert to nonprofit status solely as a means of avoiding accountability and not because of a determination that that is the best way to serve students. We anticipate that institutions purchase institutions for long-term operation. Another few years of oversight is thus eminently reasonable.

*Changes:* None.

*Comments:* One commenter stated that the proposed changes for financial responsibility, the PPAs, and administrative capability are good steps forward because such proposals will prohibit known bad actors from simply setting up shop under a new name and continuing to access Federal funds. The commenter stated this final rule will allow more oversight of programs at risk of closing for failure to meet GE metrics. However, the commenter urged the Department to further mitigate the risk of institutions failing to meet Federal requirements and creating risky financial situations for students and taxpayers. The commenter suggested setting preemptive conditions for initially certified nonprofit institutions as well as for institutions that have undergone a change in ownership and seek to convert to nonprofit status. The commenter noted that these preemptive conditions would help the department monitor risks associated with some for-profit institution conversions, such as the risk of improper benefit to the school owners and affiliated people and entities.

*Discussion:* The Department appreciates the commenter's support. We will continue to review changes of ownership, including changes from for-profit to nonprofit status, and add conditions to institutions that we deem appropriate.

*Changes:* None.

**Ability To Benefit (ATB) (§§ 668.2, 668.32, 668.156, and 668.157)**

*General Support*

*Comments:* Many commenters supported the consensus language and noted that the regulations will add much needed clarity to the ATB and eligible career pathway program (ECPP) processes.

*Discussion:* We thank the commenters for their support.

*Changes:* None.

*General Opposition*

*Comments:* One commenter believed that ATB alternatives are flawed and do more harm than good for students. The commenter suggested that we eliminate ATB completely.

*Discussion:* ATB and ECPPs are authorized by the HEA. Furthermore, giving ATB students access to high-quality programs can help put them on a path to long-term success.

*Changes:* None.

*General Comments*

*Comments:* One commenter stated that the Department only indicated that it was going to regulate on § 668.156 the Approved State Process in the request for negotiator nominations yet went beyond that during rulemaking and regulated on eligible career pathway programs.[39]

*Discussion:* The Department announced topics for the rulemaking, that as the commenter mentions, included ATB. One of the three ATB alternatives is the Approved State Process (''State process'' or ''process'') which falls under § 668.156. Under that process, a non-high school graduate could receive title IV, HEA, Federal student aid for enrollment in an institution that is participating in the State process. In both the NPRM and these final regulations, we are establishing that those institutions that participate in the State process must meet the definition of an ECPP. For these reasons, we believe that ECPPs are tied to the ATB alternatives and are a logical outgrowth of the regulatory process to discuss how ECPPs are implemented and affect the State process.

*Changes:* None.

*Comments:* A few commenters noted that the data that the Department distributed during rulemaking showed that student enrollment through the ATB alternatives and ECPPs has decreased by over 50 percent since 2016. The commenters believed that increasing regulation on the State process could have a chilling effect on States and postsecondary institutions choosing to use the alternative.

*Discussion:* We disagree this regulation will have a chilling effect on States and postsecondary institutions choosing to use this ATB alternative. While the Department acknowledges that the State process has been used little to date, we also know there could be many reasons it has been underutilized. For instance, the data shows that overall undergraduate enrollment has fallen significantly over the last several years.[40] It also shows a greater share of high school students graduating with a high school diploma or equivalency, and fewer people enrolling in postsecondary education, due at least in part to, demographic trends that show there are fewer high-school age individuals in the country.[41]

Nonetheless, we believe the changes to the ATB and ECPP processes will encourage their responsible usage by providing much-needed clarity. For instance, the current success rate requirement meant States had to admit students through a State process without the use of title IV aid to obtain the data necessary for the application (using prior- or prior-prior-year data). If the combined success rate for all the participating institutions in a State process is not 95 percent of what high school graduates achieved, no postsecondary institution in the State can admit students through the State process. With these final regulations, we created an initial application that does not require a success rate calculation. That will allow States and participating institutions time to collect the data for the success rate calculation and still allow access to title IV aid. We have also separated the success rate calculation in the subsequent application to account for individual participating institutions as opposed to a combined success rate for all participating institutions in the State. Finally, we have lowered the success rate calculation to 85 percent of what high school graduates achieved, giving states a better chance of success in the State process, while simultaneously ensuring positive outcomes for students.

We have also added clarity to ECPPs with these final regulations. Since 2014 the Department has provided guidance on ECPPs through a series of Dear Colleague Letters (DCL GEN 16–09 and 15–09). The DCLs help postsecondary institutions to implement ECPPs, but there are currently no regulations or clear documentation standards for ECPPs. We believe this has led to inconsistency in ECPPs, labeling of programs as ECPPs that do not meet the statutory threshold and a lack of authority for the Department to intervene. With these final regulations, we are defining ECPPs and clarifying the documentation requirements for them as well. We believe this will also serve to increase States' participation in the State process.

[39] 86 FR 69607.

[40] The case for college: Promising solutions to reverse college enrollment declines | Brookings.

[41] *https://knocking.wiche.edu/report/.*

*Changes:* None.

*Definitions (§ 668.2)*

*Comments:* Several commenters stated the Department should use the exact definition of ''eligible career pathway programs'' from section 484 of the HEA because it is consistent across three statues: the HEA, the Workforce Innovation and Opportunity Act of 1998, as amended (WIOA) and the Perkins Career and Technical Education Act of 2006, as amended Perkins IV. The commenters believe that the regulations should mirror the exact language in statute to avoid unintended consequences, loopholes, conflicts, confusion, or misinterpretations.

*Discussion:* As discussed in the preamble to the proposed rule, the definition of an ECPP is in large part a duplication of the statutory definition found in HEA section 484(d)(2) and has the same effect. The Department has only excluded the statutory language that reads ''(referred to individually in this chapter as an 'apprenticeship,' except in section 171).'' [42] That exclusion has no impact on the definition's meaning and does not affect its alignment and consistency with the statutory definition.

*Changes:* None.

*Student Eligibility—General (§ 668.32)*

*Comments:* One commenter recommended that the Department communicate that technical changes made to § 668.32 were not done as a benefit to those enrolled prior to 2012, but rather as an unfortunate fact that those enrolled two decades ago were not required to experience program design and delivery innovations that focus intentionally on supporting their access and success. The commenter believed that since 2015 the Department has communicated the idea that pre-2012 ATB requirements were easier and better than new ATB and that these legacy students had the better option. The commenter also requested that the Department reveal the numbers of potential participants who could utilize the legacy provision.

*Discussion:* The changes made to § 668.32 are technical, required by statute and were explained in 2012 through DCL GEN 12–09.[43] The Department does not view the legacy requirements in statute as fortunate or unfortunate, but rather a fact of the law. The Department is unable to know the potential number of participants that could use the legacy provision.

*Changes:* None.

*Approved State Process (§ 668.156)*

*Comments:* One commenter requested that the Department add the six services that participating institutions were required to offer each ATB student back to the final regulations.

*Discussion:* The six services were introduced in 1994—20 years prior to the introduction of ECPPs. Most ATB students that enroll and receive title IV aid will be required to enroll in an ECPP. The services required under the previous regulation are somewhat redundant to the requirements of an ECPP and they meet the same goals. Please see the chart below for a comparison.

| Previous services required under the State process | Requirements of ECPPs |
|---|---|
| * Orientation regarding the institution's academic standards and requirements, and student rights.<br>* Assessment of each student's existing capabilities through means other than a single standardized test.<br>* Tutoring in basic verbal and quantitative skills, if appropriate.<br>* Assistance in developing educational goals.<br>* Counseling, including counseling regarding the appropriate class level for that student given the student's individual's capabilities.<br>* Follow-up by teachers and counselors regarding the student's classroom performance and satisfactory progress toward program completion. | * Aligns with the skill needs of industries in the economy of the State or regional economy involved.<br>* Prepares an individual to be successful in any of a full range of secondary or postsecondary education options, including apprenticeships registered under the Act of August 16, 1937.<br>* Includes counseling to support an individual in achieving the individual's education and career goals.<br>* Includes, as appropriate, education offered concurrently with and in the same context as workforce preparation activities and training for a specific occupation or occupational Cluster.<br>* Organizes education, training, and other services to meet the needs of an individual in a manner that accelerates the educational and career advancement of the individual to the extent practicable.<br>* Enables an individual to attain a secondary school diploma or its recognized equivalent, and at least 1 recognized postsecondary credential.<br>* Helps an individual enter or advance within a specific occupation or occupational cluster. |

*Changes:* None.

*Comments:* One commenter requested that the Department increase the initial period under § 668.156(b) from two to three years.

*Discussion:* We believe that two years is adequate time for the State to gather the data necessary to determine a success rate (outcome metric for the ECPPs) to reapply to the Department. If a participating institution does not enroll any ATB students through its State process under § 668.156(g)(2), we will grant the State a one-year extension to its initial approval.

A State begins its initial period after its first application has been approved by the Department. During the initial two-year period, the participating institutions will not be subject to outcomes metrics about their ECPPs. Instead, a participating institution will be required to demonstrate that it does not have a withdrawal rate of over 33 percent and there will be a cap on enrollment of ATB students in ECPPs. In the subsequent application (the application to be submitted two years after the initial application was submitted), the participating institution will be required to calculate a success rate. The success rate is a metric directly related to the ECPPs the participating institution offers.

As mentioned in the NPRM, we believe, that the two-year initial period is a necessary guardrail against the rapid expansion of ECPPs through the State process. These protections are particularly important because as mentioned above the required success

[42] As we observed in the NPRM, the statute's reference to ''section 171'' may have been intended as a reference to section 171 of the Workforce Innovation and Opportunity Act, Public Law 113–128, which is in section 3226 of title 29, Labor. Neither the National Apprenticeship Act nor the HEA contains a section 171.

[43] *https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2012-06-28/gen-12-09-subjecttitle-iv-eligibility-students-without-valid-high-school-diploma.*

metric is no longer included at the initial application of a State process.

*Changes:* None.

*Comments:* One commenter said that we should exempt States with processes approved prior to the effective date of this final regulation from the initial two-year period under proposed § 668.156(b).

*Discussion:* We believe it is clear that § 668.156(b) relates solely to a State applying for its first approval. States that had an approved process before the effective date of these regulations are not subject to the initial 2-year period. Those States will be subject to the new requirements under § 668.156(e) for the subsequent application.

*Changes:* None.

*Comments:* Many commenters requested that the Department remove the enrollment cap in the State process of no more than 25 ATB students or one percent of enrollment in an ECPP at each participating institution during the initial two-year period. These commenters believe that the cap will hamper innovation, restrict funding, is arbitrary, is too small to get an accurate data for the success rate calculation, and will disincentivize the use of the State process option.

*Discussion:* We disagree with the commenters' assertions about the enrollment cap. First, the enrollment cap is not arbitrary. As we stated in the NPRM, the enrollment cap is intended to serve as a guardrail against the rapid expansion of ECPPs during a period when there is no required success metric at the initial application of a State process. Additionally, although the Department started with an enrollment cap of 1 percent, it was a committee member, concerned about its impact on smaller institutions, who suggested that the cap be established as the greater of one percent of enrollment or 25 students at each participating institution. The Committee adopted that committee member's suggestion, and the Department incorporated it into these regulations.

This enrollment cap will not disincentivize the use of the State process option. As noted in this section, the clarifying amendments to these regulations, including a lower success rate of 85 percent, is likely to increase participation in the State process. Further the enrollment cap is only for a two-year period, that will be lifted upon successful reapplication to the Department.

*Changes:* None.

*Comments:* One commenter asked multiple questions about the definition of the enrollment cap in § 668.156(b)(2). They asked whether the Department could enforce this requirement and whether the cap will only apply to the initial two-year period. They also asked whether the ''cap'' is a limitation on enrollment for postsecondary institutions that offer ECPPs or a cap on the number of ATB students who are eligible to receive title IV aid through the State process in the initial two-year period. Finally, they asked about the Department's statutory authority to institute a cap on the number of students who are eligible to receive aid under the ATB State process and whether the Department has the authority to limit access to title IV aid to eligible students.

*Discussion:* In terms of enforcement, the cap is a part of the State process, so enforcement of the cap is the State's responsibility. If the State is unable to enforce requirements in the regulation, the State may wish to take more time before applying to the Department to resolve internal control issues and may wish to apply later for an approved State process.

The cap is the limit on the number of ATB students at each participating institution who are eligible to receive title IV aid through the State process. It applies solely for the initial two-year period. It no longer applies once the subsequent application is approved.

The Department's authority for the enrollment cap stems from section 484(d)(1)(A)(ii) of the HEA, which gives the Secretary authority to determine the grounds for approval or disapproval of a State process.

*Changes:* None.

*Comments:* Several commenters requested lowering the success rate under § 668.156(e)(1) from 85 to 75 percent. These commenters believed that 75 percent would be a more reasonable target and help to encourage States to submit an application to the Department for the State process ATB alternative.

*Discussion:* Like the commenters, the Department seeks to encourage participation in the State process, provided there are appropriate protections in place for students. The negotiated rulemaking committee reached consensus on the 85 percent threshold after careful discussion, and we are not persuaded that the Department should deviate from the consensus language.

We believe that changing the requirement from a success rate of 95 percent to 75 percent would unduly compromise student protections built into this alternative. We believe a reduction to 85 percent best supports the Department's interests in increasing State participation in the State process, while simultaneously ensuring positive outcomes for students.

In arriving at the 85 percent success rate, the Department considered relevant data on the use of the State process under the current regulations. Many States have not availed themselves of this alternative, despite it providing a pathway for non-high school graduates to gain access to title IV aid. Although the State process was authorized under section 484 of the HEA in 1994, the Department did not receive its first application until 2019. As of August 2023, only six States have applied to the Department to have a State process approved. In the approved States, student enrollment through the State process has been slow and relatively low. Several States reported single digit enrollment after years of Department approval.

We understand that States may be hesitant to apply, in part, due to the 95 percent success rate requirement. Given the modest enrollment figures, the bar may be set too high for a State to risk investing resources in the process only to have its application denied. For example, under the 95 percent success rate requirement, if the high school graduate success rate was 80 percent based on 10,000 students, but the success rate for non-high school graduates was 70 percent based on 10 graduates in the State process, the overall success rate would be 87.5 percent and that State would fail, meaning that every participating institution would be prohibited from awarding title IV aid to ATB students admitted through the State process. However, that State would meet an 85 percent success rate. Additionally, under these final regulations, the success rate of those participating institutions would now be calculated individually, and not collectively as a State. This would mean individual participating institutions could pass the 85 percent success rate calculation, even if other participating institutions in their State did not.

As the Department seeks to increase participation in the State process, it must also ensure that the State process results in positive outcomes for non-high school graduate students. The Department believes that lowering the success rate to 85 percent and applying it to participating schools individually, will best balance these interests, while encouraging States to apply for the State process and expand postsecondary options for students. We believe that a success rate below 85 percent would compromise quality and program integrity.

Despite these changes to the success rate, we believe it is important to note the 95 percent success rate served the Department's interest in ensuring that the State process offers a postsecondary pathway to students who are, non-high school graduates. Although we have determined to reduce the required success rate from 95 percent to 85 percent to help encourage States to establish these pathways, and determined that, even with such a reduction, there are adequate protections for students, ultimately, we believe that ensuring these programs create positive student outcomes is more important than simply increasing the number of participating States and, for that reason, favor a more rigorous success rate requirement.

*Changes:* None.

*Comments:* One commenter said that the 85 percent success rate is not an appropriate outcome indicator for the State process because they believed that quality should not be measured by the financial outcomes of program completers.

*Discussion:* The success rate calculation does not take financial outcomes into account. The success rate calculation is a persistence metric. Section 484(d)(1)(A)(ii) of the HEA requires the Department to consider the effectiveness of the State process in enabling students without a high school diploma to benefit from the ECPP. Since 1994, the Department has implemented this requirement by assessing the effectiveness of a State process through a success rate, which is a persistence metric and not an earnings metric.

*Changes:* None.

*Comments:* One commenter noted the Department proposed two new reporting requirements for the State process ATB alternative, yet there is no such reporting required under the ATB test, six credit-hour, or 225 clock-hour alternatives. The commenter contended that this could discourage participation in the State process alternative.

*Discussion:* These reporting requirements related to the State process are necessary for the Department to discharge its statutory obligations under section 484 of the HEA.[44] Section 484(d)(1)(A)(ii) requires the Secretary to consider the effectiveness of the State process in enabling students without secondary school diplomas or the equivalent thereof to benefit from the instruction offered by institutions utilizing such process, and also take into account the cultural diversity, economic circumstances, and educational preparation of the populations served by the institutions. Through the additional reporting requirements in § 668.156(e)(3), States will provide the Secretary the information necessary to meet this statutory obligation. Specifically, § 668.156(e)(3) requires States to report information on the enrollment and success of participating students by eligible career pathway program and by race, gender, age, economic circumstances, and educational attainment, to the extent available. We have also added under § 668.156(h) that a State must submit reports on its process, according to deadlines and procedures that we publish in the **Federal Register**.

*Changes:* None.

*Comments:* Several commenters asked the Department to add linguistic status to the proposed reporting under § 668.156(e)(3). One commenter stated that knowing whether ATB supports new Americans is imperative for the future of not only many new Americans, but also the future labor market. The commenter recommended that we require reporting on other languages that are spoken at home and the self-reported English proficiency of students.

*Discussion:* We appreciate the commenters' suggestion. We will specify the data elements that must be reported in a notice published in the **Federal Register**. We will consider including linguistic status.

*Changes:* None.

*Comments:* One commenter asked the Department to broaden the Department's discretion under § 668.156(j)(1)(iii), which provides that the Department may lower the success rate to 75 percent (from the standard 85 percent) for two years if more than 50 percent of the participating institutions in the State fail to reach 85 percent. The commenter suggested that the Department should have the discretion to determine an appropriate success rate in circumstances that may extend beyond two years.

*Discussion:* Under § 668.156(j)(1)(iii), the Department may lower the success rate required under § 668.156(e)(1) from 85 to 75 percent if 50 percent or more participating institutions across all States do not meet the success rate in a given year. As discussed elsewhere in this document, through these regulations, the Department is lowering the otherwise applicable success rate from 95 to 85 percent. Given this easing of the requirement, we believe that two years will provide participating institutions sufficient time to comply with the regulations.

We also believe that having a standardized rate (75 percent) will help program integrity, data efficacy, and ensures consistency. We choose two years because that is the length of the initial approval period under § 668.156(b). We choose 75 percent, because we believe that is a reasonable exception and reduction from the 85 percent success rate requirement.

Under § 668.156(e)(1), each participating institution will calculate its own success rate. Previously, there was one collective success rate calculated for all participating institutions in the State. If flexibilities under § 668.156(j)(1)(iii) are invoked and a participating institution, or group of institutions, continues to have a success rate of less than 75 percent for more than two years, the State will need to remove the specific institution(s) from their State process, or risk revocation of its approval by the Department.

*Changes:* None.

*Eligible Career Pathway Program (§ 668.157)*

*Comments:* The Department received many comments requesting that we reconsider requiring the Department to approve nearly all ECPPs for ATB use. Commenters were concerned that this is a dramatic departure from the Department's current practice, and this could further discourage use of ATB and ECPPs.

*Discussion:* Currently, we do not approve individual career pathway programs for ATB use and have provided minimal guidance on documentation requirements. The Department is aware of compliance and program integrity concerns with programs that claim to offer an ECPP but do not offer all required components. While the Department believes that many institutions have made a good-faith effort to comply with the statutory definition, we believe it is necessary to establish an approval process in regulation to ensure program quality. Approving ECPPs would address these issues and allow ATB students served by ECPPs to receive better educational opportunities.

The Department, however, understands the concerns voiced through public comment and is persuaded based on the data released during negotiated rulemaking[45] that approving almost every ECPP for ATB use could add too much regulatory and

[44] 20 U.S.C. 1091.

[45] *www2.ed.gov/policy/highered/reg/hearulemaking/2021/analysisofatbusage.pdf. www2.ed.gov/policy/highered/reg/hearulemaking/2021/atbusagedata.xlsx.*

operational burden for postsecondary institutions.

In the final rule, the Department balances the consumer protection and burden concerns by instead limiting the Department approval to the first ECPP offered by an institution for ATB students. The Department will also maintain the authority to review ECPPs beyond the first one if the Secretary deems it necessary. This approach is similar to the Department's approval of prison education programs in part 668, subpart P, and direct assessment programs in § 668.10. If an institution already offers an ECPP, the Department will require the institution to apply for and obtain affirmative verification that the ECPP meets the standards as outlined in these new regulations in order to enroll students in the ECPP through ATB. The postsecondary institution will also need to affirm that any other ECPPs that the school offers for ATB use also comply with the new regulatory standards and documentation requirements. If the ECPP fails to meet the new standards as outlined in regulation on or after the effective date, then the ECPP will lose eligibility for ATB students who wish to use title IV aid to enroll, and the Department reserves the authority to evaluate other eligible ECPPs that enroll ATB students (if any) at the postsecondary institution. Please note that if an ECPP loses ATB title IV eligibility that does not mean that it loses overall title IV program eligibility, it just means that an ATB student could not receive title IV aid to enroll in the program. Only students with a high school diploma or its recognized equivalent could receive title IV aid to enroll in an eligible program that has lost its ECPP designation.

If the institution does not offer an ECPP, then the institution will be required to apply to the Department and have its first ECPP approved by the Department prior to offering title IV aid to enrolled students in the ECPP through ATB. The postsecondary institution will also need to affirm that any and all other ECPPs that the school offers to ATB students also comply with the new regulatory standards and documentation requirements.

Through this approach the Department will know who is offering an ECPP through ATB and that at least the first offering meets requirements.

*Changes:* The Department has amended § 668.157(b) and (c) to require the approval of one ECPP at each participating institution. If an institution already offers an ECPP for ATB use, it must apply for and obtain affirmative verification that the ECPP meets the regulatory standards in order to continue enrolling ATB students in the ECPP and affirm that any other ECPPs that it offers to ATB students also comply with the standards and documentation requirements.

The Department has also omitted § 668.156(a)(3), which would have required the Department to verify a sample of ECPPs that enroll ATB students through the State process alternative, as noted above, one ECPP will be approved per postsecondary institution, including those that enroll students through the State process.

*Comments:* Several commenters requested that the Department detail the ECPP approval process in regulation. One commenter further suggested that the Department should delay final ATB regulations until it has done so.

*Discussion:* The Department declines to regulate on the approval process. Regulating the process reduces the Department's ability to quickly adapt the process to better meet the needs of ATB. However, we will release sub-regulatory guidance on ATB and ECPPs as needed.

The Department will release an ATB ECPP application form prior to the effective date of the regulations. All information collections are required to go through an approval process that includes two separate timeframes for the public to comment. Therefore, there will be additional public feedback received through that process.

*Changes:* None.

*Comments:* Several commenters asked whether institutions could continue offering eligible ECPPs while the approval process is ongoing. The commenters also asked if the Department would work with institutions if an ECPP is not approved for ATB use and expressed concern about whether institutions would have sufficient funding and staff to complete the approval process.

*Discussion:* Postsecondary institutions can continue to offer eligible ECPPs to ATB students while a Department review is pending. The Department will release information about the approval process through sub-regulatory guidance. The Department will not hold a postsecondary institution liable if its ECPP does not meet the documentation standards in these new regulations prior to July 1, 2024. The Department will however continue to hold a postsecondary institution liable if we determine that the postsecondary institution did not make a good-faith effort (as outlined in the seventh question in DCL GEN 16–09) to comply with the statutory definition of an ECPP which has been in law since 2014. The Department will work with postsecondary institutions when issues arise regarding the continued title IV eligibility of their ECPP(s); however, ECPPs that fail to meet the regulatory definition on or after the effective date of these regulations may lose title IV eligibility for ATB students for failure to comply. We do not believe that the approval requirements are unduly burdensome and note, regarding the commenters' concerns about funding and staff, that the Department is amending the regulations to require the approval of one ECPP as opposed to almost all ECPPs offered for ATB, so the burden to complete the approval process will be limited.

*Changes:* None.

*Comments:* One commenter stated that the Department should publish on its website the basis for its conclusions that an ECPP submitted by a postsecondary institution does or does not comply with the HEA and Department ATB regulations for all programs it reviews to show that the Department is not using its review process to target and eliminate proprietary institution programs.

A few commenters believed that the Department's reference to curtailing bad actors in the NPRM was a veiled reference to ECPPs at proprietary institutions.

*Discussion:* The standards in the ATB and ECPP regulations apply to all postsecondary institutions and the Department will continue to review all ECPPs pre-July 1, 2024, based on the statute and post July 1, 2024, based on the statute and regulations. When an ECPP is denied, that institution will be informed of the reason for the denial. If we observe trends or common reasons for denials, the Department will consider issuing additional information, but we do not plan to publish individual denials. Inquirers may be able to file a Freedom of Information Act requested for that information.

*Changes:* None.

*Comments:* One commenter noted that the Department's documentation requirement under § 668.157(a)(1)(iii) is redundant to the requirement under § 668.157(a)(1)(ii) and that the Department should change § 668.157(a)(1)(iii) to reference integrated education and training as defined in 34 CFR 463.35.

*Discussion:* The Department does not believe the documentation requirements are redundant. Documentation requirements under § 668.157(a)(1)(ii) required an institution to demonstrate that a student enrolled in an ECPP receives adult education and literacy services under § 463.30. The adult

education and literacy services under § 463.30 include eight different programs activities, and services, and the regulatory text uses an ''or'' and not ''and'', meaning that the services do not necessarily have to include ''workforce preparation activities'' in § 463.30(g) as long as one other service under § 463.30(a) through (f) or (h) is incorporated. We believe that the reference to workforce preparation activities under § 668.157(a)(1)(iii) is important to maintain in the case that workforce preparation activities are not included in the ECPP under § 668.157(a)(1)(ii). Furthermore, our regulations specify the definition of ''workforce preparation activities'' as defined in § 463.34.

We do not believe that it is necessary to reference § 463.35 because the requirements under § 668.157(a)(5) essentially uses the definition of integrated education and training.

*Changes:* None.

*Comments:* A few commenters recommended that the Department change the reference to secondary education in § 668.157(a)(5) to adult education.

*Discussion:* The Department declines to make this change because the commenter did not provide sufficient rationale. However, we are going to delete the word ''secondary'' to align with the language of the statute, which references ''education'' broadly. Section 484(d)(2)(D) of the HEA states that the ECPP must include, as appropriate, education offered concurrently with and in the same context as workforce preparation activities and training for a specific occupation or occupational cluster.

*Changes:* We have removed the word ''secondary'' from § 668.157(a)(5).

*Comments:* One commenter asked the Department to provide more detail on academic and career services in § 668.157(a)(4) and workforce preparation activities and training in § 668.157(a)(5). The commenter contended that the Department has not established baseline requirements and that it is unclear where, how, or when the Department will create them.

*Discussion:* The Department declines to further change § 668.157. We established baseline requirements by requiring that postsecondary institutions maintain specific documentation that will validate their ECPPs for ATB use upon request of the Department. As stated throughout this final rule, previously the Department did not have ECPP approval requirements for ATB. The Department does not seek to regulate in a way that will curtail flexibility in a postsecondary institution's ECPP. However, the Department expects the institution to be able to document its position that the ECPP meets the HEA and regulation definition of an ECPP.

The Department intends to release sub-regulatory guidance on this topic.

*Changes:* None.

**Executive Orders 12866 and 13563**

**Regulatory Impact Analysis**

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866, as amended by Executive Order 14094, defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $200 million or more (as of 2023 but adjusted every 3 years by that 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;

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise legal or policy issues for which centralized review would meaningfully further the President's priorities, or the principles stated in the Executive Order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

This final regulatory action is not anticipated to have an annual effect on the economy of more than $200 million. The Department has not historically estimated that there is a significant budget impact on changes to Financial Responsibility, Administrative Capability, Certification Procedures, and ATB, and anticipates that this will continue in the final rule. The Financial Responsibility regulations would be the most likely to result in transfers if the Department collects on a letter of credit or funds in an escrow account to offset the costs of unpaid liabilities or discharges related to closed schools or borrower defense to repayment. However, the Department has not consistently had significant financial protection to cover those types of liabilities, so we have taken a more conservative approach to not assume any savings from these provisions. Potential effects of collecting on greater amounts of financial protection are instead captured as a sensitivity analysis.

However, the issues in this final regulation are significant because they raise legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive Order. Therefore, this regulation is subject to review by OMB under section 3(f)(1) of Executive Order 12866 (as amended by Executive Order 14094). We therefore have assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action and have determined that the benefits will justify the costs.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866 (as amended by Executive Order 14094). To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying

changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing these regulations only on a reasoned determination that their benefits will justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action will not unduly interfere with State, local, territorial, or Tribal governments in the exercise of their governmental functions.

In this regulatory impact analysis, we discuss the need for regulatory action, summarize the key changes from the NPRM to the final rule, respond to comments related to the RIA in the NPRM, discuss the potential costs and benefits, estimate the net budget impacts and paperwork burden as required by the Paperwork Reduction Act, and discuss regulatory alternatives we considered.

The regulatory actions related to Financial Responsibility, Administrative Capability, and Certification Procedures provide benefits to the Department by strengthening our ability to conduct more proactive and real-time oversight of institutions of higher education. Specifically, under the Financial Responsibility regulations, the Department can more easily obtain financial protection to offset the cost of discharges when an institution closes or engages in behavior that results in approved defense to repayment claims. The changes to the Certification Procedures rules allow the Department more flexibility to increase its scrutiny of institutions that exhibit concerning signs, including by placing them on provisional status or adding conditions to their PPA. For Administrative Capability, we are expanding the requirements to address additional areas of concern that could indicate severe or systemic administrative issues in properly managing the title IV, HEA programs, such as failing to provide adequate financial aid counseling including clear and accurate communications or adequate career services. Enhanced oversight ability better protects taxpayers and helps students by dissuading institutions from engaging in overly risky behavior and encouraging institutions to make improvements. These benefits come at the expense of some added costs for institutions to acquire additional financial protection or potentially shift their behavior. The Department believes these benefits of improved accountability outweigh those costs. There could also be limited circumstances in which an institution that was determined to lack financial responsibility and required to provide financial protection could choose to cease participating in the Federal aid programs instead of providing the required financial protection. The Department believes this would be most likely to occur in a situation in which the institution was already facing severe financial instability and on the verge of abrupt closure. In such a situation, there could be transfers from the Department to borrowers that occur in the form of a closed school loan discharge, though it is possible that the amount of such transfers is smaller than what it would otherwise be as the institution would not be operating for as long a period as it would have without the request for additional financial protection. However, the added triggers are intended to catch instances of potential financial instability far enough in advance to avoid an abrupt closure.

Finally, the ATB regulations provide much-needed clarity on the process for reviewing and approving State applications to offer a pathway into title IV, HEA aid for individuals who do not have a high school diploma or its recognized equivalent. Although States will likely incur costs in pursuing the required application, for this population of students, the regulations provide students with more opportunities for success by facilitating States' creation and expansion of options.

**1. Congressional Review Act Designation**

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated that this rule is covered under 5 U.S.C. 804(2) and (3).

**2. Need for Regulatory Action**

Institutions of higher education receive tens of billions of dollars in Federal assistance for postsecondary education each year. In most cases, these grants and loans provided to students help them achieve their educational dreams, unlocking opportunities they would not otherwise be able to afford. Unfortunately, however, there are also far too many situations in which institutions take advantage of borrowers instead of serving them well. Over the past several years, the Department has approved around $13.6 billion in student loan discharges for borrowers who attended institutions that engaged in a range of misrepresentations, including lying about job placement rates, the employment opportunities available to graduates, whether programs had certain necessary approvals for graduates to be licensed or certified to work in occupations related to the training, and the ability to transfer credits. Almost all these discharges were related to conduct by institutions that are no longer operating and who closed prior to the Department obtaining sufficient financial protection to offset the losses to taxpayers from granting these discharges.

Relatedly, the Department also regularly encounters situations when institutions close with minimal to no warning for students. A study of college closures from July 2004 to June 2020 by the State Higher Education Executive Officers (SHEEO) Association found that 70 percent of students affected by a closure experienced a sudden closure.[46] A larger share of students affected by closures received Pell Grants than those who attended open institutions. Sudden closures leave behind numerous problems. For students, they often have no approved teach-out options, giving them minimal direction on where they could finish their education. They also often have trouble accessing necessary records, and in many cases, do not continue their postsecondary education anywhere. The SHEEO report confirms this outcome, noting significantly negative correlations between sudden closures and either re-enrollment or completion compared to students who experienced an orderly closure. SHEEO found the re-enrollment rate for those in an orderly closure was nearly 30 percentage points higher than those affected by a sudden closure (70 percent versus 42 percent). Sudden closures are also costly for the government, as the Department rarely has sufficient financial protection on hand to offset the losses to the taxpayer from the closed school loan discharges that are a critical benefit for giving students a fresh start on their debt.

By contrast, the individuals and entities that managed, administered, or owned the institutions prior to their closure often faced minimal consequences for their actions beyond the loss of ongoing revenue from the title IV programs. To date, these entities have rarely paid liabilities from the costs of discharges that are not covered by any financial protection on hand. Companies and individuals have been able to own or operate other institutions

[46] *sheeo.org/wp-content/uploads/2022/11/SHEEO_NSCRC_CollegeClosures_Report1.pdf.*

even after sudden closures or significant evidence of misconduct.

The final regulations improve the Department's ability to take proactive steps to mitigate the harm from sudden closures and institutional misconduct. Changes to the financial responsibility regulations, for instance, allow the Department to seek financial protection as soon as certain warning signs occur. Doing so allows the Department to have more funds on hand to offset taxpayer losses if misconduct or closures occur. It will also discourage institutions from engaging in certain behaviors that are likely to result in a demand for financial protection. These rules recognize that while the exact timing of a closure may be sudden and unexpected, the months and years leading up to that point often involve several signs that indicate a weakening financial situation. Taking swifter and more proactive action when those indicators occur will ultimately leave students and taxpayers in a stronger position.

The changes to certification procedures provide similar benefits with respect to the conditions placed on institutions as they operate in the title IV programs. Historically, many problematic institutions have maintained full certification status up to the date they closed suddenly. The final rule strengthens the ability of the Department to place additional conditions on institutions, including more situations where an institution can become provisionally certified. The rules also make it easier for the Department to demand a teach-out plan or agreement. This is a critical tool for ensuring that borrowers have clear options for how they could continue their education in the event of a closure.

The certification procedures rules include several protections for students that will limit situations in which credits paid for with title IV funds cannot be used to deliver the benefits sought from an educational program. Requiring institutions to certify that they have the necessary approvals for program graduates to obtain licensure or certification ensures students are not taking on loan debt or using up their financial aid eligibility for programs where they legally will not be able to work in their desired field. Similarly, restrictions on when institutions can withhold transcripts due to unpaid balances will ensure students can make use of credits paid for in whole or in part by taxpayer money.

The administrative capability provisions in this final rule accomplish three goals. First, they identify additional areas where the Department has seen concerning activity by institutions, often through program reviews, that leads to loan discharges tied to misconduct, false certification discharges, or the establishment of other liabilities. This is addressed through areas like clearer expectations for career services and verifying high school diplomas. Second, the rules strengthen the Department's ability to hold institutions accountable when they employ someone who has a history of concerning past conduct in the aid programs. Third, the rules address areas where the Department has seen institutional conduct undercut the ability of students to successfully use their financial aid dollars. For instance, student aid offers that have confusing or misleading terminology or fail to clearly differentiate between what is a grant or a loan may lead students into taking on debt they did not intend to incur or not be able to fully understand the relative costs of different educational options.

Finally, the ATB provisions bring much-needed clarity to help States stand up educational opportunities for students who do not have a recognized high school diploma or its equivalent. That will help States looking to create more of these programs and lead to the expansion of ways for students to seek postsecondary education.

### 3. Summary of Comments and Changes From the NPRM

TABLE 3.1—SUMMARY OF KEY CHANGES IN THE FINAL REGULATIONS

| Provision | Regulatory section | Description of final provision |
|---|---|---|
| **Financial Responsibility** | | |
| Disclosures of related party transactions | § 668.23(d)(1) | Require management to add a note to the financial statements disclosing if there are no related party transactions for the year. |
| Disclosures on amounts spent on recruiting activities, advertising, and other pre-enrollment expenditures. | § 668.23(d)(5) | Delete a proposal in the NPRM to require an institution to disclose in a footnote to its financial statement audit the dollar amounts it has spent in the preceding fiscal year on recruiting activities, advertising, and other pre-enrollment expenditures. |
| Effect of discretionary triggers on an institution's finances. | § 668.171(b)(3)(vi), (d)(5), and (f)(3)(i)(C) and 668.175(f)(1)(i). | Replace the word ''material'' with ''significant'' as it describes both an adverse effect on an institution or the financial condition of an institution from a discretionary trigger. And removing the reference to a mandatory trigger in § 668.171(f)(3)(i)(C). |
| Mandatory Triggers—Legal and administrative actions. | § 668.171(c)(2)(i)(D) | State that for institutions subject to conditions as described, the trigger will be activated only when the conditions result in a recalculated composite score of less than 1.0 as recalculated by the Department according to § 668.171(e). The timeframe for this trigger is through the end of the second full fiscal year after the change in ownership has occurred. |
| Mandatory Triggers—Teach-out plans or agreements. | § 668.171(c)(2)(iv) | State that the mandatory trigger is activated if the institution is required to submit a teach-out plan or agreement for reasons related to financial concerns. |
| Discretionary Triggers—Teach-out plans or agreements. | § 668.171(d)(13) | Add a discretionary trigger for when an institution is required to submit any teach-out plan or agreement by a State, the Department or another Federal agency, an accrediting agency or other oversight body and which is not covered by § 668.171(c)(2)(iv). |
| Mandatory Triggers—State actions | § 668.171(c)(2)(v) | Remove the mandatory trigger dealing with State actions from § 668.171(c)(2)(v) and § 668.171(c)(2)(v) is reserved. |
| Discretionary Triggers—State actions | § 668.171(d)(9) | Amend the discretionary trigger at § 668.171(d)(9) to include when an institution is cited by a State licensing or authorizing agency and the State or agency for not meeting requirements and is provided notice that the State or agency will withdraw or terminate the institution's licensure or authorization if the institution does not come into compliance with that requirement. |
| Mandatory Triggers—Loss of eligibility | § 668.171(c)(2)(ix) | Remove the mandatory trigger dealing an institution's loss of eligibility for another Federal educational assistance program from § 668.171(c)(2)(ix) and § 668.171(c)(2)(ix) is reserved. |

TABLE 3.1—SUMMARY OF KEY CHANGES IN THE FINAL REGULATIONS—Continued

| Provision | Regulatory section | Description of final provision |
|---|---|---|
| Discretionary Triggers—Loss of program eligibility. | § 668.171(d)(10) | Amend the discretionary trigger at § 668.171(d)(10) to include when an institution or one of its educational programs loses eligibility to participate in another Federal educational assistance program due to an administrative action against the institution or its programs. |
| Mandatory Triggers—Legal and administrative actions. | § 668.171(c)(2)(i) | Change the heading of § 668.171(c)(2)(i) from ''Debts, liabilities, and losses'' to ''Legal and administrative actions'' to better reflect what actions are related to this mandatory trigger. Amend § 668.171(c)(2)(i)(A) to more accurately state what financial actions will activate this trigger. They are when institution has entered against it a final monetary judgment or award or enters into a monetary settlement which results from a legal proceeding, whether or not the judgment, award or settlement has been paid. |
| Mandatory Triggers—Legal and administrative actions. | § 668.171(c)(2)(i)(B) | Amend § 668.171(c)(2)(i)(B) to state that when a qui tam lawsuit, in which the Federal Government has intervened is a mandatory trigger but only if the qui tam action has been pending for 120 days after the intervention and there has been no motion to dismiss or its equivalent, filed within the applicable 120-day period or if a motion to dismiss was filed and denied within the applicable 120 day period. |
| Mandatory Triggers—Legal and administrative actions. | § 668.171(c)(2)(i)(C) | Amend § 668.171(c)(2)(i)(C) to state that the trigger is activated when the Department has initiated action to recover from an institution the cost of adjudicated claims. |
| Discretionary Triggers—Discontinuation of programs and closure of locations. | § 668.171(d)(8) | Revise § 668.171(d)(8) to reflect that the discretionary trigger described therein will be activated when an institution closes a location or locations that enroll more than 25 percent of the institution's students. We removed the similar proposed trigger in § 668.171(d)(8) for situations where an institution closes more than 50 percent of its locations. |
| Reporting Requirements | § 668.171(f)(1)(iii) | Remove the reporting requirement at § 668.171(f)(1)(iii) and reserving § 668.171(f)(1)(iii). We have moved the requirement that was proposed at § 668.171(f)(1)(iii) to § 668.14(e)(10). |
| Reporting Requirements | § 668.171(f)(3)(i) | Remove the word ''preliminary'' as it describes the determination made by the Department. |
| Recalculating the Composite Score | § 668.171(e)(3)(ii) and (e)(4)(ii) | Adjust the equity ratio by decreasing the modified equity and modified assets. |
| Reporting Requirements | § 668.171(f) | Provide institutions 21 days to report triggering events, up from 10 days in the NPRM. |
| Public Institutions | § 668.171(g) | Clarify that the financial responsibility provisions for public institutions with full faith and credit backing from the State would relate to conditions such as past performance and heightened cash management, but not letters of credit. |
| Public Institutions | § 668.171(g) | State that the Department will ask for proof of full faith and credit backing when a public institution first seeks to participate in the aid programs, if it converts to public status, or otherwise upon request. |
| Alternative Standards and Requirements | § 668.175 | Clarify that if the Department requires financial protection as a result of more than one mandatory or discretionary trigger, the Department will require separate financial protection for each individual trigger, unless the Department determines that individual triggers should be treated as a single triggering event. |
| **Administrative Capability** | | |
| Procedures for determining validity of high school diplomas for distance education students. | § 668.16(p) | Require institutions to look at the State where the high school is located to determine its validity, not the student's State if they are attending courses online. |
| Failing gainful employment programs | § 668.16(t) | Remove § 668.16(t)(2), which said institutions had to have more than half of their full-time-equivalent students who received title IV not be enrolled in programs failing gainful employment. |
| **Certification Procedures** | | |
| Provisional certification stemming from a lack of financial responsibility. | § 668.13(c)(1)(i)(G) | Clarify that the Secretary may provisionally certify an institution if it is under the provisional certification alternative within subpart L. |
| Maximum certification length for institutions with consumer protection concerns. | § 668.13(c)(2)(ii) | Require institutions exhibiting consumer protection concerns to recertify within no more than three years. |
| Supplementary performance measures | § 668.13(e) | Remove debt-to-earnings rates and earnings premium from the supplementary performance measures the Secretary may consider in determining whether to certify or condition the participation of an institution. Also removed the requirement for all institutions to include an audit disclosure related to the amount of money spent on recruitment and marketing and clarified that provision would be based on comparing amounts spent on recruiting, marketing, and pre-enrollment activities to amounts spent on instruction and instructional activities, academic support, and student support services. |
| Limiting excessive hours of GE programs. | § 668.14(b)(26)(ii) and (iii) | Limit the number of hours in a GE program for new entrants starting on the effective date of the regulations. Limit this provision to non-degree programs not offered entirely through distance education and remove program lengths as set by an institution's accrediting agency from the maximum length determination. |
| Licensure or certification requirements | § 668.14(b)(32)(i) and (ii) | Require all programs that prepare students for occupations requiring programmatic accreditation or State licensure to meet those requirements for all new entrants upon the effective date of the regulations for each State in which the student is located if they are not enrolled in face-to-face instruction or a State that a student attests they intend to seek employment in. |
| State laws related to closure | § 668.14(b)(32)(iii) | Require institutions to comply with all applicable State laws related to closure, including teach-out plans and agreements, tuition recovery funds, surety bonds, and record retention policies. |

TABLE 3.1—SUMMARY OF KEY CHANGES IN THE FINAL REGULATIONS—Continued

| Provision | Regulatory section | Description of final provision |
|---|---|---|
| Prohibition on transcript withholding | § 668.14(b)(33) | Prevent institutions from taking negative action against a student for balances owed due to school error. Remove a similar proposed requirement for balances owed due to R2T4 requirements. Prevent institutions from withholding transcripts for any credits funded in whole or in part with title IV funds. |
| Requirements for provisionally certified institutions at risk of closure. | § 668.14(e)(10) | Add a reporting requirement to inform the Department of government investigations. |
| Disclosure requirements related to whether a program meets the educational requirements for licensure or certification in a State. | § 668.43(c) | Changes to harmonize this disclosure requirement with the provisions in § 668.14(b)(32). |
| **Ability to Benefit** | | |
| Department approval of eligible career pathways programs. | § 668.157 | Require the Department to approve at least one career pathway program offered by an institution for ATB use to verify compliance with the regulatory definition. |

*Comments:* Some commenters raised concerns that the proposed changes in certification procedures related to institutions agreeing to comply with State laws related to misrepresentation, recruitment, and closure did not include a federalism analysis in the NPRM and did not include an assessment of the burden on States or institutions.

*Discussion:* The proposed changes in certification procedures do not require a federalism analysis because they are not regulating States. Instead, we are requiring institutions to certify that they are meeting certain requirements within a State in which they are located or a State from which they choose to enroll students in distance education programs. Whether a State chooses to have education-specific laws in these areas is and remains an area of State discretion. Moreover, many States already exercise discretion around when and whether provisions related to closure, such as tuition recovery funds, apply to institutions that do not have a physical presence in their State. For institutions, any burden would come from whether States do or do not enforce additional laws against them. Accordingly, the burden will vary by the institution's specific situation, and there is not a direct burden from the Federal Government related to this provision.

*Changes:* None.

*Comments:* A few commenters argued that they could not support the NPRM due to the regulatory, financial, and logistical burden reporting would place on small institutions. They worried that they would have to shift resources away from students and toward reporting to meet the standards of the NPRM.

*Discussion:* The Department feels that any additional burden on institutions will help protect students. That said, we believe the reporting provisions in this rule are largely about requiring institutions to tell us about critical events in a reasonable timeframe, which will not be particularly burdensome to address. We have made changes in other areas, such as ATB, to reduce the burden on institutions by requiring approval for only one program.

*Changes:* None.

*Comments:* Some commenters said the NPRM's RIA lacked an analysis of the financial consequences or unintended outcomes of the Department determining that the same event led to multiple mandatory or discretionary triggering events. They also argued that the RIA did not consider the financial cost from seeking a letter of credit when a triggering event is immaterial.

*Discussion:* The Department disagrees that the commenters' concerns would occur and, therefore, does not think there are additional analyses that could have been conducted. We clarify in this final rule that our intent is not to stack multiple requests for financial protection from the same event. Instead, we will consider whether those triggers connect to one event. We will also consider these events when determining the amount of the financial protection required.

We also disagree that the triggering conditions would lead to the Department asking for financial protection due to immaterial events. As we discuss in response to commenter suggestions to add a materiality threshold for these triggers, we believe that all the mandatory triggering situations represent significant and worrisome events that present a risk to an institution's financial health. The few items within that category in which the size of the effect might vary substantially based upon the individual facts calls for a recalculation of the composite score. We will evaluate the discretionary triggers on a case-by-case basis, which allows us to determine if the triggering event represents a lack of financial responsibility. We do not need to analyze hypothetical events that we do not believe will occur.

*Changes:* None.

*Comments:* Some commenters argued that the Department did not consider how the costs of obtaining a letter of credit could financially harm an institution due to the fees charged to obtain the financial protection or by tying up funds that must be held as collateral.

*Discussion:* The Department discussed both issues in the NPRM. With respect to the fees charged, institutions may provide cash in escrow instead of a letter of credit. That would not entail any fees being charged.

The Department believes the benefits from seeking financial protection are worth the costs to institutions in terms of either fees paid for a letter of credit or the opportunity cost of funds being held in escrow. The mandatory and discretionary trigger situations allow the Department to obtain financial protection when there are situations that indicate a serious risk that the institution may be facing financial challenges. These actions correct an imbalance that exists in regulations, where institutions can operate while exhibiting significant signs of risk and either close suddenly or engage in misconduct, resulting in unreimbursed discharges and costs to taxpayers. The Department believes it is appropriate to better reflect taxpayer equities, even at the expense of some capital for institutions. Moreover, there is no guarantee that institutions would put the funds that go toward financial protection toward ways that would strengthen an institution. Institutions can and have issued executive compensation or bonuses to senior leaders even while exhibiting signs of significant financial risk.

*Changes:* None.

*Comments:* One commenter noted that the Department's estimate for

compliance costs are incredibly high, with an estimate of $240 million and 5.1 million hours of reporting burden on institutions in the first year alone. This commenter and others stated that the costs were far too high for institutions to bear.

*Discussion:* The Department feels that any compliance costs will help protect students in the long run. The shift of any resources toward reporting would help students know if the program they are entering will yield a sustainable income. We note that the compliance costs discussed in the comment are largely related to the GE program accountability framework and the financial value transparency framework. That issue is discussed in the separate final rule that covers those topics. We anticipate the compliance costs for this regulation to be $4 million, which includes ATB as well as the accountability focused items.

*Changes:* None.

*Comments:* One commenter noted that there has not been a proper estimate of the impact this NPRM will have on States and institutions, and that previous estimates have been far below the actual time and cost it has taken for institutions to comply. They argued that more research is necessary before any new requirements are implemented.

*Discussion:* The Department feels that these new requirements will help protect students. An increase in time and cost to institutions will be worth it in the long run.

*Changes:* None.

**4. Discussion of Benefits, Costs, and Transfers**

*Financial Responsibility*

Assessing whether institutions are financially responsible is a critical way the Department ensures integrity in the title IV, HEA programs. Institutions facing financial struggles are more likely to go out of business. Particularly at private for-profit colleges, closures are more likely to be abrupt, meaning students are given minimal to no notice and there are no agreements in place to help students continue their educations elsewhere without delays and disruptions. Institutions in poor financial health may also pursue any possible means to bring in additional revenue, even if doing so results in taking advantage of students. In the past, the Department has seen institutions engage in high-pressure sales tactics to try to attract as many students as possible to continue meeting revenue goals. Such situations engender cultures where recruiters are better off making misleading comments to students about credit transferability, job placement rates, and graduate earnings so they can keep their jobs and keep enrollment up. But such behavior also leads to the later approval of loan discharges related to borrower defense to repayment.

Hundreds of thousands of students have been affected by these sudden closures and institutional misconduct over the last decade-plus. For instance, a study by SHEEO found that 70 percent of students who experienced a closure from July 2004 to June 2020 went through an abrupt closure.[47] Similarly, FSA data show that closures of for-profit colleges that occurred between January 2, 2014, to June 30, 2021, resulted in $550 million in closed school discharges. (This excludes the additional $1.1 billion in closed school discharges related to ITT Technical Institute that was announced in August 2021.) Of that amount, the Department recouped just over $10.4 million from institutions.[48]

Separately, as of September 2023 the Department had approved $13.6 billion in discharges related to borrower defense findings for almost 1 million borrowers. Among approvals since 2021, there has only been a single instance in which the Department recovered funds to offset the costs of borrower defense discharges from the institution, which was in the Minnesota School of Business and Globe University's bankruptcy proceeding. In that situation, the Department received $7 million from a bankruptcy settlement. While the Department will continue to pursue recoupment efforts of approved borrower defense claims, it will be challenging to obtain any funds from institutions that have already closed.

The financial responsibility regulations will increase the situations in which the Department seeks financial protection in response to warning signs instead of waiting until it is too late, and the institution is out of money. These situations fall into two categories. The first are mandatory triggering events. These are uncommon but serious situations that indicate an impairment to the institution's financial situation that is worrisome enough that the Department needs to step in and obtain protection. The second category are discretionary triggering events. These may be more common occurrences that may, but do not always, indicate concerning financial situations. These items would be reviewed on a case-by-case basis to determine whether they merit obtaining financial protection.

The table below shows the Department's estimation of the possible effect of the mandatory and discretionary triggering events based upon past observed events. In some cases, the table may overstate the potential effect of the triggers, assuming there is not an overall change in institutional behavior that leads to a baseline increase in triggering events. For example, some of the mandatory triggering events would involve a recalculation of the composite score. That could mean those events result in a request for financial protection at a lower rate than is reported. Similarly, one event may cause multiple simultaneous triggering events. As noted in the preamble to this rule, the Department would consider in those situations whether a single or multiple letters of credit are appropriate. The table below does not account for this overlap or the possibility that the same institution could show up under multiple of the triggering events for different reasons. The numbers for discretionary triggers are particularly likely to overstate the effect because they do not account for how many would be determined to warrant financial protection. Finally, even though the Department's goal in establishing these triggers is to obtain financial protection in advance of a closure, there is a possibility that some of the trigger events could occur so close to the closure that there is not an opportunity to obtain that relief in time.

There are some triggers where the Department cannot currently identify the number of institutions potentially affected. Each of these is a situation with obvious connections to financial concerns but where data systems have not been set up to track them on a comprehensive basis. For example, the Department has not historically asked institutions to report when they declare financial exigency, so we do not have a complete tally of how many institutions have done so. However, the declaration of financial exigency is supposed to occur when there is a significant and immediate threat to the financial health of the entity that might necessitate drastic measures. Other mandatory triggers are constructed with the hope that they will not be triggered but will rather discourage certain actions that could be used to undercut the financial oversight structure. For instance, the

[47] Burns, R., Brown, L., Heckert, K., Weeden, D. (2022). A Dream Derailed? Investigating the Impacts of College Closures on Student Outcomes, State Higher Education Executive Officers Association. *https://sheeo.org/project/college-closures/*; *https://sheeo.org/wp-content/uploads/2023/08/SHEEO_CollegeClosures_Report1.pdf.*

[48] The budgetary cost of these discharges is not the same as the amount forgiven.

withdrawal of equity after making a contribution is a sign of attempting to manipulate composite scores. Treating that as a mandatory trigger will dissuade that activity and ensure there is greater integrity in the composite scores. Similarly, the presence of creditor conditions has been used in the past to try and discourage the Department from taking actions against an institution. We are concerned that such approaches try to put private creditors ahead of the Department and a trigger in this situation corrects for that problem.

TABLE 4.1—MANDATORY TRIGGERING EVENTS

| Trigger | Description | Impact |
|---|---|---|
| Debts or liability payments § 668.171(c)(2)(i)(A). | An institution with a composite score of less than 1.5 with some exceptions is required to pay a debt or incurs a liability from a settlement, final judgment, or similar proceeding that results in a recalculated composite score of less than 1.0. | For institutional fiscal years that ended between July 1, 2019, and June 30, 2020, there were 225 private nonprofit or proprietary schools with a composite score of less than 1.5. Of these, 7 owe a liability to the Department, though not all of these liabilities are significant enough to result in a recalculated score of 1.0. We do not have data on non-Department liabilities that might meet this trigger. |
| Lawsuits § 668.171(c)(2)(i)(B) | Lawsuits against an institution after July 1, 2024, by Federal or State authorities or a qui tam in which the Federal Government has intervened. | The Department is aware of approximately 50 institutions or ownership groups that have been subject to Federal or State investigations, lawsuits, or settlements since 2012. This includes criminal prosecutions of owners. Many of these institutions, however, are no longer operating. Some of these would not have resulted in a trigger under the requirements related to the filing of a motion to dismiss within 120 days. |
| Borrower defense recoupment § 668.171(c)(2)(i)(C). | The Department has initiated a proceeding to recoup the cost of approved borrower defense claims against an institution. | The Department has initiated one proceeding against an institution to recoup the proceeds of approved claims. Separately, the Department has approved borrower defense claims at more than nine other institutions or groups of institutions where it has not sought recoupment. |
| Change in ownership debts and liabilities § 668.171(c)(2)(i)(D). | An institution in the process of a change in ownership must pay a debt or liability related to settlement, judgment, or similar matter at any point through the second full fiscal year after the change in ownership. | Over the last 5 years there have been 188 institutions that underwent a change in ownership. This number separately counts campuses that may be part of the same chain or ownership group that are part of a single transaction. The Department does not currently have data on how many of those had a debt or liability that would meet this trigger. Moreover, we cannot estimate how many of these situations would have resulted in a recalculated composite score that failed. |
| Withdrawal of owner's equity § 668.171(c)(2)(ii)(A). | A proprietary institution with a score less than 1.5 has a withdrawal of owner's equity that results in a composite score of less than 1.0. | In the most recent available data, 161 proprietary institutions had a composite score that is less than 1.5. The Department has not determined how many of those may have had a withdrawal of owner's equity that would result in a composite score that meets this trigger. |
| Significant share of Federal aid in failing GE programs § 668.171(c)(2)(iii). | An institution has at least 50 percent of its title IV, HEA aid received for programs that fail GE thresholds. | There are approximately 740 institutions that would meet this trigger based upon current data. These are almost entirely private for-profit institutions that offer only a small number of programs total. These data only include institutions operating in March 2022 that had completions reported in 2015–16 and 2016–2017. Data are based upon 2018 and 2019 calendar year earnings. |
| Teach-out plans or agreements § 668.171(c)(2)(iv). | The institution is required to submit a teach-out plan or agreement, by a State, the Department or another Federal agency, an accrediting agency, or other oversight body for reasons related in whole or in part to financial concerns. | Not identified because the Department is not currently always informed when an institution is required to submit a teach-out plan or agreement. |
| Actions related to publicly listed entities § 668.171(c)(2)(vi). | These apply to any entity where at least 50 percent of an institution's direct or indirect ownership is listed on a domestic or foreign exchange. Actions include the SEC taking steps to suspend or revoke the entity's registration or taking any other action. It also includes actions from exchanges, including foreign ones, that say the entity is not in compliance with the listing requirements or may be delisted. Finally, the entity failed to submit a required annual or quarterly report by the required due date. | Department data systems currently identify 38 schools that are owned by 13 publicly traded corporations. One of these may be affected by this trigger. |
| 90/10 failure § 668.171(c)(2)(vii) | A proprietary institution did not meet the requirement to derive at least 10 percent of its revenue from sources other than Federal educational assistance. | Over the last 5 years an average of 12 schools failed the 90/10 test. Most recently, the Department reported that 21 proprietary institutions had received 90 percent or more of their revenue from title IV, HEA programs based upon financial statements for fiscal years ending between July 1, 2020, and June 30, 2021. |
| Cohort default rate (CDR) failure § 668.171(c)(2)(viii). | An institution's two most recent official CDRs are 30 percent or greater. | Twenty institutions with at least 30 borrowers in their cohorts had a CDR at or above 30 percent for the fiscal year (FY)2017 and FY2016 cohorts (the last rates not impacted by the pause on repayment during the national emergency). |

TABLE 4.1—MANDATORY TRIGGERING EVENTS—Continued

| Trigger | Description | Impact |
|---|---|---|
| Contributions followed by a distribution § 668.171(c)(2)(x). | The institution's financial statements reflect a contribution in the last quarter of its fiscal year followed by a distribution within first two quarters of the next fiscal year and that results in a recalculated composite score of <1.0. | Not currently identified because this information is not currently centrally recorded in Department databases. |
| Creditor events § 668.171(c)(2)(xi) ..... | An institution has a condition in its agreements with a creditor that could result in a default or adverse condition due to an action by the Department or a creditor terminates, withdraws, or limits a loan agreement or other financing arrangement. | Not currently identified because institutions do not currently report the information needed to assess this trigger to the Department. Several major private for-profit colleges that failed had creditor arrangements that would have met this trigger. |
| Financial exigency § 668.171(c)(2)(xii) ..... | The institution makes a formal declaration of financial exigency. | Not identified because institutions do not currently always report this information to the Department. |
| Receivership § 668.171(c)(2)(xiii) ..... | The institution is either required to or chooses to enter a receivership. | The Department is aware of 3 instances of institutions entering receiverships in the last few years. Each of these institutions ultimately closed. |

TABLE 4.2—DISCRETIONARY TRIGGERING EVENTS

| Trigger | Description | Impact |
|---|---|---|
| Accreditor actions § 668.171(d)(1). | The institution is placed on show cause, probation, or an equivalent status. | Since 2018, we identified just under 190 private institutions that were deemed as being significantly out of compliance and placed on probation or show cause by their accrediting agency, with the bulk of these stemming from one agency that accredits cosmetology schools. |
| Other creditor events and judgments § 668.171(d)(2). | The institution is subject to other creditor actions or conditions that can result in a creditor requesting grated collateral, an increase in interest rates or payments, or other sanctions, penalties, and fees, and such event is not captured as a mandatory trigger. This trigger also captures judgments that resulted in the awarding of monetary relief that is subject to appeal or under appeal. | Not identified because institutions do not currently report this information to the Department. |
| Fluctuations in title IV, HEA volume § 668.171(d)(3). | There is a significant change upward or downward in the title IV, HEA volume at an institution between consecutive award years or over a period of award years. | From the 2016–2017 through the 2021–2022 award years, approximately 155 institutions enrolled 1,000 or more title IV, HEA students and saw their title IV, HEA volume change by more than 25 percent from one year to the next. Of those, 33 saw a change of more than 50 percent. The Department would need to determine which circumstances indicated enough risk to need additional financial protection. |
| High dropout rates § 668.171(d)(4). | An institution has high annual dropout rates, as calculated by the Department. | According to College Scorecard data for the award year (AY) 2014–15 cohort, there were approximately 66 private institutions that had more than half their students withdraw within two years of initial enrollment. Another 132 had withdrawal rates between 40 and 50 percent. The Department would need to determine which circumstances indicated enough risk to need additional financial protection. |
| Interim reporting § 668.171(d)(5) | An institution that is required to provide additional reporting due to a lack of financial responsibility shows negative cash flows, failure of other financial ratios, or other indicators of a significant adverse change of the financial condition of a school. | Not currently identified because Department staff currently do not look for this practice in their reviews. |
| Pending borrower defense claims § 668.171(d)(6). | The institution has pending borrower defense claims and the Department has formed a group process to consider at least some of them. | To date there are 53 institutional names that have had more than 2,000 borrower defense claims filed against them. This number may include multiple institutions associated with the same ownership group. There is no guarantee that a larger number of claims will result in a group claim, but they indicate a higher likelihood that there may be practices that result in a group claim. |
| Program discontinuation § 668.171(d)(7). | The institution discontinues a program or programs that affect more than 25 percent of its enrolled students that receive title IV, HEA program funds. | Not currently identified due to data limitations. |
| Location closures § 668.171(d)(8). | The institution closes locations that enroll more than 25 percent of its students who receive title IV, HEA program funds. | Not currently identified due to data limitations. |
| State actions and citations § 668.171(d)(9). | The institution is cited by a State licensing or authorizing agency for failing to meet State or agency requirements, including notice that it will withdraw or terminate the institution's licensure or authorization if the institution does not take the steps necessary to come into compliance with that requirement. | Not identified because institutions do not currently report this information consistently to the Department. |

TABLE 4.2—DISCRETIONARY TRIGGERING EVENTS—Continued

| Trigger | Description | Impact |
|---|---|---|
| Loss of institutional or program eligibility § 668.171(d)(10). | The institution or one or more of its programs loses eligibility to participate in another Federal education assistance program due to an administrative action. | The Department does not currently have comprehensive data on program eligibility loss for all other Federal assistance programs. The Department is aware of 5 institutions participating in title IV, HEA programs that have lost access to the Department of Defense's Tuition Assistance (TA) program since 2017. Three of those also lost accreditation or access to title IV, HEA funds. Since 2018 the Veterans Administration (VA) has reported over 900 instances of an institution of higher education having its access to VA benefits withdrawn. However, this number includes extensive duplication that counts multiple locations of the same school, withdrawals due to issues captured elsewhere like loss of accreditation or closure, and withdrawals that may not have lasted an extended period. The result is that the actual number of affected institutions would likely be significantly lower. |
| Exchange disclosures § 668.171(d)(11). | An institution that is at least 50 percent owned by an entity that is listed on a domestic or foreign stock exchange notes in a filing that it is under investigation for possible violations of State, Federal, or foreign law. | Department data systems currently identify 38 schools that are owned by 13 publicly traded corporations. There is one school that could potentially be affected by either this trigger or the similar mandatory one. |
| Actions by another Federal agency § 668.171(d)(12). | The institution is cited and faces loss of education assistance funds from another Federal agency if it does not comply with that agency's requirements. | Not identified because current reporting by institutions do not always capture these events. |
| Other teach-out plans or agreements § 668.171(d)(13). | The institution is required to submit a teach-out plan or agreement, including programmatic teach-outs and it is not captured in § 668.171(c)(2)(iv). | Not identified because the Department is not currently always informed when an institution is required to submit a teach-out plan or agreement. |
| Other events or conditions § 668.171(d)(14). | Any other event or condition the Department determines is likely to have a significant adverse effect on the financial condition of the institution. | Not identified because this is designed to capture events not present in other triggers that have a similar effect on the institution. |

Benefits

The changes to the financial responsibility regulations provide significant benefits to the Federal Government as well as to students. There are some additional benefits to institutions that are not subject to these triggering conditions due to the deterrent effects of these regulations.

Federal benefits come in several forms. First, the Department will obtain greater amounts of financial protection from institutions. That increases the likelihood of offsetting costs to taxpayers that arise from discharges in the case of a school closing or engaging in misconduct that results in the approval of borrower defense to repayment claims. As already discussed in this section, the Department historically has had minimal funds in place to offset these discharges. That means the cost of giving borrowers the relief they are entitled to has fallen on the taxpayers more heavily than on the institutions whose behavior created those circumstances.

The Department also benefits from the deterrent effects of many of these provisions. For instance, the trigger related to the withdrawal of owner equity after making a contribution discourages institutions from engaging in behavior that could disguise their true financial condition. That gives the Department a more accurate picture of an institution's financial health. Similarly, the trigger related to creditor conditions dissuades institutions from attempting to leverage the threat of creditor actions as a reason why the Department should not take an action that it deems necessary to protect taxpayers' investments and students. The triggers also discourage the use of receiverships by institutions, which the Department has seen in the past still lead to chaotic closures and problems for students.

Other triggers achieve deterrence in different manners. For instance, the clearer linkages between triggers and lawsuits or conduct that results in recoupment efforts from approved borrower defense claims creates a further disincentive for institutions to behave in such a manner that could lead to misconduct, approved borrower defense claims, and recoupment. Similarly, facing financial protection tied to high cohort default rates, achieving insufficient revenue from non-Federal sources, and having too much title IV revenue come from programs that do not meet gainful employment requirements is an added incentive to not fail to meet those requirements.

The regulations also provide benefits to students. The rules encourage institutions to put themselves in the strongest financial situation possible. In some cases, that might mean additional investment in the institution to improve its results on certain metrics, such as student loan default rates or performance on gainful employment measures or to keep funds invested in an institution instead of removing them. The triggers that have a deterrence effect also benefit students since the institution would have further reason to not engage in the kind of aggressive or predatory behavior that has been the source of many approved borrower defense claims to date or destabilized institutions and contributed to their closure.

Protecting students from sudden closures will provide them significant benefits. For example, research by GAO found that 43 percent of borrowers never completed their program or transferred to another school after a closure.[49] While 44 percent transferred to another school, 5 percent of all borrowers transferred to a college that later closed. GAO then looked at the subset of borrowers who transferred long enough ago that they could have been at the new school for six years, the amount of time typically used to calculate graduation rates. GAO found that nearly 49 percent of these students who transferred did not graduate in that time. These findings are similar to those from SHEEO, which found that just 47 percent of students reenrolled after a closure, and of those who reenrolled, only 37 percent earned a postsecondary credential.[50]

The deterrence effect of these final rules also benefits students by encouraging institutions to improve the financial value of their educational offerings. For example, the trigger for

[49] *www.gao.gov/products/gao-21-105373.*

[50] *sheeo.org/more-than-100000-students-experienced-an-abrupt-campus-closure-between-july-2004-and-june-2020.*

institutions with high dropout rates will incentivize institutions to improve their graduation rates. Along with the trigger for institutions failing the cohort default rate, this can reduce the number of students who default on their loans, as students who do not complete a degree are more likely to default on their loans.[51] Improved completion rates also have broader societal benefits, such as increased tax revenue because college graduates, on average, have lower unemployment rates, are less likely to rely on public benefit programs, and contribute more in tax revenue through higher earnings.[52]

Many institutions will also benefit from the financial responsibility triggers. In the past, institutions that were unwilling to engage in aggressive and deceptive tactics may have been at a disadvantage in trying to attract potential students. These triggers will discourage the use of such tactics, providing benefits to institutions that will not have to adjust their recruitment or marketing approaches to avoid conduct that risks causing a triggering event to occur.

Costs

Some institutions will face costs from these regulatory changes. The largest are the costs associated with providing financial protection. Some of these are administrative costs in the form of fees paid to banks or other financial institutions to obtain a letter of credit. These are costs that an institution bears regardless of whether a letter of credit is collected upon. The exact amount of this fee will vary by institution and at least partly reflect the assessment of the institution's riskiness by that financial institution. Institutions do not report the costs of obtaining a letter of credit to the Department. Anecdotally, institutions have reported that, over time, financial institutions have increasingly charged higher fees for letters of credit or asked for a larger percentage of the funds to be held at the financial institution in order to issue the letter of credit. That is why many institutions are instead opting to provide funds in escrow to the Department, an option that does not carry additional fees.

Institutions also have opportunity costs associated with the funds that must be set aside to obtain a letter of credit or placed into escrow as they cannot use those resources for other purposes. The nature of the opportunity cost will vary by institution as well as the counterfactual use of the funds otherwise identified for that purpose. For example, an institution that would have otherwise distributed the funds set aside as profits or dividends to owners faces a different set of opportunity costs than one that was going to make additional investments in the educational enterprise, such as upgrading facilities or adding staff. There is no way to clearly assess what these opportunity costs are because money is fungible, and each institution's circumstances are unique. Moreover, there will be some institutions that provide letters of credit when they could have instead made investments in the institution to have avoided the triggering event. For instance, additional spending on instruction and student supports might have raised completion rates and helped lower default rates and therefore would have avoided a trigger. Another example of a way to avoid a trigger is not taking a distribution after making a contribution. As such, it would not be reasonable to determine that every instance of financial protection provided incurs an opportunity cost that would have benefited the institution and its students.

Institutions will also face costs in the form of transfers to the Department that occur when it collects on a letter of credit or keeps the funds from a cash escrow account, title IV, HEA offset, or other forms of financial protection. In those situations, the Department would use those funds to offset liabilities owed to it. The collection of the escrow does not affect the total amount of liabilities originally owed by the institution, as those are determined through separate processes. However, this would be a transfer because the Department would be collecting against a liability in situations where it traditionally has not done so at high rates. Successfully offsetting the cost of more liabilities is a benefit to the Department and taxpayers.

On net, the increase in the number of triggering conditions means it is likely that the Department will be seeking financial protection more often than it does under current practice. It is also likely that the amount collected upon will also increase as there will be some institutions that would close regardless of any deterrence effect of the trigger. In other cases, whether increases in requests for financial protection translate into greater collection of this protection will depend on how institutions change their behavior.

Variations in institutional response to the triggers could affect the amounts collected. If there is no change in institutional behavior, then the amount collected will increase, as institutions face triggering events and then take no steps to avoid closures or misconduct. However, if institutions do respond to the triggers, then both the frequency at which the Department asks for financial protection and the rate at which it collects upon it may not significantly change. Examples highlight how these dynamics could affect outcomes. If the number of institutions that enter into receivership does not change as a result of the mandatory trigger, then the Department would seek more financial protection than it currently does. The past instances of receivership that the Department is aware of ended in closures. If that too is unchanged, then the presence of the trigger would result in the collection of greater amounts of financial protection. However, if the trigger fully discourages the use of receiverships, then there would not be financial protection demanded as a result of this trigger and there would not be funds from that trigger to collect. Similarly, if institutions change their conduct to avoid the types of lawsuits that result in a trigger, then neither the frequency with which the Department seeks financial protection, nor the amount collected would change.

Regardless of the institutional response, the general effect of these provisions is that increases in financial protection provide greater opportunities for benefits that help the Department and students with a related increase in the potential costs faced by institutions that are subject to additional requests for financial protection.

*Administrative Capability*

Benefits

The Administrative Capability portion of the final rule provides benefits for students and the Department.

Students

For students, the changes help them make more informed choices about where to enroll and how much they might borrow and helps ensure that students who are seeking a job get the assistance they need to launch or continue their careers. The changes in § 668.16(h) expand an existing requirement related to sufficient financial aid counseling to also include written information, such as what is contained when institutions inform students about their financial aid packages. Having a clear sense of how much an institution will cost is critical for students to properly judge the financial transaction they are entering into when they enroll. For many

[51] *libertystreeteconomics.newyorkfed.org/2017/11/who-is-more-likely-to-default-on-student-loans/.*

[52] *www.luminafoundation.org/resource/its-not-just-the-money/*; *www.thirdway.org/report/ripple-effect-the-cost-of-the-college-dropout-rate.*

students and families, a postsecondary education is the second-most expensive financial decision they make after buying a home. However, the current process of understanding the costs of a college education is far less straightforward than that of a buying a home. When home buyers take out a mortgage, for example, there are required standard disclosures that present critical information like the total price, interest rate, and the amount of interest that will ultimately be paid. Having such common disclosures helps to compare different mortgage offers.

By contrast, financial aid offers are extremely varied. A 2018 study by New America that examined more than 11,000 financial aid offers from 515 schools found 455 different terms used to describe an unsubsidized loan, including 24 that did not use the word ''loan.'' [53] More than a third of the financial aid offers New America reviewed did not include any cost information. Additionally, many colleges included Parent PLUS loans as ''awards'' with 67 unique terms, 12 of which did not use the word ''loan'' in the description. Similarly, a 2022 report by the GAO estimated that, based on their nationally representative sample of colleges, 22 percent of colleges do not provide any information about college costs in their financial aid offers, and of those that include cost information, 41 percent do not include a net price and 50 percent understate the net price.[54] GAO estimated that 21 percent of colleges do not include key details about how Parent PLUS loans differ from student loans. This kind of inconsistency creates significant risk that students and families may be presented with information that is both not directly comparable across institutions and may be outright misleading. That hinders the ability to make an informed financial choice and can result in students and families paying more out-of-pocket or going into greater debt than they had planned.

The new requirements establish key information that must be provided to students. Some of these details align with the existing College Financing Plan, which is used by half of the institutions in at least some form. Students will thus be more likely to receive consistent information, including, in some cases, through the expanded adoption of the College Financing Plan. Clear and reliable information further helps students choose institutions and programs that might have lower net prices, regardless of sticker price, which may result in students enrolling in institutions and programs where they and their families are able to pay less out of pocket or take on lower amounts of debt.

Students also benefit from the procedures in § 668.16(p) related to evaluating high school diplomas. It is critical that students can benefit from the postsecondary training they pursue. If they do not, then they risk wasting time and money, as well as ending up with loan debt they would struggle to repay because they are unable to secure employment in the field they are studying. Students who have not obtained a valid high school diploma may be at a particular risk of ending up in programs where they are unlikely to succeed. The Department has seen in the past that institutions that had significant numbers of students who enrolled from diploma mills or other schools that did not provide a proper secondary education have had high rates of withdrawal, non-completion, or student loan default. The requirements in § 668.16(p) better ensure that students pursuing postsecondary education have received the secondary school education needed to benefit from the programs they are pursuing.

In the past, the Department has had problems with several institutions related to promises of getting jobs or making sure students are prepared to enter certain occupations. These issues are addressed by the changes in § 668.16(q) and (r). The first deals with ensuring that institutions have the career services resources necessary to make good on what they are telling students in terms of the degree of assistance they can provide for finding a job. This responds to issues the Department has seen where recruiters tell students that they will receive extensive job search and placement help only for those individuals to find that such assistance is not actually available. The second addresses issues where institutions have recruited students for programs that involve time in a clinical or externship setting in order to complete the program, only the institution does not actually have sufficient spots available for all its students to be offered a necessary spot. When that occurs, the student is unable to finish their program and thus cannot work in the field for which they are being prepared. Students will thus benefit from knowing that they will receive the promised career services and be able to engage in the non-classroom experiences necessary to complete their programs. That in turn will help them find employment after graduation and give them an improved financial return on their program.

Changes on the awarding of financial aid funds in § 668.16(s) will help students by ensuring they receive their refunds when most needed. Refunds of financial aid funds remaining after paying for tuition and fees gives students critical resources to cover important costs like food, housing, books, and transportation. Students that are unable to pay for these costs struggle to stay enrolled and may instead need to either leave a program or increase the number of hours they are working, which can hurt their odds of academic success. Timely aid receipt will thus help with retention and completion for students.

Finally, the provisions in § 668.16(k)(2) and (t) through (u) also benefit students by protecting them from institutions that are engaging in poor behavior, institutions that are at risk of losing access to title IV, HEA aid for a significant share of their students because they do not deliver sufficient financial value, and institutions that are employing individuals who have a problematic history with the financial aid programs. All three of these elements can be a sign of an elevated risk of closure or an institution's engagement in concerning behaviors that could result in misrepresentations to borrowers.

Federal Government

The Department and the Federal Government also benefit from the Administrative Capability regulations set out in this rule. False institutional promises about the availability of career services or failure to get students into the externships or clinical experiences they need can result in the Department granting a borrower defense discharge. For instance, the Department has approved borrower defense claims at American Career Institute for false statements about career services and at Corinthian Colleges and ITT Technical Institute related to false promises about students' job prospects. The Department has also encountered numerous applications that contain allegations that institutions promised extensive help for career searches that never materialized. But the Department has largely not been able to recoup the costs of those transfers to borrowers from the Department. The added Administrative Capability regulations increase the ability of the Department to identify circumstances earlier that might otherwise lead to borrower defense discharges later. That should reduce the number of future claims as institutions would know ahead of time that failing

[53] *www.newamerica.org/education-policy/policy-papers/decoding-cost-college/.*

[54] *www.gao.gov/products/gao-23-104708.*

to offer these services is not acceptable and therefore would comply. It also could mean terminating the participation in the title IV, HEA programs sooner for institutions that do not meet these standards, reducing the exposure to future possible liabilities through borrower defense.

The Department also benefits from improved rules around verifying high school diplomas. Borrowers who received student loans when they did not in fact have a valid high school diploma may be eligible for a false certification discharge. If that occurs, the Department has no guarantee that it would be able to recover the cost of such a discharge from the institution, resulting in a transfer from the government to the borrower. Similarly, grant aid that goes to students who lack a valid high school diploma is a transfer of funds that should not otherwise be allowed and is unlikely to be recovered. Finally, if students who lack a valid high school diploma or its equivalent are not correctly identified, then the Department may end up transferring Federal funds to students who are less likely to succeed in their program and could end up in default or without a credential. Such transfers would represent a reduction in the effectiveness of the Federal financial aid programs.

Provisions around hiring individuals with past problems related to the title IV, HEA programs also benefit the Department. Someone with an existing track record of misconduct, including the possibility that they have pled guilty to or been convicted of a crime, represents a significant risk to taxpayers that those individuals might engage in the same behavior again. Keeping these individuals away from the Federal aid programs would decrease the likelihood that concerning behavior will repeat. These regulations will reduce the risk that executives who run one institution poorly can simply jump to another or end up working at a third-party servicer.

The Department gains similar benefits from the provisions related to institutions subject to a significant negative action or findings by a State or Federal agency, court, or accrediting agency; and institutions found to have engaged in substantial misrepresentations or similar behavior. These are situations where a school may be at risk of closure or facing significant borrower defense liabilities. Allowing these institutions to continue to participate in title IV, HEA programs could result in transfers to borrowers in the form of closed school or borrower defense discharges that are not reimbursed. These provisions will allow for more proactive action to address these concerning situations and behaviors.

The provision regarding institutions with significant title IV revenue from failing GE programs recognizes that having most aid associated with programs that could imminently lose access to Federal student aid represents a sign of broader institutional problems than a program-by-program assessment may indicate. These situations raise broader concerns about the amount of debt institutions are leaving students to pay and the return that students are receiving. Making that an administrative capability finding will allow the Department to conduct a more systemic review of the institutions in question.

Finally, the Department benefits from students receiving accurate financial aid information. Students whose program costs end up being far different from what the institution initially presented may end up not completing a program because the price tag ends up being unaffordable. That can make them less likely to pay their student loans back and potentially leave them struggling in default. This could also include situations where the cost is presented accurately but the institution fails to properly distinguish grants from loans, resulting in a student taking on more debt than they intended to and being unable to repay their debt as a result.

Costs

The regulations create costs for institutions, as well as some administrative costs for the Department, and the possibility of some smaller costs for students in more limited circumstances. Institutions could see increased costs to improve their financial aid information, strengthen their career services department, improve their procedures for verifying high school diplomas, and improve partnerships to provide clinical opportunities and externships. The extent of these costs will vary across institutions. Institutions that do not have to change any practices will see no added costs. Beyond that, costs could range from small one-time charges to tweak financial aid communications to ongoing expenses to have the staff necessary for career services or findings spots for clinical and externship opportunities. The costs associated with a strengthened review of high school diplomas will also vary based upon what institutions currently do to review questionable credentials and institutions' tendency to enroll students with the kinds of indicators that merit further review. Based upon past experience, the Department has seen issues with valid high school diplomas being most common in open access certificate and associate degree programs.

The provisions related to issues such as State, accreditor, or other Federal agency sanctions or conducting misrepresentations also have varied cost effects on institutions. Those not facing any of these issues would see no added costs. Institutions subject to these provisions would see costs to rectify these problems and, if they go unaddressed, could see costs in the form of reduced transfers from the Department if those actions result in loss of access to title IV, HEA financial assistance.

These changes also impose some administrative costs on the Department. The Department needs to incorporate procedures into its reviews of institutions to identify the added criteria. That could result in costs for retraining staff or added time to review certain institutions where these issues manifest.

Several commenters asserted that the provisions related to valid high school diplomas would create costs for students. They claimed this would happen from institutions rejecting otherwise valid high school diplomas or delays associated with reviewing diplomas. The Department disagrees that such situations are likely to occur because the provisions do not require the review of every diploma, but only those for which there is a question about its validity. By providing the guidance and clarity in these regulations, we believe that this provision will help institutions develop processes to evaluate diplomas so that they do not arbitrarily reject diplomas, therefore helping students. The commenters raising these concerns also largely represented four-year private nonprofit institutions and well-regarded private high schools, none of which have been the source of these issues in the past. Instead, the possible cost to students would be borne by individuals who do not in fact have valid high school diplomas who would have been able to obtain financial aid under the prior regulations but are unable to do so in this situation. While this restricts the choices available to those individuals, they should not have been eligible for aid under the old regulations. Additionally, this restriction may itself not always be a cost, as individuals in those situations would be less likely to complete their courses, and more likely to be able to have difficulty repaying loans or end up in default.

*Certification Procedures*

Certification procedures represent the Department's process for ensuring that institutions agree to abide by the requirements of the title IV, HEA programs, which provides critical integrity and accountability around Federal dollars. Decisions about whether to certify an institution's participation, how long to certify it for, and what types of conditions should be placed on that certification are critical elements of managing oversight of institutions, particularly the institutions that pose risks to students and taxpayers. Shorter certification periods or provisional certification allow the Department greater flexibility to respond to an institution exhibiting some signs of concern. Similarly, institutions that do not raise concerns can be certified for longer and with no additional conditions, allowing the Department to focus its resources where greater attention is most needed.

Benefits

The Certification Procedures regulations provide benefits for the Federal Government, students, and States.

Federal Government

The regulations provide several important benefits for the Department and the Federal Government more generally. These particularly relate to improved program integrity, improved resource management, greater protection from closures, greater assurances that taxpayers will not fund credits that cannot result in long-term student benefits, and improved resource management. The elimination of § 668.13(b)(3) addresses the first two benefits. The provision being removed required the Department to issue a decision on a certification within 12 months of the date its participation expires. While it is important for the Department to move with deliberate speed in its oversight work, the institutions that have extended periods with a pending certification application are commonly in this situation due to unresolved issues that must be dealt with first. For instance, an institution may have a pending certification application because it may have an open program review or a Federal or State investigation that could result in significant actions. Forcing decisions on those application before the review process or an investigation is completed results in suboptimal outcomes for the Department, the school, and students. For the institution, the Department may end up placing it on a short certification that would result in an institution facing the burden of redoing paperwork after only a few months. That would carry otherwise unnecessary administrative costs and increase uncertainty for the institution and its students.

The provisions in § 668.13(c)(1) that provides additional circumstances in which an institution would become provisionally certified also provides benefits for program integrity and improved program administration. For instance, the ability to request a teach-out plan or agreement when a provisionally certified institution is at risk of closure ensures the Department is not solely dependent upon a State or accreditation agency to help find options for students when a closure appears possible. The inability to ask for a teach-out plan or agreement to date has limited the Department's ability to ensure students are given options for continuing their education. This can result in an increase in closed school loan discharges, as well as significant costs to students who cannot recoup the time spent in a program they cannot continue elsewhere. Creating situations that automatically result in provisional certification also helps with program integrity and management. An institution may face a sudden shock that puts them out of business or the gradual accumulation of a series of smaller problems that culminates in a sudden closure. The pace at which these events occur requires the Department to be nimble in responding to issues and better able to add additional requirements for an institution's participation outside of the normal renewal process. Under current regulations, the Department has too often been in a position where an obviously struggling institution faces no additional conditions on participation even if doing so might have resulted in a more orderly closure.

Such benefits are also related to the provisions in § 668.14(e) that lay out additional conditions that could be placed on an institution if it is in a provisional status. This non-exhaustive list of requirements specifies ways the Department can more easily protect students and taxpayers when concerns arise. Some of these conditions make it easier to manage the size of a risky institution and would ensure that it does not keep growing when it may be in dire straits. This would be done through conditions like restricting the growth of an institution, preventing the addition of new programs or locations, or limiting the ability of the institution to serve as a teach-out partner for other schools or to enter into agreements with other institutions to provide portions of an educational program.

Other conditions in § 668.14(e) give the Department better ability to ensure that it is receiving the information it needs to properly monitor schools and that there are plans for adequately helping students. The reporting requirements in § 668.14(e)(7) and (10) help the Department more quickly receive information about issues so it could react in real-time as concerns arise.

To get a sense of the potential effect of these changes, Table 4.3 below breaks down the certification status of all institutions participating in title IV, HEA programs. This provides some sense of which institutions might currently be subject to additional conditions.

TABLE 4.3—CERTIFICATION STATUS OF INSTITUTIONS PARTICIPATING IN THE TITLE IV, HEA FEDERAL STUDENT AID PROGRAMS

| | Fully certified | Provisionally certified | Month-to-month certification |
|---|---|---|---|
| Public | 1,748 | 86 | 23 |
| Private Nonprofit | 1,464 | 191 | 35 |
| Private For-Profit | 1,115 | 489 | 43 |
| Foreign | 297 | 73 | 42 |
| Total | 4,624 | 839 | 143 |

Source: Postsecondary Education Participants Systems as of August 2023.
**Note:** The month-to-month column is a subset of schools that could be in either the fully certified or the provisionally certified column.

As the table shows, there is a very significant difference in the amounts of liabilities assessed versus the amounts collected. This shows the importance of greater accountability to avoid the liabilities in the first place. It also demonstrates the critical need for tools like the financial responsibility triggers to obtain protection that can offset these liabilities.

The Department also benefits from changes in § 668.14 that increase the number of entities that could be financially liable for the cost of monies owed to the Department that are unpaid by institution. EA GENERAL–22–16 updated PPA signature requirements for entities exercising substantial control over non-public institutions of higher education.[55] While EA GENERAL–22–16 used a rebuttable presumption, language in § 668.14(a)(3) would not only require a representative of the institution to sign a PPA, but also an authorized representative of an entity with direct or indirect ownership of a private institution. For private nonprofit institutions, this additional signature would generally be by an authorized representative of the nonprofit entity or entities that own the institution. Historically, the Department has often seen colleges decide to close when faced with significant liabilities instead of paying them. The result is both that the existing liability is not paid and the cost to taxpayers further increases due to closed school discharges due to students.

To get a sense of how often the Department successfully collects on assessed liabilities, we looked at the amount of institutional liabilities established as an account receivable and processed for repayment, collections, or referral to Treasury following the exhaustion of any applicable appeals over the prior 10 years. This does not include liabilities that were settled or not established as an account receivable and referred to the Department's Finance Office. Items in the latter category could include liabilities related to closed school loan discharges that the Department did not assess because there were no assets remaining at the institution to collect from.

We then compared estimated liabilities to the amount of money collected from institutions for liabilities owed over the same period. The amount collected in a year is not necessarily from a liability established in that year, as institutions may make payments on payment plans, have liabilities held while they are under appeal, or be in other similar circumstances.

TABLE 4.4—LIABILITIES VERSUS COLLECTIONS FROM INSTITUTIONS

[$ in millions]

| Federal fiscal year | Established liabilities | Amounts collected from institutions |
|---|---|---|
| 2013 | 19.6 | 26.9 |
| 2014 | 86.1 | 37.5 |
| 2015 | 108.1 | 13.1 |
| 2016 | 64.5 | 30.8 |
| 2017 | 149.7 | 34.5 |
| 2018 | 126.2 | 51.1 |
| 2019 | 142.9 | 52.3 |
| 2020 | 246.2 | 31.7 |
| 2021 | 465.7 | 29.1 |
| 2022 | 203.0 | 37.0 |
| 2013–2022 | 1,611.9 | 344.2 |

Source: Department analysis of data from the Office of Finance and Operations including reports from the Financial Management Support System.

The added signature requirements are important because there may be many situations where the entities that own the closed institution still have resources that could be used to pay liabilities owed to the Department. The provisions in § 668.14(a)(3) make it clearer that the Department will seek signatures on PPAs from those types of entities, making them financially liable for the costs to the Department. In addition to the financial benefits in the form of the greater possibility of transfers from the school or other entities to the Department, this provision also provides deterrence benefits. Entities considering whether to invest in or otherwise purchase an institution would want to conduct greater levels of due diligence to ensure that they are not supporting a place that might be riskier and, therefore, more likely to generate liabilities the investors would have to repay. The effect should mean that riskier institutions receive less outside investment and are unable to grow unsustainably. In turn, outside investors may then be more willing to consider institutions that generate lower returns due to more sustainable business practices. This could include institutions that do not grow as quickly because they want to ensure they are capable of serving all their students well or make other choices that place a greater priority on student success.

The provisions in § 668.14(b)(32)(iii) will benefit the Department in its work to minimize the costs of institutional closures in two ways. The first is to help students better navigate their options if they wish to complete their education while the second is to minimize the financial costs associated with loan discharges for students who do not continue their education elsewhere. The part of the provision related to requiring institutions to abide by a State's laws related to closure around teach-out plans or agreements and the retention of student records relate to that first goal. Teach-outs are designed to give students the most seamless path to finishing a program and typically address complex issues like what credits will or will not transfer, whether the cost will be the same, and other key matters. Similarly, successful transfer requires that

[55] Updated Program Participation Agreement Signature Requirements for Entities Exercising Substantial Control Over Non-Public Institutions of Higher Education. *https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2022-03-23/updated-program-participation-agreement-signature-requirements-entities-exercising-substantial-control-over-non-public-institutions-higher-education.*

students have ways to access their records, especially transcripts. An August 2023 study by SHEEO found that students whose colleges closed and were in States that had both teach-out and record retention policies in place were more likely to re-enroll within four months than those who did not have those policies in place.[56] Though there were not long-term completion benefits from these policies, it does suggest that at least giving students the chance to continue has benefit.

Providing students with a smoother path to continuing their education when their college closes provide financial benefits for the Department too. The regulations around closed school discharges that were finalized on November 1, 2022 (87 FR 65904) state that borrowers who did not graduate from a program and were enrolled within 180 days of closure only lose eligibility for a closed school loan discharge if they accept and complete either a teach-out or a continuation of the program at another location of the same school.[57] That provision is designed to encourage orderly closures and the provision of teach-out agreements. Reinforcing the emphasis on teach-outs by requiring institutions to abide by State specific laws related to that area will thus further encourage the offering of orderly plans for students to continue their education and potentially reduce the number of closed school discharges that are granted because more borrowers will re-enroll, complete, and thus not be eligible for a closed school discharge.

Requiring institutions to abide by State-specific laws related to tuition recovery funds and surety bonds also benefits the Department by providing another source of funds to cover potential costs from closures. As SHEEO notes in its August 2023 paper, these policies as currently constructed are generally less about encouraging re-enrollment or program completion and more about giving students a path to having some of their costs reimbursed. To the extent these funds can help students pay off Federal loans, that would cover costs that are otherwise borne by the Department. Moreover, making institutions subject to these requirements would also help deter behavior that could lead to a closure since it would result in increased expenses for an institution.

Overall, having institutions abide by State laws specific to closure of postsecondary education institutions will benefit the Department by allowing the State part of the regulatory triad to be more involved. That means the Department would get greater support in ensuring struggling colleges have teach-out plans and agreements in place, as well as lessening the costs from discharges that are not reimbursed.

Several other provisions in the certification procedures regulations address the benefits related to ensuring that Federal student aid is paying for fewer credits that cannot be used for long-term student success. This shows up in several ways. For one, the Department is concerned about students who receive Federal loans and grants to pay for credits in programs that lack the necessary licensure or certification for the students to actually work in those fields. When that occurs, the credits are essentially worthless as they cannot be put toward the occupations connected to the program.

In other cases, students may be accumulating credits far in excess of what they need to obtain a job in a given State. Section 668.14(b)(26) provides that the Department will not pay for GE programs that are longer than what is needed in the State where they are located (or a bordering State if certain exceptions are met), subject to certain exclusions. States establish the educational requirements they deem necessary and paying for credits beyond that point increases costs to the Department and also creates the risk that the return on investment for the program will be worse due to higher costs that may not be matched by an increase in wages in the relevant field.

The Department also receives benefits from ensuring that students are able to use the credits paid for with Federal funds. The changes in § 668.14(b)(34) establish that institutions must provide official transcripts that include all credits from a period in which the student received title IV, HEA program funds and the student had satisfied all institutional charges for that period at the time when the request was made. This provision bolsters other requirements that ban transcript withholding related to institutional errors § 668.14(b)(33). As a result, students will be more easily able to transfer their credits, which can bolster rates of completion and the associated benefits that come with earning a postsecondary credential.

The changes in § 668.14(b)(35) also benefit the Department by bolstering the ability of students to complete their education. Research shows that additional financial aid can provide important supports to help increase the likelihood that students graduate. For example, one study showed that increasing the amount some students were allowed to borrow improved degree completion, later-life earnings, and their ability to repay their loans.[58] The language in § 668.14(b)(35) addresses situations in which an institution may prevent a student from receiving all the title IV aid they are entitled to without replacing it with other grant aid. The changes diminish the risk that students are left with gaps that could otherwise have been covered by title IV aid, which would help them finish their programs.

Students

Many of the same benefits for the Department will also accrue to students. This is particularly true for the provisions designed to make college closures more orderly and better protect students throughout that process. In most cases, college closures are extremely disruptive for students. As found by GAO and SHEEO, only 44 to 47 percent of students enroll elsewhere after a closure, and even fewer complete college.[59] SHEEO also found that over 100,000 students were affected by sudden closures from July 2004 to June 2020.[60] Allowing the Secretary to provisionally certify an institution deemed at risk of closure as well as request a teach-out plan or agreement from a provisionally certified institution at risk of closure will provide students with more structured pathways to continue their education if their institution shuts down. Requiring institutions to abide by State-specific laws related to the closure of postsecondary institutions will also give States a stronger role to ensure closures are orderly. As noted above, SHEEO has found that the presence of teach-out and record retention requirements are positively correlated with short-term enrollment, though long-term benefits fade out.[61] Ensuring States can enforce

[56] Burns, R., Weeden, D., Bryer, E., Heckert, K., Brown, L. (2023). A Dream Derailed? Investigating the Causal Effects of Student Protection Authorization Policies on Student Outcomes After College Closures, State Higher Education Executive Officers Association. *https://sheeo.org/wp-content/uploads/2023/08/SHEEO_CollegeClosures_Report3.pdf* page 35.

[57] The closed school discharge regulation is currently stayed pending appeal from a court's denial of a preliminary injunction. *See Career Colleges & Schs. of Tex.* v. *United States Dep't of Educ.,* No. 23–50491, Doc 42–1 (5th Cir. Aug. 7, 2023).

[58] *www.nber.org/papers/w27658.*

[59] *www.gao.gov/products/gao-21-105373*; *sheeo.org/more-than-100000-students-experienced-an-abrupt-campus-closure-between-july-2004-and-june-2020/.*

[60] *https://sheeo.org/more-than-100000-students-experienced-an-abrupt-campus-closure-between-july-2004-and-june-2020/.*

[61] *https://sheeo.org/wp-content/uploads/2023/08/SHEEO_CollegeClosures_Report3.pdf.*

their laws related to tuition recovery funds and surety bonds also provides financial benefits to students by giving them another avenue to receive money back besides a closed school loan discharge.

Other changes within § 668.14(b)(26) provide benefits to students by reducing the number of postsecondary credits paid for with Federal aid that are either not needed for success or cannot be used to help students achieve their educational goals. In the former area, limitations on the length of programs will reduce situations where borrowers may be paying for credits beyond what is needed to get licensed for a GE program. Given that many of these are certificate programs that result in low-to-moderate incomes, the cost of added credits may well undercut a program's positive financial return on investment. It also represents more time a student must spend enrolled as opposed to making money in the workforce. Provisions around requiring programs to have necessary approvals for licensure or certification reduce the likelihood that students may end up expending significant amounts of time and money, including Federal aid, in programs where they will be unable to work in their chosen field upon completion. It would be very challenging for students in these situations to receive the financial benefits they sought from a program and protections will ensure that time and money are well spent.

The limitations on how institutions can withhold transcripts in § 668.14(b)(33) and (34) similarly benefit students by increasing the situations in which they will be able to make use of the credits they earn. In particular, the requirement added from the NPRM that institutions must provide a transcript that includes credits earned during a period in which the student received title IV, HEA program funds and no longer has a balance for that period will protect more credits entirely from withholding. Withheld transcripts are a significant issue. A 2020 study by Ithaka S+R estimated that 6.6 million students have credits they are unable to access because their transcript is being withheld by an institution.[62] That study and a 2021 study published by the same organization estimate that the students most affected are likely adult learners, low-income students, and racial and ethnic minority students.[63] This issue inhibits students with some college, but no degree, from completing their educational programs, as well as prevents some students with degrees from pursuing further education or finding employment if potential employers are unable to verify that they completed a degree or if they are unable to obtain licensure for the occupation for which they trained.

Finally, the requirement in § 668.14(b)(35) around polices to limit the awarding of aid will benefit students by ensuring that they receive all the Federal aid they are entitled to. This will likely result in a small increase in transfers from the Department to students as they receive aid that would otherwise have been withheld by the school. Research shows that increased ability to borrow can increase completed credits and improve grade point average, completion, post-college earnings, and loan repayment for some students.[64]

The expanded requirements for who signs a PPA as spelled out in § 668.14(a)(3) provides similar benefits for students. Requiring outside investors to be jointly and severally liable for any liabilities not paid for by the institution should encourage more cautious approaches to institutional management and investment. Such approaches discourage the kind of aggressive recruitment that has resulted in schools misrepresenting key elements of postsecondary educations to students, giving grounds for the approval of borrower defense to repayment claims. Institutions that also took less cautious approaches have also exhibited signs of financial struggle if they cannot maintain enrollment, including instances of sudden closures that left students without clear educational options.

States

States will benefit from the language in § 668.14(b)(32) that requires institutions to abide by State laws related to institutional closures. As discussed already, college closures are disruptive for students, can often mean the end of their educational journey, and can result in unreimbursed costs for the student. Closures can also be burdensome on States that step in and try to manage options for students, especially if the institution closes without a teach-out agreement in place or a plan for record retention. Under current regulations, a State is not always able to enforce its own laws related to the closure of postsecondary institutions for places that do not have a physical presence in their State. Ensuring States can enforce laws related to institutional closure for their students regardless of where the school is physically located will allow States to better protect the people living in their borders, if they choose to do so. At the same time, because the State has the option to choose whether to have laws in this area, and what the content of those laws say, they have flexibility to determine how much work applying these provisions will mean for them.

Costs

The regulations create some costs for the Federal Government, students, States, and institutions.

Federal Government

The regulations create some modest administrative costs for the Department. These consist of staffing costs to monitor the additional conditions added to PPAs, as well as any increase in changes to an institution's certification status. Beyond these administrative costs, the Department could see a slight increase in costs in the title IV, HEA programs that come in the form of greater transfers to students who would otherwise have received less financial aid under the conditions prohibited in § 668.14(b) (35). As discussed in the benefits section, greater aid could help students finish their programs.

Students

The Department is not anticipating that these regulations will have a significant cost for students, especially on an ongoing basis. The greatest cost for students could be for those who are in the process of choosing an institution as the regulations go into effect. These students may incur some costs to expand or otherwise continue their school search if it turns out a program they were considering did not have necessary approvals, was subject to a growth restriction, or some other condition that meant they could not enroll in that institution. However, these costs would be more than offset by the benefits received by a student from enrolling in a program where they will be able to obtain necessary licensure or certification or enrolling in an institution that is not as risky.

States

Ensuring States can enforce their laws related to institutional closures regardless of whether the school is physically located in their borders could have some additional administrative costs for States. The extent of these costs would be dependent on how States structure their laws. For instance, if States chose to expand their laws to

[62] *sr.ithaka.org/publications/solving-stranded-credits.*

[63] *sr.ithaka.org/publications/stranded-credits-a-matter-of-equity.*

[64] *www.aeaweb.org/articles?id=10.1257/pol.20180279*; *www.nber.org/papers/w24804.*

subject more institutions to requirements for teach-outs, record retention, surety bonds, or tuition recovery funds, then they would see added administrative costs to enforce the expanded requirements. However, if States make no changes or choose to not apply requirements to online schools not located in their borders, then they would not see added costs. This provision thus gives States the option to choose how much added work to take on or not.

Institutions

Some institutions will see increased administrative costs or costs in the form of reduced transfers from the Department, but the nature and extent will vary significantly. Many institutions will see no change in their transfers, as they are not affected by provisions like the ones that cap program length, require having necessary approvals for licensure or certification, or do not offer distance programs outside their home State. For other institutions, the nature and extent of costs will vary depending on how much they must either engage in administrative work to come into compliance with the regulations or otherwise reduce enrollment that is supported by title IV, HEA funds. For instance, an institution that enrolls many students who are in States where the program does not have necessary approvals for licensure or certification will either face administrative costs to make their program eligible or see a reduction in transfers because they no longer enroll students from those locations. Similarly, programs that need to be shortened because they are longer than State requirements will either generate administrative costs to come into compliance or stop offering those programs. For institutions offering distance education, the costs will also depend based upon whether they are enrolling significant numbers of students in States that have rules around institutional closures or not and how much it costs to comply with those rules. This includes issues like whether the institution must provide more surety bonds or contribute money into a tuition recovery fund.

Institutions that are placed on provisional status will incur other administrative expenses. This can come from submitting additional information for reporting purposes or applying for recertification after a shorter period, which requires some staff time. Institutions that are asked to provide a teach-out plan or agreement will also incur administrative expenses to produce those documents.

The highly varied nature of these effects means it is not possible to model these costs for institutions. For instance, the Department does not currently have data from institutions on which programs are more than 100 percent of the required length set by the State. Nor do we know how many programs enroll students from States where they do not have the necessary approvals for graduates to obtain licensure or certification. The same is true of several other provisions. This makes it impossible to estimate how many institutions would have to consider adjustments. We also do not know how extensive any necessary modifications would be or how many students are affected—two issues that affect the administrative costs and potential costs in the form of reduced transfers.

Overall, however, we believe that the benefits to the Federal Government and students will exceed these costs. For example, a program that lacks the necessary approvals for a graduate to become licensed or certified is not putting graduates in a position to use the training they are paying for. Even if there are costs to the institution to modify or cease enrolling students in that program, the benefits to students from not paying for courses that cannot lead them to achieve their educational goals makes the cost versus benefit analysis worthwhile.

*Ability To Benefit*

The HEA requires students who are not high school graduates to fulfill an ATB alternative and enroll in an eligible career pathway program to gain access to title IV, HEA aid. The three ATB alternatives are passing an independently administered ATB test, completing six credits or 225 clock hours of coursework, or enrolling through a State process.[65] Colloquially known as ATB students, these students are eligible for all title IV, HEA aid, including Federal Direct loans. The ATB regulations have not been updated since 1994. In fact, the current Code of Federal Regulations makes no mention of eligible career pathway programs. Changes to the statute have been implemented through sub regulatory guidance laid out in Dear Colleague Letters (DCLs). DCL GEN 12–09, 15–09, and 16–09 explained the implementation procedures for the statutory text. Due to the changes over the years the Department updates, clarifies, and streamlines the regulations related to ATB.

[65] As of January 2023, there are six States with an approved State process.

Benefits

The regulations will provide benefits to States by more clearly establishing the necessary approval processes. This helps more States have their applications approved and reduces the burden of seeking approval. This is particularly achieved by creating an initial and subsequent process for applications. Currently, States that apply are required to submit a success rate calculation under current § 668.156(h) as a part of the first application. Doing so is very difficult because the calculation requires that a postsecondary institution is accepting students through its State process for at least one year. This means that a postsecondary institution needs to enroll students without the use of title IV aid for one year to gather enough data to submit a success rate to the Department. Doing so may be cost prohibitive for postsecondary institutions.

The regulations also benefit institutions by making it easier for them to continue participating in a State process while they work to improve their results. More specifically, reducing the success rate calculation threshold from 95 percent to 85 percent, and allowing struggling institutions to meet a 75 percent threshold for a limited number of years, gives institutions additional opportunities to improve their outcomes before being terminated from a State process. This added benefit does not come at the expense of costs to the student from taking out title IV, HEA aid to attend an eligible career pathway program. This is because the Department incorporates more guardrails and student protections in the oversight of ATB programs, including documentation and approval by the Department of the eligible career pathway program. That means regulatory oversight is not decreased overall.

Institutions that are maintaining acceptable results also benefit from these regulations. Under current regulations, the success rate calculation includes all institutions combined. The result is that an institution with strong outcomes could be combined with those that are doing worse. Under the final regulations, the State calculates the success rate for each individual participating institution, therefore allowing other participating institutions that are in compliance with the regulations to continue participation in the State process.

Costs

The regulatory changes impose additional costs on the Department, postsecondary institutions, and entities that apply for the State process.

The regulations will break up the State process into an initial and subsequent application that must be submitted to the Department after two years of initial approval. This increases costs to the State and participating institutions. This new application process will be offset because the participating institutions will no longer need to fund their own State process without title IV, HEA program aid to gain enough data to submit a successful application to the Department.

In the initial application, the State will have to calculate the withdrawal rate for each participating institution. This increases costs to the State and participating institutions. The increased administrative costs associated with the new outcome metric will be minimal because a participating institution already know how to calculate the withdrawal rate as it is already required under Administrative Capability regulations.

The Department is placing additional reporting requirements on States, including information on the demographics of students. This increases administrative burden costs to the State and participating institutions. There is a lack of data about ATB and eligible career pathway programs, and the new reporting means the Department will be able to analyze the data and may be able to report trends publicly.

The minimum documentation requirements in § 668.157 prescribe what all eligible career pathway programs will have to meet in the event of an audit, program review, or review and approval by the Department. Currently the Department does not approve eligible career pathway programs, therefore, the regulation increases costs to any postsecondary institutions that provide an eligible career pathway program. For example, § 668.157(a)(2) requires a government report demonstrate that the eligible career pathway program aligns with the skill needs of industries in the State or regional labor market. Therefore, if no such report exists the program would not be title IV, HEA eligible. Further, in § 668.157(b) and (c) the Department approves at least one eligible career pathway program at each postsecondary institution that offers such programs. We believe that benefits of the new documentation standards outweigh their costs because the regulations increase program integrity and oversight and could stop title IV, HEA aid from subsidizing programs that do not meet the statutory definition. Institutions currently use their best faith to comply with the statute which means there are likely many different interpretations of the HEA. These regulations will set clear expectations and standardize the rules.

Elsewhere in this section under the Paperwork Reduction Act of 1995, we identify and explain burdens specifically associated with information collection requirements.

**5. Net Budget Impacts**

We do not estimate that the regulations on Financial Responsibility, Administrative Capability, Certification Procedures, and ATB will have a significant budget impact. This is consistent with how the Department has treated similar changes in recent regulatory changes related to Financial Responsibility and Certification Procedures. The Financial Responsibility triggers are intended to identify struggling institutions and increase the financial protection the Department receives. While this may increase recoveries from institutions for certain types of loan discharges, affect the level of closed school discharges, or result in the Department withholding title IV, HEA funds, all items that would have some budget impact, we have not estimated any savings related to those provisions. Historically, the Department has not been able to obtain much financial protection from closed schools and existing triggers have not been widely used. Therefore, we will wait to include any effects from these provisions until indications are available in title IV, HEA loan data that they meaningfully reduce closed school discharges or significantly increase recoveries. We did run some sensitivity analyses where these changes did affect these discharges, as described in Table 5.1. We only project these sensitivity analyses affecting future cohorts of loans. This approach reflects our assumption that much of the liabilities associated with past cohorts of loans due to closed school discharges and borrower defense is either already known or will be tied to institutions that are closed thus there will not be a way to obtain financial protection. Concerns with the inability to have sufficient financial protection in place prior to the generation of liabilities is one of the reasons the Department is issuing this final rule as we hope to prevent such situations from repeating in the future. The results in Table 5.1 differ from those in the NPRM which included the effect of the GE provisions which are now in the baseline for this analysis. We are including the estimate of the financial responsibility sensitivities without the GE provisions from the NPRM in Table 5.1 for comparison.

TABLE 5.1—FINANCIAL RESPONSIBILITY SENSITIVITY ANALYSIS

| Scenario | Cohorts 2024–2033 Outlays ($ in millions) | |
|---|---|---|
| | NPRM | Final |
| Closed School Discharges Reduced by 5 percent | −284 | −247 |
| Closed School Discharges Reduced by 25 percent | −1,500 | −1,254 |
| Borrower Defense Discharges Reduced by 5 percent | −70 | −56 |
| Borrower Defense Discharges Reduced by 15 percent | −230 | −173 |

**6. Accounting Statement**

As required by OMB Circular A–4, we have prepared an accounting statement showing the classification of the benefits, costs, and transfers associated with the provisions of these regulations.

TABLE 6.1—ACCOUNTING STATEMENT FOR PRIMARY SCENARIO

| | Annualized impact (millions, $2023) | |
|---|---|---|
| | Discount rate = 3% | Discount rate = 7% |
| **Benefits** | | |
| Consolidation of all financial responsibility factors under subpart L | 0.12<br>Not quantified | 0.12 |
| **Costs** | | |
| Information submission that may be required of provisionally certified institutions, initially certified nonprofit institutions, and those that undergo a change in ownership | 0.02 | 0.02 |
| Required financial aid counseling to students and families to accept the most beneficial type of financial assistance and strengthened requirement for institutions to develop and follow procedures to validate high school diplomas | 2.88 | 2.89 |
| Information submission that any domestic or foreign institution that is owned directly or indirectly by any foreign entity holding at least a 50 percent voting or equity interest in the institution must provide documentation of the entity's status under the law of the jurisdiction under which the entity is organized | 0.72 | 0.72 |
| Compliance with approval requirements for State process for ATB | 0.16 | 0.16 |
| Documentation requirements for Eligible Career Pathways program | 0.50 | 0.50 |
| Increased reporting of financial responsibility triggers and requirement that some public institutions provide documentation from a government entity that confirms that the institution is a public institution and is backed by the full faith and credit of that government entity to be considered as financially responsible | 0.08 | 0.08 |
| **Transfers** | | |
| None in primary estimate. | | |

*Financial Responsibility Triggers*

We conducted several sensitivity analyses to model the potential effects of the Financial Responsibility triggers if they did result in meaningful increases in financial protection obtained that can offset either closed school or borrower defense discharges. We modeled these as reductions in the number of projected discharges in these categories. This would not represent a reduction in benefits given to students, but a way of considering what the cost would be if the Department was reimbursed for a portion of the discharges. These are described above in Net Budget Impacts.

**7. Alternatives Considered**

The Department considered the following items in response to public comments submitted on the NPRM. Many of these are also discussed in the preamble to this final rule.

*Financial Responsibility*

We considered adopting a materiality threshold but declined to do so. Materiality is a concept often attested to by auditors based upon representations made by management. We are concerned that such an approach would undercut the discretion of the Department and that the time it would take for auditors to provide an assessment of materiality would result in it taking too long to seek financial protection when needed.

We also considered adopting a formal appeals process related to the imposition of letters of credit but decided that maintaining the current practice of having back and forth discussions with institutions while we work to understand the nature of the triggering event would be more effective and efficient for both parties. The purpose of the trigger is to quickly seek financial protection when there are concerns about how the triggering event may affect the financial health of the institution. An appeals process could result in dragging out that process so long that closures could still occur with no protection in place.

*Administrative Capability*

The Department considered adopting a suggestion from commenters to not require institutions to verify high school diplomas that might be questionable if they came from a high school that was licensed or registered by the State. However, we are concerned that those terms could be read to allow obtaining a business license that is unrelated to education as exempting high schools from consideration.

*Certification Procedures*

We considered removing all supplementary performance measures in § 668.13(e) but decided to only remove the items related to debt-to-earnings and earnings premium. Providing institutions notice that measures such as withdrawal rates, licensure passage rates, and the share of spending devoted to marketing and recruitment could be considered during the institutional certification and recertification process gives greater clarity to the field.

We also considered adopting suggestions by commenters to only apply the signature requirement to individuals. However, we decided to keep applying the requirements to corporations or entities because that better reflects the structure of most ownership groups for institutions of higher education and thus better matches our goal of ensuring taxpayers have greater protections against possible liabilities.

The Department considered suggestions from commenters to entirely remove requirements that institutions certify they abide by certain State laws specifically related to postsecondary education as well as to expand the types of education-specific laws covered by that provision. We ultimately felt that limiting this provision to specific items related to protecting students from institutional closures struck the best balance between giving clear expectations to the field with protecting students from the circumstances we are most worried about.

For certification requirements related to professional licensure, we considered suggestions from commenters to maintain the current regulations that require disclosures to students. However, we are concerned that students who use Federal aid to pay for programs where graduates will be unable to work in their desired field sets students up for financial struggles and is likely to be a waste of taxpayer resources. Accordingly, we think the

stronger certification requirement will better protect students and lessen the risk of paying for programs that cannot lead to employment in the related field.

We also considered adopting recommendations from commenters to allow GE programs to be as long as 150 percent of State maximum hour requirements. However, we are concerned that allowing programs to exceed the time necessary to receive State certification or licensure risks students taking on greater amounts of loan debt that will not result in appreciably higher earnings. That could risk students ending up with loans that would have been more affordable at the shorter program lengths. Accordingly, we think a cap related to 100 percent of the required State length is more appropriate.

*Ability To Benefit*

The Department considered suggestions from commenters to reduce the success rate to as low as 75 percent. However, we are concerned that level would expose the State process to unacceptable levels of performance and poor student outcomes. We also considered adopting larger caps on the number of students that could enroll in eligible career pathways programs in the initial two years of the State process or not having any cap at all. Given that the caps are only in place for two years, we think that starting small and ensuring models are successful is better than allowing programs to start at larger sizes before determining if they can serve students well.

**8. Regulatory Flexibility Act Analysis**

This section considers the effects that the final regulations will have on small entities in the Educational Sector as required by the Regulatory Flexibility Act (RFA, 5 U.S.C. *et seq.,* Pub. L. 96–354) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). The purpose of the RFA is to establish as a principle of regulation that agencies should tailor regulatory and informational requirements to the size of entities, consistent with the objectives of a particular regulation and applicable statutes. The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the APA or any other statute unless the agency certifies that the rule will not have a ''significant impact on a substantial number of small entities.'' As noted in the RIA, the Department does not expect that the regulatory action will have a significant budgetary impact, but there are some costs to small institutions that are described in this Final Regulatory Flexibility Analysis.

*Description of the Reasons That Action by the Agency Is Being Considered*

These final regulations address four areas: financial responsibility, administrative capability, certification procedures, and ATB. The financial responsibility regulations will increase our ability to identify high-risk events that are likely to have a significant adverse effect on the financial condition of the institution and require the financial protection we believe is needed to protect students and taxpayers. We strengthened institutional requirements in the administrative capability regulations at § 668.16 to improve the administration of the title IV, HEA programs and address concerning practices that were previously unregulated. The certification procedures regulations will create a more rigorous process for certifying institutions to participate in the title IV, HEA programs. Finally, we amended regulations for ATB at §§ 668.156 and 668.157, which will clarify student eligibility requirements for non-high school graduates and the documentation requirements for eligible career pathway programs.

*Succinct Statement of the Objectives of, and Legal Basis for, the Regulations*

The objective of the financial responsibility regulations is to ensure institutions meet minimum standards of financial responsibility on an ongoing basis while identifying changes in condition that warrant safeguards such as increased financial protection. Doing so increases the Department's ability to identify high-risk events and require the financial protection we believe is needed to protect students and taxpayers. We are strengthening requirements in the administrative capability regulations to improve the administration of the title IV, HEA programs and address concerning practices that were previously unregulated.

Our goal of the certification procedures regulations is to create a more rigorous process for certifying institutions to participate in the title IV, HEA programs. We expect all of these regulations to better protect students and taxpayers.

Finally, our objective for the ATB regulations is to clarify student eligibility requirements for non-high school graduates and the documentation requirements for eligible career pathway programs so that more students can access postsecondary education and succeed.

The Department's authority to pursue the financial responsibility regulations is derived from section 498(c) of the HEA. HEA section 498(d) authorizes the Secretary to establish certain requirements relating to institutions' administrative capacities. The Secretary's authority around institutional eligibility and certification procedures is derived primarily from HEA section 498. Section 487(a) of the HEA requires institutions to enter into an agreement with the Secretary, and that agreement conditions an institution's participation in title IV programs on a list of requirements. Furthermore, as discussed elsewhere in the preamble, HEA section 487(c)(1)(B) authorizes the Secretary to issue regulations as may be necessary to provide reasonable standards of financial responsibility and appropriate institutional capability for the administration of title IV, HEA programs in matters not governed by specific program provisions, and that authorization includes any matter the Secretary deems necessary for the sound administration of the student aid programs. The Department's authority for the ATB regulations comes from section 498(d) of the HEA, which outlines how a student who does not have a certificate of graduation from a school providing secondary education, or the recognized equivalent of such certificate, can be eligible for Federal student aid.

*Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Regulations Will Apply*

The Small Business Administration (SBA) defines ''small institution'' using data on revenue, market dominance, tax filing status, governing body, and population. Most entities to which the Office of Postsecondary Education's (OPE) regulations apply are postsecondary institutions, however, which do not report data on revenue that is directly comparable across institutions. As a result, for purposes of this NPRM, the Department proposes to continue defining ''small entities'' by reference to enrollment, to allow meaningful comparison of regulatory impact across all types of higher education institutions.

The enrollment standard for small less-than-two-year institutions (below associate degrees) is less than 750 full-time-equivalent (FTE) students and for small institutions of at least two but less-than-4-years and 4-year institutions,

less than 1,000 FTE students.[66] As a result of discussions with the Small Business Administration, this is an update from the standard used in some prior rules, such as the NPRM associated with this final rule, ''Financial Value Transparency and Gainful Employment (GE), Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit (ATB),'' published in the **Federal Register** May 19, 2023,[67] the final rule published in the **Federal Register** on July 10, 2023, for the ''Improving Income Driven Repayment'' rule,[68] and the final rule published in the **Federal Register** on October 28, 2022, on ''Pell Grants for Prison Education Programs; Determining the Amount of Federal Education Assistance Funds Received by Institutions of Higher Education (90/10); Change in Ownership and Change in Control.'' [69] Those prior rules applied an enrollment standard for a small two-year institution of less than 500 full-time-equivalent (FTE) students and for a small 4-year institution, less than 1,000 FTE students.[70] The Department consulted with the Office of Advocacy for the SBA and the Office of Advocacy has approved the revised alternative standard for this rulemaking. The Department continues to believe this approach most accurately reflects a common basis for determining size categories that is linked to the provision of educational services and that it captures a similar universe of small entities as the SBA's revenue standard.[71]

TABLE 8.1—SMALL INSTITUTIONS UNDER ENROLLMENT-BASED DEFINITION

| | Small | Total | Percent |
|---|---|---|---|
| Proprietary | 2,114 | 2,331 | 91 |
| 2-year | 1,875 | 1,990 | 94 |
| 4-year | 239 | 341 | 70 |
| Private not-for-profit | 997 | 1,831 | 54 |
| 2-year | 199 | 203 | 98 |
| 4-year | 798 | 1,628 | 49 |
| Public | 524 | 1,924 | 27 |
| 2-year | 461 | 1,145 | 40 |
| 4-year | 63 | 779 | 8 |
| Total | 3,635 | 6,086 | 60 |

Source: 2020–21 IPEDS data reported to the Department.

Table 8.1 summarizes the number of institutions affected by these final regulations. As seen in Table 8.2, the average total revenue at small institutions ranges from $3.0 million for proprietary institutions to $16.5 million at private institutions.

TABLE 8.2—AVERAGE AND TOTAL REVENUES AT SMALL INSTITUTIONS

| | Average | Total |
|---|---|---|
| Proprietary | 2,959,809 | 6,257,035,736 |
| 2-year | 2,257,046 | 4,231,961,251 |
| 4-year | 8,473,115 | 2,025,074,485 |
| Private not-for-profit | 16,531,376 | 16,481,781,699 |
| 2-year | 3,664,051 | 729,146,103 |
| 4-year | 19,740,145 | 15,752,635,596 |
| Public | 11,084,101 | 5,808,068,785 |
| 2-year | 8,329,653 | 3,839,969,872 |
| 4-year | 31,239,665 | 1,968,098,913 |
| Total | 7,853,339 | 28,546,886,220 |

As noted in the net budget estimate section, we do not anticipate that the Financial Responsibility, Administrative Capability, Certification Procedures, and ATB components of the regulation will have any significant budgetary impact, or an impact on a substantial number of small entities. We have, however, run a sensitivity analysis of what an effect of the Financial Responsibility provisions could be on offsetting the transfers of certain loan

[66] In regulations prior to 2016, the Department categorized small businesses based on tax status. Those regulations defined ''non-profit organizations'' as ''small organizations'' if they were independently owned and operated and not dominant in their field of operation, or as ''small entities'' if they were institutions controlled by governmental entities with populations below 50,000. Those definitions resulted in the categorization of all private nonprofit organizations as small and no public institutions as small. Under the previous definition, proprietary institutions were considered small if they are independently owned and operated and not dominant in their field of operation with total annual revenue below $7,000,000. Using FY 2017 IPEDs finance data for proprietary institutions, 50 percent of 4-year and 90 percent of 2-year or less proprietary institutions would be considered small. By contrast, an enrollment-based definition applies the same metric to all types of institutions, allowing consistent comparison across all types.

[67] 88 FR 32300.

[68] 88 FR 43820.

[69] 87 FR 65426.

[70] In those prior rules, at least two but less-than-four-years institutions were considered in the broader two-year category. In this iteration, after consulting with the Office of Advocacy for the SBA, we separate this group into its own category.

[71] The Department uses an enrollment-based definition since this applies the same metric to all types of institutions, allowing consistent comparison across all types. For a further explanation of why the Department proposes this alternative size standard, please see ''Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program (Borrower Defense)'' proposed rule published July 31, 2018 (83 FR 37242).

discharges from the Department to borrowers by obtaining additional funds from institutions. We elected to use a sensitivity analysis to reflect the uncertainty of how this rule, as well as final rules around GE and borrower defense may deter the behavior that in the past led to liabilities against institutions. These sensitivities reduced borrower defense claims by 5 percent and 15 percent and closed school claims by 5 percent and 25 percent. Using the sensitivities, we estimated there could be a reduction in the budget impact of closed school discharges or borrower defense of $0.5 to $1.5 billion for loan cohorts through 2033 from all types of institutions, not just small institutions. Since these amounts scale with the number of students, we anticipate the impact to be much smaller at small entities.

While we do not anticipate a significant budget impact from these provisions, the RIA identifies some potential costs to institutions that may also affect small institutions. The Department has not quantified these costs because they are specific to individual institutions' circumstances. The largest are the costs associated with providing financial protection. Some of these are administrative costs in the form of fees paid to banks or other financial institutions to obtain a letter of credit. These are costs that an institution bears regardless of whether a letter of credit is collected upon. The exact amount of this fee will vary by institution and at least partly reflect the assessment of the institution's riskiness by the financial institution. Institutions do not report the costs of obtaining a letter of credit to the Department.

In addition to the potential cost of financial protection, institutions could see increased costs to improve their financial aid information, strengthen their career services, improve their procedures for verifying high school diplomas, and providing clinical opportunities and externships. The extent of these costs will vary across institutions, with some not requiring any changes and others facing costs that could range from small one-time charges to tweak financial aid communications to ongoing expenses to have the staff necessary for career services or findings spots for clinical and externship opportunities. Potential costs associated with reviewing high school diplomas will also vary greatly based on institutions' existing procedures.

The certification provisions could also result in administrative expenses or costs in the form of reduced transfers from the Department, but the nature and extent will vary significantly. Many institutions will see no change in their transfers, as they are not affected by provisions like the ones that cap the length of gainful employment programs, require having necessary approvals for licensure or certification, or do not offer distance programs outside their home State. For other institutions, the nature and extent of costs will vary depending on how much they must either engage in administrative work to come into compliance with the regulations or otherwise reduce enrollment that is supported by title IV, HEA funds. Institutions that are placed on provisional status will incur other administrative expenses. This can come from submitting additional information for reporting purposes or applying for recertification after a shorter period, which requires some staff time. Institutions that are asked to provide a teach-out plan or agreement will also incur administrative expenses to produce those documents.

The ability to benefit provisions will impose additional costs on small entities that apply for the State process. The regulations will break up the State process into an initial and subsequent application that must be submitted to the Department after two years of initial approval. This increases costs to the State and participating institutions. This new application process will be offset because the participating institutions will no longer need to fund their own State process without title IV, HEA program aid to gain enough data to submit a successful application to the Department. There are also additional reporting costs associated with the ATB and eligible career pathways program requirements that are described in the following section of this analysis.

*Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Regulations, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirements and the Type of Professional Skills Necessary for Preparation of the Report or Record*

As detailed in the Paperwork Reduction Act of 1995 section of this preamble, institutions in certain circumstances will be required to submit information to the Department. The final regulations require provisionally certified institutions at risk of closure to submit to the Department acceptable teach-out plans, and acceptable record retention plans. For provisionally certified institutions at risk of closure, are teaching out or closing, or are not financially responsible or administratively capable, the change requires the release of holds on student transcripts. Other provisions require institutions to provide adequate financial aid counseling and financial aid communications to advise students and families to accept the most beneficial types of financial assistance available to enrolled students and strengthen the requirement to evaluate the validity of students' high school diplomas. The final regulations also require information about relevant foreign ownership, the State process for ability to benefit qualification, eligible career pathways programs, financial responsibility trigger events, and, for some institutions, confirmation that they are public institutions backed by the full faith and credit of that government entity to be considered as financially responsible. Based on the share of institutions considered small entities, we have estimated the paperwork burden of these provisions in Table 8.3.

TABLE 8.3—ESTIMATED PAPERWORK BURDEN ON SMALL ENTITIES

| OMB control No. | Regulatory section | Information collection | Hours | Estimated cost | Average hours per institution | Average amount per institution | As % of average revenue |
|---|---|---|---|---|---|---|---|
| 1845–0022 ..... | § 668.14 ..... | Amend § 668.14(e) to establish a non-exhaustive list of conditions that the Secretary may apply to provisionally certified institutions, such as the submission of a teach-out plan or agreement.<br>Amend § 668.14(g) to establish conditions that may apply to an initially certified nonprofit institution, or an institution that has undergone a change of ownership and seeks to convert to nonprofit status. | 258 | $12,398 | 10 | 481 | 0.01 |

TABLE 8.3—ESTIMATED PAPERWORK BURDEN ON SMALL ENTITIES—Continued

| OMB control No. | Regulatory section | Information collection | Hours | Estimated cost | Average hours per institution | Average amount per institution | As % of average revenue |
|---|---|---|---|---|---|---|---|
| 1845–0022 ..... | § 668.15 ..... | Remove and reserve § 668.15 thereby consolidating all financial responsibility factors, including those governing changes in ownership, under part 668, subpart L. | (1,493) | (70,576) | (1) | (46) | 0.00 |
| 1845–0022 ..... | § 668.16 ..... | Amend § 668.16(h) to require institutions to provide adequate financial aid counseling and financial aid communications to advise students and families to accept the most beneficial types of financial assistance available. Amend § 668.16(p) to strengthen the requirement that institutions must develop and follow adequate procedures to evaluate the validity of a student's high school diploma. | 34,518 | 1,658,590 | 11 | 529 | 0.01 |
| 1845–0022 ..... | § 668.23 ..... | Amend § 668.23(d) to require that any domestic or foreign institution that is owned directly or indirectly by any foreign entity holding at least a 50 percent voting or equity interest in the institution must provide documentation of the entity's status under the law of the jurisdiction under which the entity is organized. | 8,640 | 416,305 | 40 | 1,917 | 0.02 |
| 1845–0176 ..... | § 668.156 ..... | Amend § 668.156 to clarify the requirements for the approval of a State process. The State process is one of the three ATB alternatives that an individual who is not a high school graduate could fulfill to receive title IV, Federal student aid to enroll in an eligible career pathway program. | 1,920 | 92,256 | 320 | 15,376 | 0.20 |
| 1845–0175 ..... | § 668.157 ..... | Add a new § 668.157 to clarify the documentation requirements for eligible career pathway programs. | 6,000 | 288,300 | 10 | 481 | 0.01 |
| 1845–0022 ..... | § 668.171 ..... | Amend § 668.171(f) to revise the set of conditions whereby an institution must report to the Department that a triggering event, described in § 668.171(c) and (d), has occurred. Amend § 668.171(g) to require some public institutions to provide documentation from a government entity that confirms that the institution is a public institution and is backed by the full faith and credit of that government entity to be considered as financially responsible. | 948 | 45,551 | 2 | 103 | 0.001 |

*Identification, to the Extent Practicable, of All Relevant Federal Regulations That May Duplicate, Overlap or Conflict With the Regulations*

The regulations are unlikely to conflict with or duplicate existing Federal regulations.

*Alternatives Considered*

As described in section 7 of the Regulatory Impact Analysis above, ''Alternatives Considered,'' we evaluated several alternative provisions and approaches. For financial responsibility, we considered adopting a materiality threshold and a formal appeals process related to the imposition of letters of credit. In the administrative capability regulations, the Department considered not requiring institutions to verify high school diplomas that might be questionable if they came from a high school that was licensed or registered by the State. We considered removing all supplementary performance measures in the certification procedures, as well as only applying the signature requirement to individuals. The Department considered suggestions from commenters to entirely remove requirements that institutions certify they abide by certain State laws specifically related to postsecondary education as well as to expand the types of education-specific laws covered by that provision. For certification requirements related to professional licensure, we considered suggestions from commenters to maintain the current regulations that require disclosures to students. We also considered adopting recommendations from commenters to allow GE programs to be as long as 150 percent of State maximum hour requirements. In the ATB regulations, we considered suggestions from commenters to reduce the success rate to as low as 75 percent.

**9. Paperwork Reduction Act of 1995**

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Sections 668.14, 668.15, 668.16, 668.23, 668.156, 668.157, and 668.171 of the final regulations contain information collections requirements.

Under the PRA, the Department has or will at the required time submit a copy of these sections and Information Collection requests to OMB for its review. A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number. Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number. In these final regulations, we display the control numbers assigned by OMB to any information collection requirements proposed in the NPRM and adopted in the final regulations.

*Section 668.14—Program Participation Agreement*

*Requirements:* The final rule redesignates current § 668.14(e) as § 668.14(h). The Department also includes a new paragraph (e) that outlines a non-exhaustive list of conditions that we may opt to apply to provisionally certified institutions. The final rule also requires that institutions at risk of closure must submit an

acceptable teach-out plan or agreement to the Department, the State, and the institution's recognized accrediting agency. Institutions at risk of closure must also submit an acceptable records retention plan that addresses title IV, HEA records, including but not limited to student transcripts, and evidence that the plan has been implemented, to the Department.

The final rule also requires that an institution at risk of closure that is teaching out, closing, or that is not financially responsible or administratively capable, release holds on student transcripts. Other conditions for institutions that are provisionally certified and may be applied by the Secretary are also included.

*Burden Calculations:* Section 668.14 will add burden to all institutions, domestic and foreign. The change in § 668.14(e) will require provisionally certified institutions at risk of closure to submit to the Department acceptable teach-out plans and record retention plans. For provisionally certified institutions that are at risk of closure, are teaching out or closing, or are not financially responsible or administratively capable, the change requires the release of holds on student transcripts.

This type of submission will require 10 hours for each institution to provide the appropriate material or take the required action under the final regulations. As of January 2023, there were a total of 863 domestic and foreign institutions that were provisionally certified. We estimate that of that figure 5 percent or 43 provisionally certified institutions may be at risk of closure. We estimate that it will take private non-profit institutions 250 hours ($25 \times 10 = 250$) to complete the submission of information or required action. We estimate that it will take proprietary institutions 130 hours ($13 \times 10 = 130$) to complete the submission of information or required action. We estimate that it will take public institutions 50 hours ($5 \times 10 = 50$) to complete the submission of information or required action.

The estimated § 668.14(e) total burden is 430 hours with a total rounded estimated cost for all institutions of $20,663 ($430 \times $48.05 = $20,661.50).

STUDENT ASSISTANCE GENERAL PROVISIONS—OMB CONTROL NUMBER 1845–0022

| Affected entity | Respondent | Responses | Burden hours | Cost $48.05 per institution |
|---|---|---|---|---|
| Private non-profit | 25 | 25 | 250 | $12,013 |
| Proprietary | 13 | 13 | 130 | 6,247 |
| Public | 5 | 5 | 50 | 2,403 |
| Total | 43 | 43 | 430 | $20,663 |

*Section 668.15—Factors of Financial Responsibility*

*Requirements:* This section is being removed and reserved.

*Burden Calculations:* With the removal of regulatory language in § 668.15 the Department will remove the associated burden of 2,448 hours under OMB Control Number 1845–0022.

STUDENT ASSISTANCE GENERAL PROVISIONS—OMB CONTROL NUMBER 1845–0022

| Affected entity | Respondent | Responses | Burden hours | Cost $ − 48.05 per institution |
|---|---|---|---|---|
| Private non-profit | − 866 | − 866 | − 816 | − $39,209 |
| Proprietary | − 866 | − 866 | − 816 | $39,209 |
| Public | − 866 | − 866 | − 816 | $39,209 |
| Total | − 2,598 | − 2,598 | − 2,448 | $117,627 |

*Section 668.16—Standards of Administrative Capability*

*Requirements:* The Department amends § 668.16 to clarify the characteristics of institutions that are administratively capable. The final rule amends § 668.16(h) which will require institutions to provide adequate financial aid counseling and financial aid communications to advise students and families to accept the most beneficial types of financial assistance available to enrolled students. This includes clear information about the cost of attendance, sources and amounts of each type of aid separated by the type of aid, the net price, and instructions and applicable deadlines for accepting, declining, or adjusting award amounts. Institutions also must provide students with information about the institution's cost of attendance, the source and type of aid offered, whether it must be earned or repaid, the net price, and deadlines for accepting, declining, or adjusting award amounts.

The final rule also amends § 668.16(p) which strengthens the requirement that institutions must develop and follow adequate procedures to evaluate the validity of a student's high school diploma if the institution or the Department has reason to believe that the high school diploma is not valid or was not obtained from an entity that provides secondary school education. The Department updates the references to high school completion in existing regulations to high school diploma which will set specific requirements to the existing procedural requirement for adequate evaluation of the validity of a student's high school diploma.

*Burden Calculations:* Section 668.16 adds burden to all institutions, domestic and foreign. The changes in § 668.16(h) require an update to the financial aid communications provided to students.

We estimate that this update will require 8 hours for each institution to review their current communications and make the appropriate updates to the material. We estimate that it will take private non-profit institutions 15,304 hours ($1,913 \times 8 = 15,304$) to complete the required review and update. We estimate that it will take proprietary institutions 12,032 hours ($1,504 \times 8 =$

12,032) to complete the required review and update. We estimate that it will take public institutions 14,504 hours (1,813 × 8 = 14,504) to complete the required review and update. The estimated § 668.16(h) total burden is 41,840 hours with a total rounded estimated cost for all institutions of $2,010,412 (41,840 × $48.05 = $2,010,412).

The changes in § 668.16(p) add requirements for adequate procedures to evaluate the validity of a student's high school diploma if the institution or the Department has reason to believe that the high school diploma is not valid or was not obtained from an entity that provides secondary school education.

This update will require 3 hours for each institution to review their current policy and procedures for evaluating high school diplomas and make the appropriate updates to the material. We estimate that it will take private non-profit institutions 5,739 hours (1,913 × 3 = 5,739) to complete the required review and update. We estimate that it will take proprietary institutions 4,512 hours (1,504 × 3 = 4,512) to complete the required review and update. We estimate that it will take public institutions 5,439 hours (1,813 × 3 = 5,439) to complete the required review and update. The estimated § 668.16(p) total burden is 15,690 hours with a total rounded estimated cost for all institutions of $753,905 (15,690 × $48.05 = $753,904.50).

The total estimated increase in burden to OMB Control Number 1845–0022 for § 668.16 is 57,530 hours with a total rounded estimated cost of $2,764,317.

STUDENT ASSISTANCE GENERAL PROVISIONS—OMB CONTROL NUMBER 1845–0022

| Affected entity | Respondent | Responses | Burden hours | Cost $48.05 per institution |
|---|---|---|---|---|
| Private non-profit | 1,913 | 3,826 | 21,043 | $1,011,116 |
| Proprietary | 1,504 | 3,008 | 16,544 | 794,940 |
| Public | 1,813 | 3,626 | 19,943 | 958,261 |
| Total | 5,230 | 10,460 | 57,530 | 2,764,317 |

*Section 668.23—Compliance Audits*

*Requirements:* The Department adds § 668.23(d)(2)(ii) that requires an institution, domestic or foreign, that is owned by a foreign entity holding at least a 50 percent voting or equity interest to provide documentation of its status under the law of the jurisdiction under which it is organized, as well as basic organizational documents. The submission of such documentation will better equip the Department to obtain appropriate and necessary documentation from an institution which has a foreign owner or owners with 50 percent or greater voting or equity interest which will provide a clearer picture of the institution's legal status to the Department, as well as who exercises direct or indirect ownership over the institution.

*Burden Calculations:* The regulatory language in § 668.23(d)(2)(ii) adds burden to foreign institutions and certain domestic institutions to submit documentation, translated into English as needed.

We estimate this reporting activity will require an estimated 40 hours of work for affected institutions to complete. We estimate that it will take private non-profit institutions 13,520 hours (338 × 40 = 13,520) to complete the required documentation gathering and translation as needed. We estimate that it will take proprietary institutions 920 hours (23 × 40 = 920) to complete the required footnote activity. The estimated § 668.23(d)(2)(ii) total burden is 14,440 hours with a total rounded estimated cost for all institutions of $693,842 (14,440 × $48.05 = $693,842).

The total estimated increase in burden to OMB Control Number 1845–0022 for § 668.23 is 14,440 hours with a total rounded estimated cost of $693.842.

STUDENT ASSISTANCE GENERAL PROVISIONS—OMB CONTROL NUMBER 1845–0022

| Affected entity | Respondent | Responses | Burden hours | Cost $48.05 per institution |
|---|---|---|---|---|
| Private non-profit | 338 | 338 | 13,520 | $649,636 |
| Proprietary | 23 | 23 | 920 | 44,206 |
| Total | 361 | 361 | 14,440 | 693,842 |

*Section 668.156—Approved State Process*

*Requirements:* The changes to § 668.156 clarify the requirements for the approval of a State process. Under § 668.156, a State must apply to the Secretary for approval of its State process as an alternative to achieving a passing score on an approved, independently administered test or satisfactory completion of at least six credit hours (or its recognized equivalent coursework) for the purpose of determining a student's eligibility for title IV, HEA programs. The State process is one of the three ATB alternatives that an individual who is not a high school graduate could fulfill to receive title IV, HEA, Federal student aid to enroll in an eligible career pathway program.

The monitoring requirement in redesignated § 668.156(c) provides a participating institution that has failed to achieve the 85 percent success rate up to three years to achieve compliance.

The redesignated § 668.156(e) requires that States report information on race, gender, age, economic circumstances, and education attainment. Under § 668.156(h), the Secretary may specify in a notice published in the **Federal Register** additional information that States must report.

*Burden Calculation:* We estimate that it will take a State 160 hours to create and submit an application for a State Process to the Department under § 668.156(a) for a total of 1,600 hours (160 hours × 10 States).

We estimate that it will take a State an additional 40 hours annually to monitor the compliance of the institution's use of the State Process under § 668.156(c) for a total of 400

hours (40 hours × 10 States). This time includes the development of any Corrective Action Plan for any institution the State finds not be complying with the State Process.

We estimate that it will take a State 120 hours to meet the reapplication requirements in § 668.156(e) for a total of 1,200 hours (120 hours × 10 States).

The total hours associated with the change in the regulations as of the effective date of the regulations are estimated at a total of 3,200 hours of burden (320 hours × 10 States) with a total estimated cost of $153,760.00 in OMB Control Number 1845–0176.

APPROVED STATE PROCESS—1845–0176

| Affected entity | Respondent | Responses | Burden hours | Cost $48.05 per institution |
|---|---|---|---|---|
| State | 10 | 30 | 3,200 | $153,760 |
| Total | 10 | 30 | 3,200 | 153,760 |

*Section 668.157—Eligible Career Pathway Program*

*Requirements:* The final rule amends subpart J by adding § 668.157 to clarify the documentation requirements for eligible career pathway program. This new section dictates the documentation requirements for eligible career pathway programs for submission to the Department for approval as a title IV eligible program. Under § 668.157(b), for career pathways programs that do not enroll students through a State process as defined in § 668.156, the Secretary will verify the eligibility of the first eligible career pathway program offered by an institution for title IV, HEA program purposes pursuant to § 668.157(a). The Secretary will have the discretion required to verify the eligibility of programs in instances of rapid expansion or if there are other concerns. Under § 668.157(b), we will also provide an institution with the opportunity to appeal any adverse eligibility decision.

*Burden Calculations:* Section 668.157 adds burden to institutions to participate in eligible career pathway programs. Section 668.157 requires institutions to demonstrate to the Department that the eligible career pathways programs being offered meet the regulatory requirements for the first one or two programs offered by the institution.

We estimate that 1,000 institutions will submit the required documentation to determine eligibility for a career pathway program. We estimate that this documentation and reporting activity will require an estimated 10 hours per program per institution. We estimate that each institution will document and report on one individual eligible career pathways program for a total of 10 hours per institution. We estimate it will take private non-profit institutions 3,600 hours (360 institutions × 1 program = 360 programs × 10 hours per program = 3,600) to complete the required documentation and reporting activity. We estimate that it will take proprietary institutions 1,300 hours (130 institutions × 1 program = 130 programs × 10 hours per program = 1,300) to complete the required documentation and reporting activity. We estimate that it will take public institutions 5,100 hours (510 institutions × 1 program = 510 programs × 10 hours per program = 5,100) to complete the required documentation and reporting activities. The total estimated increase in burden to OMB Control Number 1845–0175 for § 668.157 is 10,000 hours with a total estimated cost of $480,500.00.

ELIGIBLE CAREER PATHWAYS PROGRAM—1845–0175

| Affected entity | Respondent | Responses | Burden hours | Cost $48.05 per institution |
|---|---|---|---|---|
| Private non-profit | 360 | 360 | 3,600 | 172,980 |
| Proprietary | 130 | 130 | 1,300 | 62,465 |
| Public | 510 | 510 | 5,100 | 245,055 |
| Total | 1,000 | 1,000 | 10,000 | 480,500 |

*Section 668.171—General*

*Requirements:* The final rule amends § 668.171(f) by adding several new events to the existing reporting requirements, and expanding others, that must be reported generally no later than 21 days following the event. Implementation of the reportable events will make the Department more aware of instances that may impact an institution's financial responsibility or stability. The reportable events are linked to the financial standards in § 668.171(b) and the financial triggers in § 668.171(c) and (d) where there is no existing mechanism for the Department to know that a failure or a triggering event has occurred. Notification regarding these events allows the Department to initiate actions to either obtain financial protection, or determine if financial protection is necessary, to protect students from the negative consequences of an institution's financial instability and possible closure.

The final rule also amends § 668.171(g) by adding language which requires an institution seeking eligibility as a public institution for the first time, as part of a request to be recognized as a public institution following a change in ownership, or otherwise upon request by the Department to provide to the Department a letter from an official of the government entity or other signed documentation acceptable to the Department. The letter or documentation must state that the institution is backed by the full faith and credit of the government entity. The Department also includes similar amendments to apply to foreign institutions.

*Burden Calculations:* The regulatory language in § 668.171(f) adds burden to institutions regarding evidence of financial responsibility. The regulations in § 668.171(f) require institutions to demonstrate to the Department that it met the triggers set forth in the

regulations. We estimate that domestic and foreign institutions have the potential to hit a trigger that will require them to submit documentation to determine eligibility for continued participation in the title IV programs. The overwhelming majority of reporting will likely stem from the mandatory triggering event on GE programs that are failing with limited reporting under additional events. We estimate that this documentation and reporting activity will require an estimated 2 hours per institution. We estimate it will take private non-profit institutions 100 hours (50 institutions × 2 hours = 100) to complete the required documentation and reporting activity. We estimate that it will take proprietary institutions 1,300 hours (650 institutions × 2 hours = 1,300) to complete the required documentation and reporting activity.

The regulatory language in § 668.171(g) adds burden to public institutions regarding evidence of financial responsibility. The regulations in § 668.171(g) require institutions in two specific circumstances or upon request from the Department to demonstrate that the public institution is backed by the full faith and credit of the government entity. We estimate that 36 public institutions (two percent of the currently participating public institutions) will be required to recertify in a given year. We further estimate that it will take each institution 5 hours to procure the required documentation from the appropriate governmental agency for a total of 180 hours (36 institutions × 5 hours = 180 hours).

The total estimated increase in burden to OMB Control Number 1845–0022 for § 668.171 is 1,580 hours with a total rounded estimated cost of $775,919.

STUDENT ASSISTANCE GENERAL PROVISIONS—OMB CONTROL NUMBER 1845–0022

| Affected entity | Respondent | Responses | Burden hours | Cost $48.05 per institution |
|---|---|---|---|---|
| Private non-profit | 50 | 50 | 100 | $4,805 |
| Proprietary | 650 | 650 | 1,300 | 62,465 |
| Public | 36 | 36 | 180 | 8,649 |
| Total | 736 | 736 | 1,580 | 75,919 |

Consistent with the discussions above, the following chart describes the sections of the final regulations involving information collections, the information being collected and the collections that the Department will submit to OMB for approval and public comment under the PRA, and the estimated costs associated with the information collections. The monetized net cost of the increased burden for institutions and students, using wage data developed using Bureau of Labor Statistics (BLS) data.

For individuals, we used the median hourly wage for all occupations, $22.26 per hour according to BLS (*bls.gov/oes/current/oes_nat.htm#=0000*). For institutions, we used the median hourly wage for Education Administrators, Postsecondary, $48.05 per hour according to BLS (*bls.gov/oes/current/oes119033.htm*).

COLLECTION OF INFORMATION

| Regulatory section | Information collection | OMB control No. and estimated burden | Estimated cost $48.05 Institutional $22.26 Individual unless otherwise noted |
|---|---|---|---|
| § 668.14 | Amend § 668.14(e) to establish a non-exhaustive list of conditions that the Secretary may apply to provisionally certified institutions, such as the submission of a teach-out plan or agreement. Amend § 668.14(g) to establish conditions that may apply to an initially certified non-profit institution, or an institution that has undergone a change in ownership and seeks to convert to nonprofit status. | 1845–0022, +430 hrs | +20,663 |
| § 668.15 | Remove and reserve § 668.15 thereby consolidating all financial responsibility factors, including those governing changes in ownership, under part 668, subpart L. | 1845–0022, −2,448 hrs | −117,627 |
| § 668.16 | Amend § 668.16(h) to require institutions to provide adequate financial aid counseling and financial aid communications to advise students and families to accept the most beneficial types of financial assistance available. Amend § 668.16(p) to strengthen the requirement that institutions must develop and follow adequate procedures to evaluate the validity of a student's high school diploma. | 1845–0022 +57,530 hrs | +2,764,317 |
| § 668.23 | Amend § 668.23(d) to require that any domestic or foreign institution that is owned directly or indirectly by any foreign entity holding at least a 50 percent voting or equity interest in the institution must provide documentation of the entity's status under the law of the jurisdiction under which the entity is organized. | 1845–0022, +14,440 hrs | +693,842 |
| § 668.156 | Amend § 668.156 to clarify the requirements for the approval of a State process. The State process is one of the three ATB alternatives that an individual who is not a high school graduate could fulfill to receive title IV, Federal student aid to enroll in an eligible career pathway program. | 1845–0176, +3,200 | +153,760 |
| § 668.157 | Add a new § 668.157 to clarify the documentation requirements for eligible career pathway programs. | 1845–0175, +10,000 | +480,500 |

COLLECTION OF INFORMATION—Continued

| Regulatory section | Information collection | OMB control No. and estimated burden | Estimated cost $48.05 Institutional $22.26 Individual unless otherwise noted |
|---|---|---|---|
| § 668.171 ..... | Amend § 668.171(f) to revise the set of conditions whereby an institution must report to the Department that a triggering event, described in § 668.171(c) and (d), has occurred. Amend § 668.171(g) to require some public institutions to provide documentation from a government entity that confirms that the institution is a public institution and is backed by the full faith and credit of that government entity to be considered as financially responsible. | 1845–0022, +1,580 hrs ..... | +75,919 |

The total burden hours and change in burden hours associated with each OMB Control number affected by the final regulations follows: 1845–0022, 1845–0176, and 1845–0175.

| Control No. | Total burden hours | Change in burden hours |
|---|---|---|
| 1845–0022 ..... | 2,621,280 | +71,532 |
| 1845–0176 ..... | 3,200 | +3,200 |
| 1845–0175 ..... | 10,000 | +10,000 |
| Total ..... | 2,634,480 | 346,232 |

To comment on the information collection requirements, please send your comments to the Office of Information and Regulatory Affairs in OMB, Attention: Desk Officer for the U.S. Department of Education. Send these comments by email to *OIRA_DOCKET@omb.eop.gov* or by fax to (202) 395–6974. You may also send a copy of these comments to the Department contact named in the **ADDRESSES** section of the preamble.

We have prepared the Information Collection Request (ICR) for these collections. You may review the ICR which is available at *www.reginfo.gov*. Click on Information Collection Review. These collections are identified as collections 1845–022, 1845–0175, 1845–1076.

**Intergovernmental Review**

This program is 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.

**Assessment of Educational Impact**

In the NPRM we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available. Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

**Federalism**

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. ''Federalism implications'' means 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. The final regulations do not have federalism implications.

*Accessible Format:* On request to one of the program contact persons 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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**List of Subjects in 34 CFR Part 668**

Administrative practice and procedure, Aliens, Colleges and universities, Consumer protection, Grant programs-education, Incorporation by reference, Loan programs-education, Reporting and recordkeeping requirements, Selective Service System, Student aid, Vocational education.

**Miguel A. Cardona,**

*Secretary of Education.*

For the reasons discussed in the preamble, the Secretary amends part 668 of title 34 of the Code of Federal Regulations as follows:

## PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

■ 1. The authority citation for part 668 continues to read as follows:

**Authority:** 20 U.S.C. 1001–1003, 1070g, 1085, 1088, 1091, 1092, 1094, 1099c, 1099c–1, 1221e–3, and 1231a, unless otherwise noted.

Section 668.14 also issued under 20 U.S.C. 1085, 1088, 1091, 1092, 1094, 1099a–3, 1099c, and 1141.

Section 668.41 also issued under 20 U.S.C. 1092, 1094, 1099c.

Section 668.91 also issued under 20 U.S.C. 1082, 1094.

Section 668.171 also issued under 20 U.S.C. 1094 and 1099c and 5 U.S.C. 404.

Section 668.172 also issued under 20 U.S.C. 1094 and 1099c and 5 U.S.C. 404.

Section 668.175 also issued under 20 U.S.C. 1094 and 1099c.

■ 2. Section 668.2 is amended in paragraph (b) by adding definitions of ''Eligible career pathway program'' and ''Financial exigency'' in alphabetical order to read as follows:

**§ 668.2 General definitions.**

* * * * *

(b) * * *

*Eligible career pathway program:* A program that combines rigorous and high-quality education, training, and other services that—

(i) Align with the skill needs of industries in the economy of the State or regional economy involved;

(ii) Prepare an individual to be successful in any of a full range of secondary or postsecondary education options, including apprenticeships registered under the Act of August 16, 1937 (commonly known as the ''National Apprenticeship Act''; 50 Stat. 664, chapter 663; 29 U.S.C. 50 *et seq.*);

(iii) Include counseling to support an individual in achieving the individual's education and career goals;

(iv) Include, as appropriate, education offered concurrently with and in the same context as workforce preparation activities and training for a specific occupation or occupational cluster;

(v) Organize education, training, and other services to meet the particular needs of an individual in a manner that accelerates the educational and career advancement of the individual to the extent practicable;

(vi) Enable an individual to attain a secondary school diploma or its recognized equivalent, and at least one recognized postsecondary credential; and

(vii) Help an individual enter or advance within a specific occupation or occupational cluster.

* * * * *

*Financial exigency:* A status declared by an institution to a governmental entity or its accrediting agency representing severe financial distress that, absent significant reductions in expenditures or increases in revenue, reductions in administrative staff or faculty, or the elimination of programs, departments, or administrative units, could result in the closure of the institution.

* * * * *

■ 3. Section 668.13 is amended by:

■ a. Removing paragraph (b)(3).

■ b. Revising paragraphs (c)(1)(i)(C) and (D).

■ c. In paragraph (c)(1)(i)(E), removing the word ''or'' at the end of the paragraph.

■ d. Revising paragraph (c)(1)(i)(F).

■ e. Adding paragraph (c)(1)(i)(G).

■ f. Revising paragraph (c)(1)(ii).

■ g. Adding paragraph (c)(1)(iii).

■ h. Revising paragraph (c)(2) and (d)(2)(ii).

■ i. Adding paragraph (e).

The revisions and addition read as follows:

**§ 668.13 Certification procedures.**

* * * * *

(c) * * *

(1) * * *

(i) * * *

(C) The institution is a participating institution that is applying for a renewal of certification—

(*1*) That the Secretary determines has jeopardized its ability to perform its financial responsibilities by not meeting the factors of financial responsibility under subpart L of this part or the standards of administrative capability under § 668.16;

(*2*) Whose participation has been limited or suspended under subpart G of this part; or

(*3*) That voluntarily enters into provisional certification;

(D) The institution seeks to be reinstated to participate in a title IV, HEA program after a prior period of participation in that program ended;

* * * * *

(F) The Secretary has determined that the institution is at risk of closure; or

(G) The institution is under the provisional certification alternative of subpart L of this part.

(ii) An institution's certification becomes provisional upon notification from the Secretary if—

(A) The institution triggers one of the financial responsibility events under § 668.171(c) or (d) and, as a result, the Secretary requires the institution to post financial protection; or

(B) Any owner or interest holder of the institution with control over that institution, as defined in 34 CFR 600.31, also owns another institution with fines or liabilities owed to the Department and is not making payments in accordance with an agreement to repay that liability.

(iii) A proprietary institution's certification automatically becomes provisional at the start of a fiscal year if it did not derive at least 10 percent of its revenue for its preceding fiscal year from sources other than Federal educational assistance funds, as required under § 668.14(b)(16).

(2) If the Secretary provisionally certifies an institution, the Secretary also specifies the period for which the institution may participate in a title IV, HEA program. Except as provided in paragraph (c)(3) of this section or subpart L of this part, a provisionally certified institution's period of participation expires—

(i) Not later than the end of the first complete award year following the date on which the Secretary provisionally certified the institution for its initial certification;

(ii) Not later than the end of the third complete award year following the date on which the Secretary provisionally certified an institution for reasons—

(A) Related to substantial liabilities owed or potentially owed to the Department for discharges related to borrower defense to repayment or false certification, or arising from claims under consumer protection laws; or

(B) As a result of a change in ownership, recertification, reinstatement, automatic re-certification, or a failure under § 668.14(b)(32); and

(iii) If the Secretary provisionally certified the institution as a result of its accrediting agency losing recognition, not later than 18 months after the date that the Secretary withdrew recognition from the institution's nationally recognized accrediting agency.

* * * * *

(d) * * *

(2) * * *

(ii) The revocation takes effect on the date that the Secretary transmits the notice to the institution.

* * * * *

(e) *Supplementary performance measures.* In determining whether to certify, or condition the participation of, an institution under this section and § 668.14, the Secretary may consider the following, among other information at the program or institutional level:

(1) *Withdrawal rate.* The percentage of students who withdrew from the institution within 100 percent or 150 percent of the published length of the program.

(2) *Educational and pre-enrollment expenditures.* The amounts the institution spent on instruction and instructional activities, academic support, and support services, compared to the amounts spent on recruiting activities, advertising, and other pre-enrollment expenditures.

(3) *Licensure pass rate.* If a program is designed to meet educational requirements for a specific professional license or certification that is required for employment in an occupation, and the institution is required by an accrediting agency or State to report passage rates for the licensure exam for the program, such passage rates.

* * * * *

■ 4. Section 668.14 is amended by:
■ a. Adding paragraph (a)(3).
■ b. Revising paragraphs (b)(5), (17), (18), and (26).
■ c. In paragraph (b)(30)(ii)(C), removing the word ''and'' at the end of the paragraph.
■ d. In paragraph (b)(31)(v), removing the period and adding a semicolon in its place.
■ e. Adding paragraphs (b)(32) through (35).
■ f. Redesignating paragraphs (e) through (h) as paragraphs (h) through (k), respectively.
■ f. Adding new paragraphs (e) through (g).

The revisions and additions read as follows:

**§ 668.14 Program participation agreement.**

(a) * * *

(3) An institution's program participation agreement must be signed by—

(i) An authorized representative of the institution; and

(ii) For a proprietary or private nonprofit institution, an authorized representative of an entity with direct or indirect ownership of the institution if that entity has the power to exercise control over the institution. The Secretary considers the following as examples of circumstances in which an entity has such power:

(A) If the entity has at least 50 percent control over the institution through direct or indirect ownership, by voting rights, by its right to appoint board members to the institution or any other entity, whether by itself or in combination with other entities or natural persons with which it is affiliated or related, or pursuant to a proxy or voting or similar agreement.

(B) If the entity has the power to block significant actions.

(C) If the entity is the 100 percent direct or indirect interest holder of the institution.

(D) If the entity provides or will provide the financial statements to meet any of the requirements of 34 CFR 600.20(g) or (h) or subpart L of this part.

(b) * * *

(5) It will comply with the provisions of subpart L of this part relating to factors of financial responsibility;

* * * * *

(17) The Secretary, guaranty agencies, and lenders as defined in 34 CFR part 682, nationally recognized accrediting agencies, Federal agencies, State agencies recognized under 34 CFR part 603 for the approval of public postsecondary vocational education, State agencies that legally authorize institutions and branch campuses or other locations of institutions to provide postsecondary education, and State attorneys general have the authority to share with each other any information pertaining to the institution's eligibility for or participation in the title IV, HEA programs or any information on fraud, abuse, or other violations of law;

(18) It will not knowingly—

(i) Employ in a capacity that involves the administration of the title IV, HEA programs or the receipt of funds under those programs, an individual who has been:

(A) Convicted of, or pled nolo contendere or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds;

(B) Administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds;

(C) An owner, director, officer, or employee who exercised substantial control over an institution, or a direct or indirect parent entity of an institution, that owes a liability for a violation of a title IV, HEA program requirement and is not making payments in accordance with an agreement to repay that liability; or

(D) A ten-percent-or-higher equity owner, director, officer, principal, executive, or contractor at an institution in any year in which the institution incurred a loss of Federal funds in excess of 5 percent of the participating institution's annual title IV, HEA program funds; or

(ii) Contract with any institution, third-party servicer, individual, agency, or organization that has, or whose owners, officers or employees have—

(A) Been convicted of, or pled nolo contendere or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds;

(B) Been administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds;

(C) Had its participation in the title IV programs terminated, certification revoked, or application for certification or recertification for participation in the title IV programs denied;

(D) Been an owner, director, officer, or employee who exercised substantial control over an institution, or a direct or indirect parent entity of an institution, that owes a liability for a violation of a title IV, HEA program requirement and is not making payments in accordance with an agreement to repay that liability; or

(E) Been a 10 percent-or-higher equity owner, director, officer, principal, executive, or contractor affiliated with another institution in any year in which the other institution incurred a loss of Federal funds in excess of 5 percent of the participating institution's annual title IV, HEA program funds;

* * * * *

(26) If an educational program offered by the institution on or after July 1, 2024, is required to prepare a student for gainful employment in a recognized occupation, the institution must—

(i) Establish the need for the training for the student to obtain employment in the recognized occupation for which the program prepares the student; and

(ii) Demonstrate a reasonable relationship between the length of the program and the entry level requirements for the recognized occupation for which the program prepares the student by limiting the number of hours in the program to the greater of—

(A) The required minimum number of clock hours, credit hours, or the equivalent required for training in the recognized occupation for which the program prepares the student, as established by the State in which the institution is located, if the State has established such a requirement or as established by any Federal agency; or

(B) Another State's required minimum number of clock hours, credit hours, or the equivalent required for training in the recognized occupation for which the program prepares the student, if the institution documents, with substantiation by a certified public accountant who prepares the institution's compliance audit report as required under § 668.23 that—

(*1*) A majority of students resided in that State while enrolled in the program during the most recently completed award year;

(*2*) A majority of students who completed the program in the most recently completed award year were employed in that State; or

(*3*) The other State is part of the same metropolitan statistical area as the institution's home State and a majority of students, upon enrollment in the program during the most recently completed award year, stated in writing that they intended to work in that other State; and

(iii) Notwithstanding paragraph (a)(26)(ii) of this section, the program length limitation does not apply for occupations where the State entry level requirements include the completion of an associate or higher-level degree; or where the program is delivered entirely through distance education or correspondence courses;

* * * * *

(32) In each State in which: the institution is located; students enrolled by the institution in distance education or correspondence courses are located, as determined at the time of initial enrollment in accordance with 34 CFR 600.9(c)(2); or for the purposes of paragraphs (b)(32)(i) and (ii) of this section, each student who enrolls in a program on or after July 1, 2024, and attests that they intend to seek employment, the institution must determine that each program eligible for title IV, HEA program funds—

(i) Is programmatically accredited if the State or a Federal agency requires such accreditation, including as a condition for employment in the occupation for which the program prepares the student, or is programmatically pre-accredited when programmatic pre-accreditation is sufficient according to the State or Federal agency;

(ii) Satisfies the applicable educational requirements for professional licensure or certification requirements in the State so that a student who enrolls in the program, and seeks employment in that State after completing the program, qualifies to take any licensure or certification exam that is needed for the student to practice or find employment in an occupation that the program prepares students to enter; and

(iii) Complies with all State laws related to closure, including record retention, teach-out plans or agreements, and tuition recovery funds or surety bonds;

(33) It will not withhold official transcripts or take any other negative action against a student related to a balance owed by the student that resulted from an error in the institution's administration of the title IV, HEA programs, or any fraud or misconduct by the institution or its personnel;

(34) Upon request by a student, the institution will provide an official transcript that includes all the credit or clock hours for payment periods—

(i) In which the student received title IV, HEA funds; and

(ii) For which all institutional charges were paid or included in an agreement to pay at the time the request is made; and

(35) It will not maintain policies and procedures to encourage, or that condition institutional aid or other student benefits in a manner that induces, a student to limit the amount of Federal student aid, including Federal loan funds, that the student receives, except that the institution may provide a scholarship on the condition that a student forego borrowing if the amount of the scholarship provided is equal to or greater than the amount of Federal loan funds that the student agrees not to borrow.

* * * * *

(e) If an institution is provisionally certified, the Secretary may apply such conditions as are determined to be necessary or appropriate to the institution, including, but not limited to—

(1) For an institution that the Secretary determines may be at risk of closure—

(i) Submission of an acceptable teach-out plan or agreement to the Department, the State, and the institution's recognized accrediting agency; and

(ii) Submission to the Department of an acceptable records retention plan that addresses title IV, HEA records, including but not limited to student transcripts, and evidence that the plan has been implemented;

(2) For an institution that the Secretary determines may be at risk of closure, that is teaching out or closing, or that is not financially responsible or administratively capable, the release of holds on student transcripts;

(3) Restrictions or limitations on the addition of new programs or locations;

(4) Restrictions on the rate of growth, new enrollment of students, or title IV, HEA volume in one or more programs;

(5) Restrictions on the institution providing a teach-out on behalf of another institution;

(6) Restrictions on the acquisition of another participating institution, which may include, in addition to any other required financial protection, the posting of financial protection in an amount determined by the Secretary but not less than 10 percent of the acquired institution's title IV, HEA volume for the prior fiscal year;

(7) Additional reporting requirements, which may include, but are not limited to, cash balances, an actual and protected cash flow statement, student rosters, student complaints, and interim unaudited financial statements;

(8) Limitations on the institution entering into a written arrangement with another eligible institution or an ineligible institution or organization for that other eligible institution or ineligible institution or organization to provide between 25 and 50 percent of the institution's educational program under § 668.5(a) or (c); and

(9) For an institution found to have engaged in substantial misrepresentations to students, engaged in aggressive recruiting practices, or violated incentive compensation rules, requirements to hire a monitor and to submit marketing and other recruiting materials (*e.g.,* call scripts) for the review and approval of the Secretary; and

(10) Reporting to the Department, no later than 21 days after an institution receives from any local, State, Tribal, Federal, or foreign government or government entity a civil investigative demand, a subpoena, a request for documents or information, or other formal inquiry that is related to the marketing or recruitment of prospective students, the awarding of Federal financial aid for enrollment at the school, or the provision of educational services for which Federal aid is provided.

(f) If a proprietary institution seeks to convert to nonprofit status following a change in ownership, the following conditions will apply to the institution following the change in ownership, in addition to any other conditions that the Secretary may deem appropriate:

(1) The institution must continue to meet the requirements under § 668.28(a) until the Department has accepted, reviewed, and approved the institution's financial statements and compliance audits that cover two complete consecutive fiscal years in which the institution meets the requirements of paragraph (b)(16) of this section under its new ownership, or until the Department approves the institution's request to convert to nonprofit status, whichever is later.

(2) The institution must continue to meet the gainful employment requirements of subpart S of this part until the Department has accepted, reviewed, and approved the institution's financial statements and compliance

audits that cover two complete consecutive fiscal years under its new ownership, or until the Department approves the institution's request to convert to nonprofit status, whichever is later.

(3) The institution must submit regular and timely reports on agreements entered into with a former owner of the institution or a natural person or entity related to or affiliated with the former owner of the institution, so long as the institution participates as a nonprofit institution.

(4) The institution may not advertise that it operates as a nonprofit institution for the purposes of title IV, HEA until the Department approves the institution's request to convert to nonprofit status.

(g) If an institution is initially certified as a nonprofit institution, or if it has undergone a change in ownership and seeks to convert to nonprofit status, the following conditions will apply to the institution upon initial certification or following the change in ownership, in addition to any other conditions that the Secretary may deem appropriate:

(1) The institution must submit reports on accreditor and State authorization agency actions and any new servicing agreements within 10 business days of receipt of the notice of the action or of entering into the agreement, as applicable, until the Department has accepted, reviewed, and approved the institution's financial statements and compliance audits that cover two complete consecutive fiscal years following initial certification, or two complete fiscal years after a change in ownership, or until the Department approves the institution's request to convert to nonprofit status, whichever is later.

(2) The institution must submit a report and copy of the communications from the Internal Revenue Service (IRS) or any State or foreign country related to tax-exempt or nonprofit status within 10 business days of receipt so long as the institution participates as a nonprofit institution.

* * * * *

**§ 668.15 [Removed and Reserved]**

■ 4. Section 668.15 is removed and reserved.

■ 5. Section 668.16 is amended by:

■ a. Revising the introductory text and paragraphs (h), (k), and (m).

■ b. Redesignating paragraph (n) as paragraph (v).

■ c. Adding a new paragraph (n).

■ d. Removing the word ''and'' at the end of paragraph (o)(2).

■ e. Revising paragraph (p).

■ f. Adding paragraphs (q) through (u).

■ g. Revising newly redesignated paragraph (v).

■ h. Removing the parenthetical authority citation at the end of the section.

The revisions and additions read as follows:

**§ 668.16 Standards of administrative capability.**

To begin and to continue to participate in any title IV, HEA program, an institution must demonstrate to the Secretary that the institution is capable of adequately administering that program under each of the standards established in this section. The Secretary considers an institution to have that administrative capability if the institution—

* * * * *

(h) Provides adequate financial aid counseling with clear and accurate information to students who apply for title IV, HEA program assistance. In determining whether an institution provides adequate counseling, the Secretary considers whether its counseling and financial aid communications advise students and families to accept the most beneficial types of financial assistance available to them and include information regarding—

(1) The cost of attendance of the institution as defined under section 472 of the HEA, including the individual components of those costs and a total of the estimated costs that will be owed directly to the institution, for students, based on their attendance status;

(2) The source and amount of each type of aid offered, separated by the type of the aid and whether it must be earned or repaid;

(3) The net price, as determined by subtracting total grant or scholarship aid included in paragraph (h)(2) of this section from the cost of attendance in paragraph (h)(1) of this section;

(4) The method by which aid is determined and disbursed, delivered, or applied to a student's account, and instructions and applicable deadlines for accepting, declining, or adjusting award amounts; and

(5) The rights and responsibilities of the student with respect to enrollment at the institution and receipt of financial aid, including the institution's refund policy, the requirements for the treatment of title IV, HEA program funds when a student withdraws under § 668.22, its standards of satisfactory progress, and other conditions that may alter the student's aid package;

* * * * *

(k)(1) Is not, and has not been—

(i) Debarred or suspended under Executive Order (E.O.) 12549 (3 CFR, 1986 Comp., p. 189) or the Federal Acquisition Regulations (FAR), 48 CFR part 9, subpart 9.4; or

(ii) Engaging in any activity that is a cause under 2 CFR 180.700 or 180.800, as adopted at 2 CFR 3485.12, for debarment or suspension under E.O. 12549 (3 CFR, 1986 Comp., p. 189) or the FAR, 48 CFR part 9, subpart 9.4; and

(2) Does not have any principal or affiliate of the institution (as those terms are defined in 2 CFR parts 180 and 3485), or any individual who exercises or previously exercised substantial control over the institution as defined in § 668.174(c)(3), who—

(i) Has been convicted of, or has pled nolo contendere or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, Tribal, or local government funds, or has been administratively or judicially determined to have committed fraud or any other material violation of law involving those funds; or

(ii) Is a current or former principal or affiliate (as those terms are defined in 2 CFR parts 180 and 3485), or any individual who exercises or exercised substantial control as defined in § 668.174(c)(3), of another institution whose misconduct or closure contributed to liabilities to the Federal Government in excess of 5 percent of its title IV, HEA program funds in the award year in which the liabilities arose or were imposed;

* * * * *

(m)(1) Has a cohort default rate—

(i) That is less than 25 percent for each of the three most recent fiscal years during which rates have been issued, to the extent those rates are calculated under subpart M of this part;

(ii) On or after 2014, that is less than 30 percent for at least two of the three most recent fiscal years during which the Secretary has issued rates for the institution under subpart N of this part; and

(iii) As defined in 34 CFR 674.5, on loans made under the Federal Perkins Loan Program to students for attendance at that institution that does not exceed 15 percent;

(2) Provided that—

(i) If the Secretary determines that an institution's administrative capability is impaired solely because the institution fails to comply with paragraph (m)(1) of this section, and the institution is not subject to a loss of eligibility under § 668.187(a) or § 668.206(a), the Secretary allows the institution to continue to participate in the title IV, HEA programs. In such a case, the

Secretary may provisionally certify the institution in accordance with § 668.13(c) except as provided in paragraphs (m)(2)(ii) through (v) of this section;

(ii) An institution that fails to meet the standard of administrative capability under paragraph (m)(1)(ii) of this section based on two cohort default rates that are greater than or equal to 30 percent but less than or equal to 40 percent is not placed on provisional certification under paragraph (m)(2)(i) of this section if it—

(A) Has timely filed a request for adjustment or appeal under § 668.209, § 668.210, or § 668.212 with respect to the second such rate, and the request for adjustment or appeal is either pending or succeeds in reducing the rate below 30 percent;

(B) Has timely filed an appeal under § 668.213 after receiving the second such rate, and the appeal is either pending or successful; or

(C)(*1*) Has timely filed a participation rate index challenge or appeal under § 668.204(c) or § 668.214 with respect to either or both of the two rates, and the challenge or appeal is either pending or successful; or

(*2*) If the second rate is the most recent draft rate, and the institution has timely filed a participation rate challenge to that draft rate that is either pending or successful;

(iii) The institution may appeal the loss of full participation in a title IV, HEA program under paragraph (m)(2)(i) of this section by submitting an erroneous data appeal in writing to the Secretary in accordance with and on the grounds specified in § 668.192 or § 668.211 as applicable;

(iv) If the institution has 30 or fewer borrowers in the three most recent cohorts of borrowers used to calculate its cohort default rate under subpart N of this part, we will not provisionally certify it solely based on cohort default rates; and

(v) If a rate that would otherwise potentially subject the institution to provisional certification under paragraphs (m)(1)(ii) and (m)(2)(i) of this section is calculated as an average rate, we will not provisionally certify it solely based on cohort default rates;

(n) Has not been subject to a significant negative action or a finding as by a State or Federal agency, a court, or an accrediting agency, where the basis of the action is repeated or unresolved, such as non-compliance with a prior enforcement order or supervisory directive, and the institution has not lost eligibility to participate in another Federal educational assistance program due to an administrative action against the institution;

* * * * *

(p) Develops and follows adequate procedures to evaluate the validity of a student's high school diploma if the institution or the Secretary has reason to believe that the high school diploma is not valid or was not obtained from an entity that provides secondary school education, consistent with the following requirements:

(1) Adequate procedures to evaluate the validity of a student's high school diploma must include—

(i) Obtaining documentation from the high school that confirms the validity of the high school diploma, including at least one of the following—

(A) Transcripts;

(B) Written descriptions of course requirements; or

(C) Written and signed statements by principals or executive officers at the high school attesting to the rigor and quality of coursework at the high school;

(ii) If the high school is regulated or overseen by a State agency, Tribal agency, or Bureau of Indian Education, confirming with, or receiving documentation from that agency that the high school is recognized or meets requirements established by that agency; and

(iii) If the Secretary has published a list of high schools that issue invalid high school diplomas, confirming that the high school does not appear on that list; and

(2) A high school diploma is not valid if it—

(i) Did not meet the applicable requirements established by the appropriate State agency, Tribal agency, or Bureau of Indian Education in the State where the high school is located;

(ii) Has been determined to be invalid by the Department, the appropriate State agency in the State where the high school was located, or through a court proceeding; or

(iii) Was obtained from an entity that requires little or no secondary instruction or coursework to obtain a high school diploma, including through a test that does not meet the requirements for a recognized equivalent of a high school diploma under 34 CFR 600.2;

(q) Provides adequate career services to eligible students who receive title IV, HEA program assistance. In determining whether an institution provides adequate career services, the Secretary considers—

(1) The share of students enrolled in programs designed to prepare students for gainful employment in a recognized occupation;

(2) The number and distribution of career services staff;

(3) The career services the institution has promised to its students; and

(4) The presence of institutional partnerships with recruiters and employers who regularly hire graduates of the institution;

(r) Provides students, within 45 days of successful completion of other required coursework, geographically accessible clinical or externship opportunities related to and required for completion of the credential or licensure in a recognized occupation;

(s) Disburses funds to students in a timely manner that best meets the students' needs. The Secretary does not consider the manner of disbursements to be consistent with students' needs if, among other conditions—

(1) The Secretary is aware of multiple valid and relevant student complaints;

(2) The institution has high rates of withdrawals attributable to delays in disbursements;

(3) The institution has delayed disbursements until after the point at which students have earned 100 percent of their eligibility for title IV, HEA funds, in accordance with the return to title IV, HEA requirements in § 668.22; or

(4) The institution has delayed disbursements with the effect of ensuring the institution passes the 90/10 ratio;

(t) Offers gainful employment (GE) programs subject to subpart S of this part and at least half of its total title IV, HEA funds in the most recent award year are not from programs that are ''failing'' under subpart S of this part;

(u) Does not engage in substantial misrepresentations, as defined in subpart F of this part, or aggressive and deceptive recruitment tactics or conduct, including as defined in subpart R of this part; and

(v) Does not otherwise appear to lack the ability to administer the title IV, HEA programs competently.

* * * * *

■ 6. Section 668.23 is amended by revising paragraphs (a)(4) and (5) and (d)(1) and (2) to read as follows:

**§ 668.23 Compliance audits and audited financial statements.**

(a) * * *

(4) *Submission deadline.* Except as provided by the Single Audit Act, chapter 75 of title 31, United States Code, an institution must submit annually to the Department its compliance audit and its audited

financial statements by the date that is the earlier of—

(i) Thirty days after the later of the date of the auditor's report for the compliance audit and the date of the auditor's report for the audited financial statements; or

(ii) Six months after the last day of the institution's fiscal year.

(5) *Audit submission requirements.* In general, the Department considers the compliance audit and audited financial statements submission requirements of this section to be satisfied by an audit conducted in accordance with 2 CFR part 200, or the audit guides developed by and available from the Department of Education's Office of Inspector General, whichever is applicable to the entity, and provided that the Federal student aid functions performed by that entity are covered in the submission.

* * * * *

(d) * * *

(1) *General.* To enable the Department to make a determination of financial responsibility, an institution must, to the extent requested by the Department, submit to the Department a set of acceptable financial statements for its latest complete fiscal year (or such fiscal years as requested by the Department or required by this part), as well as any other documentation the Department deems necessary to make that determination. For fiscal years beginning on or after July 1, 2024, financial statements submitted to the Department must match the fiscal year end of the entity's annual return(s) filed with the IRS. Financial statements submitted to the Department must include the Supplemental Schedule required under § 668.172(a) and section 2 of appendices A and B to subpart L of this part, and be prepared on an accrual basis in accordance with generally accepted accounting principles (GAAP), and audited by an independent auditor in accordance with generally accepted government auditing standards (GAGAS), issued by the Comptroller General of the United States and other guidance contained in 2 CFR part 200; or in audit guides developed by and available from the Department of Education's Office of Inspector General, whichever is applicable to the entity, and provided that the Federal student aid functions performed by that entity are covered in the submission. As part of these financial statements, the institution must include a detailed description of related entities based on the definition of a related entity as set forth in Accounting Standards Codification (ASC) 850. The disclosure requirements under this paragraph (d)(1) extend beyond those of ASC 850 to include all related parties and a level of detail that would enable the Department to readily identify the related party. Such information must include, but is not limited to, the name, location and a description of the related entity including the nature and amount of any transactions between the related party and the institution, financial or otherwise, regardless of when they occurred. If there are no related party transactions during the audited fiscal year or related party outstanding balances reported in the financial statements, then management must add a note to the financial statements to disclose this fact.

(2) *Submission of additional information.* (i) In determining whether an institution is financially responsible, the Department may also require the submission of audited consolidated financial statements, audited full consolidating financial statements, audited combined financial statements, or the audited financial statements of one or more related parties that have the ability, either individually or collectively, to significantly influence or control the institution, as determined by the Department.

(ii) For a domestic or foreign institution that is owned directly or indirectly by any foreign entity holding at least a 50 percent voting or equity interest in the institution, the institution must provide documentation of the entity's status under the law of the jurisdiction under which the entity is organized, including, at a minimum, the date of organization, a current certificate of good standing, and a copy of the authorizing statute for such entity status. The institution must also provide documentation that is equivalent to articles of organization and bylaws and any current operating or shareholders' agreements. The Department may also require the submission of additional documents related to the entity's status under the foreign jurisdiction as needed to assess the entity's financial status. Documents must be translated into English.

* * * * *

■ 7. Section 668.32 is amended by revising the section heading and paragraphs (e)(2), (3), and (5) to read as follows:

**§ 668.32 Student eligibility.**

* * * * *

(e) * * *

(2) Has obtained a passing score specified by the Secretary on an independently administered test in accordance with subpart J of this part, and either—

(i) Was first enrolled in an eligible program before July 1, 2012; or

(ii) Is enrolled in an eligible career pathway program as defined in § 668.2;

(3) Is enrolled in an eligible institution that participates in a State process approved by the Secretary under subpart J of this part, and either—

(i) Was first enrolled in an eligible program before July 1, 2012; or

(ii) Is enrolled in an eligible career pathway program as defined in § 668.2;

* * * * *

(5) Has been determined by the institution to have the ability to benefit from the education or training offered by the institution based on the satisfactory completion of 6 semester hours, 6 trimester hours, 6 quarter hours, or 225 clock hours that are applicable toward a degree or certificate offered by the institution, and either—

(i) Was first enrolled in an eligible program before July 1, 2012; or

(ii) Is enrolled in an eligible career pathway program as defined in § 668.2.

* * * * *

■ 8. Section 668.43 is amended by revising paragraphs (a)(5)(v) and (c)(1) and (2) to read as follows:

**§ 668.43 Institutional and programmatic information.**

(a) * * *

(5) * * *

(v) If an educational program is designed to meet educational requirements for a specific professional license or certification that is required for employment in an occupation, or is advertised as meeting such requirements, a list of all States where the institution has determined, including as part of the institution's obligation under § 668.14(b)(32), that the program does and does not meet such requirements; and

* * * * *

(c)(1) If the institution has made a determination under paragraph (a)(5)(v) of this section that the program's curriculum does not meet the State educational requirements for licensure or certification in the State in which a prospective student is located, or if the institution has not made a determination regarding whether the program's curriculum meets the State educational requirements for licensure or certification, the institution must provide notice to that effect to the student prior to the student's enrollment in the institution in accordance with § 668.14(b)(32).

(2) If the institution makes a determination under paragraph (a)(5)(v)

of this section that a program's curriculum does not meet the State educational requirements for licensure or certification in a State in which a student who is currently enrolled in such program is located, the institution must provide notice to that effect to the student within 14 calendar days of making such determination.

* * * * *

■ 9. Section 668.156 is revised to read as follows:

**§ 668.156 Approved State process.**

(a)(1) A State that wishes the Secretary to consider its State process as an alternative to achieving a passing score on an approved, independently administered test or satisfactory completion of at least six credit hours or its recognized equivalent coursework for the purpose of determining a student's eligibility for title IV, HEA program funds must apply to the Secretary for approval of that process.

(2) A State's application for approval of its State process must include—

(i) The institutions located in the State included in the proposed process, which need not be all of the institutions located in the State;

(ii) The requirements that participating institutions must meet to offer eligible career pathway programs through the State process;

(iii) A certification that, as of the date of the application, each proposed career pathway program intended for use through the State process constitutes an ''eligible career pathway program'' as defined in § 668.2 and as documented pursuant to § 668.157;

(iv) The criteria used to determine student eligibility for participation in the State process; and

(v) For an institution listed for the first time on the application, an assurance that not more than 33 percent of the institution's undergraduate regular students withdrew from the institution during the institution's latest completed award year. For purposes of calculating this rate, the institution must count all regular students who were enrolled during the latest completed award year, except those students who, during that period—

(A) Withdrew from, dropped out of, or were expelled from the institution; and

(B) Were entitled to and actually received in a timely manner, a refund of 100 percent of their tuition and fees.

(b) For a State applying for approval for the first time, the Secretary may approve the State process for a two-year initial period if—

(1) The State's process satisfies the requirements contained in paragraphs (a), (c), and (d) of this section; and

(2) The State agrees that the total number of students who enroll through the State process during the initial period will total no more than the greater of 25 students or 1.0 percent of enrollment at each institution participating in the State process.

(c) A State process must—

(1) Allow the participation of only those students eligible under § 668.32(e)(3);

(2) Monitor on an annual basis each participating institution's compliance with the requirements and standards contained in the State's process, including the success rate as calculated in paragraph (f) of this section;

(3) Require corrective action if an institution is found to be in noncompliance with the State process requirements;

(4) Provide a participating institution that has failed to achieve the success rate required under paragraphs (e)(1) and (f) up to three years to achieve compliance;

(5) Terminate an institution from the State process if the institution refuses or fails to comply with the State process requirements, including exceeding the total number of students referenced in paragraph (b)(2) of this section; and

(6) Prohibit an institution from participating in the State process for at least five years after termination.

(d)(1) The Secretary responds to a State's request for approval of its State process within six months after the Secretary's receipt of that request. If the Secretary does not respond by the end of six months, the State's process is deemed to be approved.

(2) An approved State process becomes effective for purposes of determining student eligibility for title IV, HEA program funds under this subpart—

(i) On the date the Secretary approves the process; or

(ii) Six months after the date on which the State submits the process to the Secretary for approval, if the Secretary neither approves nor disapproves the process during that six-month period.

(e) After the initial two-year period described in paragraph (b) of this section, the State must reapply for continued participation and, in its application—

(1) Demonstrate that the students it admits under that process at each participating institution have a success rate as determined under paragraph (f) of this section that is within 85 percent of the success rate of students with high school diplomas;

(2) Demonstrate that the State's process continues to satisfy the requirements in paragraphs (a), (c), and (d) of this section; and

(3) Report information to the Department on the enrollment and success of participating students by eligible career pathway program and by race, gender, age, economic circumstances, and educational attainment, to the extent available.

(f) The State must calculate the success rate for each participating institution as referenced in paragraph (e)(1) of this section by—

(1) Determining the number of students with high school diplomas or equivalent who, during the applicable award year described in paragraph (g)(1) of this section, enrolled in the same programs as students participating in the State process at each participating institution and—

(i) Successfully completed education or training programs;

(ii) Remained enrolled in education or training programs at the end of that award year; or

(iii) Successfully transferred to and remained enrolled in another institution at the end of that award year;

(2) Determining the number of students with high school diplomas or equivalent who, during the applicable award year described in paragraph (g)(1) of this section, enrolled in the same programs as students participating in the State process at each participating institution;

(3) Determining the number of students calculated in paragraph (f)(2) of this section who remained enrolled after subtracting the number of students who subsequently withdrew or were expelled from each participating institution and received a 100 percent refund of their tuition under the institution's refund policies;

(4) Dividing the number of students determined under paragraph (f)(1) of this section by the number of students determined under paragraph (f)(3) of this section; and

(5) Making the calculations described in paragraphs (f)(1) through (4) of this section for students who enrolled through a State process in each participating institution.

(g)(1) For purposes of paragraph (f) of this section, the applicable award year is the latest complete award year for which information is available.

(2) If no students are enrolled in an eligible career pathway program through a State process, then the State will receive a one-year extension to its initial approval of its State process.

(h) A State must submit reports on its State process, in accordance with deadlines and procedures established and published by the Secretary in the

**Federal Register**, with such information as the Secretary requires.

(i) The Secretary approves a State process as described in paragraph (e) of this section for a period not to exceed five years.

(j)(1) The Secretary withdraws approval of a State process if the Secretary determines that the State process violated any terms of this section or that the information that the State submitted as a basis for approval of the State process was inaccurate.

(i) If a State has not terminated an institution from the State process under paragraph (c)(5) of this section for failure to meet the success rate, then the Secretary withdraws approval of the State process, except in accordance with paragraph (j)(1)(ii) of this section.

(ii) At the Secretary's discretion, under exceptional circumstances, the State process may be approved once for a two-year period.

(iii) If 50 percent or more participating institutions across all States do not meet the success rate in a given year, then the Secretary may lower the success rate to no less than 75 percent for two years.

(2) The Secretary provides a State with the opportunity to contest a finding that the State process violated any terms of this section or that the information that the State submitted as a basis for approval of the State process was inaccurate.

(3) If the Secretary upholds the withdrawal of approval of a State process, then the State cannot reapply to the Secretary for a period of five years.

(Approved by the Office of Management and Budget under control number 1845–0049)

■ 10. Section 668.157 is added to read as follows:

**§ 668.157 Eligible career pathway program.**

(a) An institution demonstrates to the Secretary that a student is enrolled in an eligible career pathway program by documenting that—

(1) The student has enrolled in or is receiving all three of the following elements simultaneously—

(i) An eligible postsecondary program as defined in § 668.8;

(ii) Adult education and literacy activities under the Workforce Innovation and Opportunity Act as described in 34 CFR 463.30 that assist adults in attaining a secondary school diploma or its recognized equivalent and in the transition to postsecondary education and training; and

(iii) Workforce preparation activities as described in 34 CFR 463.34;

(2) The program aligns with the skill needs of industries in the State or regional labor market in which the institution is located, based on research the institution has conducted, including—

(i) Government reports identifying in-demand occupations in the State or regional labor market;

(ii) Surveys, interviews, meetings, or other information obtained by the institution regarding the hiring needs of employers in the State or regional labor market; and

(iii) Documentation that demonstrates direct engagement with industry;

(3) The skill needs described in paragraph (a)(2) of this section align with the specific coursework and postsecondary credential provided by the postsecondary program or other required training;

(4) The program provides academic and career counseling services that assist students in pursuing their credential and obtaining jobs aligned with skill needs described in paragraph (a)(2) of this section, and identifies the individuals providing the career counseling services;

(5) The appropriate education is offered, concurrently with and in the same context as workforce preparation activities and training for a specific occupation or occupational cluster through an agreement, memorandum of understanding, or some other evidence of alignment of postsecondary and adult education providers that ensures the education is aligned with the students' career objectives; and

(6) The program is designed to lead to a valid high school diploma as defined in § 668.16(p) or its recognized equivalent.

(b) For a postsecondary institution that offered an eligible career pathway program prior to July 1, 2024, the institution must—

(1) Apply to the Secretary to have one of its career pathway programs determined to be eligible for title IV, HEA program purposes by a date as specified by the Secretary; and

(2) Affirm that any career pathway program offered by the institution meets the documentation standards in paragraph (a) of this section.

(c) For a postsecondary institution that does not offer an eligible career pathway program prior to July 1, 2024, the institution must—

(1) Apply to the Secretary to have its program determined to be an initial eligible career pathway program; and

(2) Affirm that any subsequent career pathway program offered by the institution, initiated only after the approval of the initial eligible career pathway program, will meet the documentation standards outlined in paragraph (a) of this section.

(d) The Secretary provides an institution with the opportunity to appeal an adverse eligibility decision under paragraphs (b) and (c) of this section.

(e) The Secretary maintains the authority to require the approval of additional eligible career pathway programs offered by a postsecondary institution beyond the requirements outlined in paragraphs (b) and (c) of this section for any reason, including but not limited to—

(1) A rapid increase, as determined by the Secretary, of eligible career pathway programs at the institution; or

(2) The Secretary determines that other eligible career pathway programs at the postsecondary institution do not meet the documentation standards outlined in this section.

■ 11. Section 668.171 is amended by revising paragraphs (b) introductory text, (b)(3), and (c) through (i) to read as follows:

**§ 668.171 General.**

* * * * *

(b) *General standards of financial responsibility.* Except as provided in paragraph (h) of this section, the Department considers an institution to be financially responsible if the Department determines that—

* * * * *

(3) The institution is able to meet all of its financial obligations and provide the administrative resources necessary to comply with title IV, HEA program requirements. An institution is not deemed able to meet its financial or administrative obligations if—

(i) It fails to make refunds under its refund policy, return title IV, HEA program funds for which it is responsible under § 668.22, or pay title IV, HEA credit balances as required under § 668.164(h)(2);

(ii) It fails to make repayments to the Department for any debt or liability arising from the institution's participation in the title IV, HEA programs;

(iii) It fails to make a payment in accordance with an existing undisputed financial obligation for more than 90 days;

(iv) It fails to satisfy payroll obligations in accordance with its published payroll schedule;

(v) It borrows funds from retirement plans or restricted funds without authorization; or

(vi) It is subject to an action or event described in paragraph (c) of this section (mandatory triggering events), or

an action or event that the Department has determined to have a significant adverse effect on the financial condition of the institution under paragraph (d) of this section (discretionary triggering events); and

* * * * *

(c) *Mandatory triggering events.* (1) Except for the mandatory triggers that require a recalculation of the institution's composite score, the mandatory triggers in this paragraph (c) constitute automatic failures of financial responsibility. For any mandatory triggers under this paragraph (c) that result in a recalculated composite score of less than 1.0, and for those mandatory triggers that constitute automatic failures of financial responsibility, the Department will require the institution to provide financial protection as set forth in this subpart, unless the institution demonstrates that the event is resolved or that insurance covers the loss in accordance with paragraph (f)(3) of this section. The financial protection required under this paragraph is not less than 10 percent of the total title IV, HEA funding in the prior fiscal year. If the Department requires financial protection as a result of more than one mandatory or discretionary trigger, the Department will require separate financial protection for each individual trigger. For automatic triggers, the Department will consider whether the financial protection can be released following the institution's submission of two full fiscal years of audited financial statements following the Department's notice that requires the posting of the financial protection. In making this determination, the Department considers whether the administrative or financial risk caused by the event has ceased or been resolved, including full payment of all damages, fines, penalties, liabilities, or other financial relief. For triggers that require a recalculation of the composite score, the Department will consider whether the financial protection can be released if subsequent annual submissions pass the Department's requirements for financial responsibility.

(2) The following are mandatory triggers:

(i) *Legal and administrative actions.* (A) For an institution or entity with a composite score of less than 1.5, other than a composite score calculated under 34 CFR 600.20(g) and § 668.176, that has entered against it a final monetary judgment or award, or enters into a monetary settlement which results from a legal proceeding, including from a lawsuit, arbitration, or mediation, whether or not the judgment, award or settlement has been paid, and as a result, the recalculated composite score for the institution or entity is less than 1.0, as determined by the Department under paragraph (e) of this section;

(B) On or after July 1, 2024, the institution or any entity whose financial statements were submitted in the prior fiscal year to meet the requirements of 34 CFR 600.20(g) or this subpart, is sued by a Federal or State authority to impose an injunction, establish fines or penalties, or to obtain financial relief such as damages, or in a qui tam action in which the United States has intervened, but only if the Federal or State action has been pending for 120 days, or a qui tam action has been pending for 120 days following intervention by the United States, and—

(*1*) No motion to dismiss, or its equivalent under State law has been filed within the applicable 120-day period; or

(*2*) If a motion to dismiss or its equivalent under State law, has been filed within the applicable 120-day period and denied, upon such denial;

(C) The Department has initiated action to recover from the institution the cost of adjudicated claims in favor of borrowers under the borrower defense to repayment provisions in 34 CFR part 685 and, the recalculated composite score for the institution or entity as a result of the adjudicated claims is less than 1.0, as determined by the Department under paragraph (e) of this section; or

(D) For an institution or entity that has submitted an application for a change in ownership under 34 CFR 600.20 that has entered against it a final monetary judgment or award, or enters into a monetary settlement which results from a legal proceeding, including from a lawsuit, arbitration, or mediation, or a monetary determination arising from an administrative proceeding described in paragraph (c)(2)(i)(B) or (C) of this section, at any point through the end of the second full fiscal year after the change in ownership has occurred, and as a result, the recalculated composite score for the institution or entity is less than 1.0, as determined by the Department under paragraph (e) of this section. This trigger applies whether the judgment, award, settlement, or monetary determination has been paid.

(ii) *Withdrawal of owner's equity.* (A) For a proprietary institution whose composite score is less than 1.5, or for any proprietary institution through the end of the first full fiscal year following a change in ownership, and there is a withdrawal of owner's equity by any means, including by declaring a dividend, unless the withdrawal is a transfer to an entity included in the affiliated entity group on whose basis the institution's composite score was calculated; or is the equivalent of wages in a sole proprietorship or general partnership or a required dividend or return of capital; and

(B) As a result of that withdrawal, the institution's recalculated composite score for the entity whose financial statements were submitted to meet the requirements of § 668.23 for the annual submission, or 34 CFR 600.20(g) or (h) for a change in ownership, is less than 1.0, as determined by the Department under paragraph (e) of this section.

(iii) *Gainful employment.* As determined annually by the Department, the institution received at least 50 percent of its title IV, HEA program funds in its most recently completed fiscal year from gainful employment (GE) programs that are ''failing'' under subpart S of this part. (iv) *Institutional teach-out plans or agreements.* The institution is required to submit a teach-out plan or agreement, by a State, the Department or another Federal agency, an accrediting agency, or other oversight body for reasons related in whole or in part to financial concerns.

(v) [Reserved]

(vi) *Publicly listed entities.* For an institution that is directly or indirectly owned at least 50 percent by an entity whose securities are listed on a domestic or foreign exchange, the entity is subject to one or more of the following actions or events:

(A) *SEC actions.* The U.S. Securities and Exchange Commission (SEC) issues an order suspending or revoking the registration of any of the entity's securities pursuant to section 12(j) of the Securities Exchange Act of 1934 (the ''Exchange Act'') or suspends trading of the entity's securities pursuant to section 12(k) of the Exchange Act.

(B) *Other SEC actions.* The SEC files an action against the entity in district court or issues an order instituting proceeding pursuant to section 12(j) of the Exchange Act.

(C) *Exchange actions.* The exchange on which the entity's securities are listed notifies the entity that it is not in compliance with the exchange's listing requirements, or its securities are delisted.

(D) *SEC reports.* The entity failed to file a required annual or quarterly report with the SEC within the time period prescribed for that report or by any extended due date under 17 CFR 240.12b–25.

(E) *Foreign exchanges or oversight authority.* The entity is subject to an event, notification, or condition by a

foreign exchange or oversight authority that the Department determines is equivalent to those identified in paragraphs (c)(2)(vi)(A) through (D) of this section.

(vii) *Non-Federal educational assistance funds.* For its most recently completed fiscal year, a proprietary institution did not receive at least 10 percent of its revenue from sources other than Federal educational assistance, as provided under § 668.28(c). The financial protection provided under this paragraph (c)(3)(viii) will remain in place until the institution passes the 90/10 revenue requirement under § 668.28(c) for two consecutive years.

(viii) *Cohort default rates.* The institution's two most recent official cohort default rates are 30 percent or greater, as determined under subpart N of this part, unless—

(A) The institution files a challenge, request for adjustment, or appeal under subpart N of this part with respect to its rates for one or both of those fiscal years; and

(B) That challenge, request, or appeal remains pending, results in reducing below 30 percent the official cohort default rate for either or both of those years or precludes the rates from either or both years from resulting in a loss of eligibility or provisional certification.

(ix) [Reserved]

(x) *Contributions and distributions.* (A) An institution's financial statements required to be submitted under § 668.23 reflect a contribution in the last quarter of the fiscal year, and the entity that is part of the financial statements then made a distribution during the first two quarters of the next fiscal year; and

(B) The offset of such distribution against the contribution results in a recalculated composite score of less than 1.0, as determined by the Department under paragraph (e) of this section.

(xi) *Creditor events.* As a result of an action taken by the Department, the institution or any entity included in the financial statements submitted in the current or prior fiscal year under 34 CFR 600.20(g) or (h), § 668.23, or this subpart is subject to a default or other adverse condition under a line of credit, loan agreement, security agreement, or other financing arrangement.

(xii) *Declaration of financial exigency.* The institution declares a state of financial exigency to a Federal, State, Tribal, or foreign governmental agency or its accrediting agency.

(xiii) *Receivership.* The institution, or an owner or affiliate of the institution that has the power, by contract or ownership interest, to direct or cause the direction of the management of policies of the institution, files for a State or Federal receivership, or an equivalent proceeding under foreign law, or has entered against it an order appointing a receiver or appointing a person of similar status under foreign law.

(d) *Discretionary triggering events.* The Department may determine that an institution is not able to meet its financial or administrative obligations if the Department determines that a discretionary triggering event is likely to have a significant adverse effect on the financial condition of the institution. For those discretionary triggers that the Department determines will have a significant adverse effect on the financial condition of the institution, the Department will require the institution to provide financial protection as set forth in this subpart. The financial protection required under this paragraph (d) is not less than 10 percent of the total title IV, HEA funding in the prior fiscal year. If the Department requires financial protection as a result of more than one mandatory or discretionary trigger, the Department will require separate financial protection for each individual trigger. The Department will consider whether the financial protection can be released following the institution's submission of two full fiscal years of audited financial statements following the Department's notice that requires the posting of the financial protection. In making this determination, the Department considers whether the administrative or financial risk caused by the event has ceased or been resolved, including full payment of all damages, fines, penalties, liabilities, or other financial relief. The following are discretionary triggers:

(1) *Accrediting agency and government agency actions.* The institution's accrediting agency or a Federal, State, local, or Tribal authority places the institution on probation or issues a show-cause order or places the institution in a comparable status that poses an equivalent or greater risk to its accreditation, authorization, or eligibility.

(2) *Other defaults, delinquencies, creditor events, and judgments.* (i) Except as provided in paragraph (c)(2)(xi) of this section, the institution or any entity included in the financial statements submitted in the current or prior fiscal year under 34 CFR 600.20(g) or (h), § 668.23, or this subpart is subject to a default or other adverse condition under a line of credit, loan agreement, security agreement, or other financing arrangement;

(ii) Under that line of credit, loan agreement, security agreement, or other financing arrangement, a monetary or nonmonetary default or delinquency or other event occurs that allows the creditor to require or impose on the institution or any entity included in the financial statements submitted in the current or prior fiscal year under 34 CFR 600.20(g) or (h), § 668.23, or this subpart, an increase in collateral, a change in contractual obligations, an increase in interest rates or payments, or other sanctions, penalties, or fees;

(iii) Any creditor of the institution or any entity included in the financial statements submitted in the current or prior fiscal year under 34 CFR 600.20(g) or (h), § 668.23, or this subpart takes action to terminate, withdraw, limit, or suspend a loan agreement or other financing arrangement or calls due a balance on a line of credit with an outstanding balance;

(iv) The institution or any entity included in the financial statements submitted in the current or prior fiscal year under 34 CFR 600.20(g) or (h), § 668.23, or this subpart enters into a line of credit, loan agreement, security agreement, or other financing arrangement whereby the institution or entity may be subject to a default or other adverse condition as a result of any action taken by the Department; or

(v) The institution or any entity included in the financial statements submitted in the current or prior fiscal year under 34 CFR 600.20(g) or (h), § 668.23, or this subpart has a judgment awarding monetary relief entered against it that is subject to appeal or under appeal.

(3) *Fluctuations in title IV volume.* There is a significant fluctuation between consecutive award years, or a period of award years, in the amount of Direct Loan or Pell Grant funds, or a combination of those funds, received by the institution that cannot be accounted for by changes in those programs.

(4) *High annual dropout rates.* As calculated by the Department, the institution has high annual dropout rates.

(5) *Interim reporting.* For an institution required to provide additional financial reporting to the Department due to a failure to meet the financial responsibility standards in this subpart or due to a change in ownership, there are negative cash flows, failure of other financial ratios, cash flows that significantly miss the projections submitted to the Department, withdrawal rates that increase significantly, or other indicators of a significant change in the financial condition of the institution.

(6) *Pending borrower defense claims.* There are pending claims for borrower relief discharge under 34 CFR 685.400 from students or former students of the institution and the Department has formed a group process to consider claims under 34 CFR 685.402 and, if approved, those claims could be subject to recoupment.

(7) *Discontinuation of programs.* The institution discontinues academic programs that enroll more than 25 percent of its enrolled students who receive title IV, HEA program funds.

(8) *Closure of locations.* The institution closes locations that enroll more than 25 percent of its students who receive title IV, HEA program funds.

(9) *State actions and citations.* The institution, or one or more of its programs, is cited by a State licensing or authorizing agency for failing to meet State or agency requirements, including notice that it will withdraw or terminate the institution's licensure or authorization if the institution does not take the steps necessary to come into compliance with that requirement.

(10) *Loss of institutional or program eligibility.* The institution or one or more of its programs has lost eligibility to participate in another Federal educational assistance program due to an administrative action against the institution or its programs.

(11) *Exchange disclosures.* If an institution is directly or indirectly owned at least 50 percent by an entity whose securities are listed on a domestic or foreign exchange, the entity discloses in a public filing that it is under investigation for possible violations of State, Federal or foreign law.

(12) *Actions by another Federal agency.* The institution is cited and faces loss of education assistance funds from another Federal agency if it does not comply with the agency's requirements.

(13) *Other teach-out plans or agreements not included in paragraph (c) of this section.* The institution is required to submit a teach-out plan or agreement, including programmatic teach-outs, by a State, the Department or another Federal agency, an accrediting agency, or other oversight body.

(14) *Other events or conditions.* Any other event or condition that the Department learns about from the institution or other parties, and the Department determines that the event or condition is likely to have a significant adverse effect on the financial condition of the institution.

(e) *Recalculating the composite score.* When a recalculation of an institution's most recent composite score is required by the mandatory triggering events described in paragraph (c) of this section, the Department makes the recalculation as follows:

(1) For a proprietary institution, debts, liabilities, and losses (including cumulative debts, liabilities, and losses for all triggering events) since the end of the prior fiscal year incurred by the entity whose financial statements were submitted in the prior fiscal year to meet the requirements of § 668.23 or this subpart, and debts, liabilities, and losses (including cumulative debts, liabilities, and losses for all triggering events) through the end of the first full fiscal year following a change in ownership incurred by the entity whose financial statements were submitted for 34 CFR 600.20(g) or (h), will be adjusted as follows:

(i) For the primary reserve ratio, increasing expenses and decreasing adjusted equity by that amount.

(ii) For the equity ratio, decreasing modified equity by that amount.

(iii) For the net income ratio, decreasing income before taxes by that amount.

(2) For a nonprofit institution, debts, liabilities, and losses (including cumulative debts, liabilities, and losses for all triggering events) since the end of the prior fiscal year incurred by the entity whose financial statements were submitted in the prior fiscal year to meet the requirements of § 668.23 or this subpart, and debts, liabilities, and losses (including cumulative debts, liabilities, and losses for all triggering events) through the end of the first full fiscal year following a change in ownership incurred by the entity whose financial statements were submitted for 34 CFR 600.20(g) or (h), will be adjusted as follows:

(i) For the primary reserve ratio, increasing expenses and decreasing expendable net assets by that amount.

(ii) For the equity ratio, decreasing modified net assets by that amount.

(iii) For the net income ratio, decreasing change in net assets without donor restrictions by that amount.

(3) For a proprietary institution, the withdrawal of equity (including cumulative withdrawals of equity) since the end of the prior fiscal year from the entity whose financial statements were submitted in the prior fiscal year to meet the requirements of § 668.23 or this subpart, and the withdrawal of equity (including cumulative withdrawals of equity) through the end of the first full fiscal year following a change in ownership from the entity whose financial statements were submitted for 34 CFR 600.20(g) or (h), will be adjusted as follows:

(i) For the primary reserve ratio, decreasing adjusted equity by that amount.

(ii) For the equity ratio, decreasing modified equity and modified total assets by that amount.

(4) For a proprietary institution, a contribution and distribution in the entity whose financial statements were submitted in the prior fiscal year to meet the requirements of § 668.23, this subpart, or 34 CFR 600.20(g) will be adjusted as follows:

(i) For the primary reserve ratio, decreasing adjusted equity by the amount of the distribution.

(ii) For the equity ratio, decreasing modified equity by the amount of the distribution.

(f) *Reporting requirements.* (1) In accordance with procedures established by the Department, an institution must timely notify the Department of the following actions or events:

(i) For a monetary judgment, award, or settlement incurred under paragraph (c)(2)(i)(A) of this section, no later than 21 days after either the date of written notification to the institution or entity of the monetary judgment or award, or the execution of the settlement agreement by the institution or entity.

(ii) For a lawsuit described in paragraph (c)(2)(i)(B) of this section, no later than 21 days after the institution or entity is served with the complaint, and an updated notice must be provided 21 days after the suit has been pending for 120 days.

(iii) [Reserved]

(iv) For a withdrawal of owner's equity described in paragraph (c)(2)(ii) of this section—

(A) For a capital distribution that is the equivalent of wages in a sole proprietorship or general partnership, no later than 21 days after the date the Department notifies the institution that its composite score is less than 1.5. In response to that notice, the institution must report the total amount of the wage-equivalent distributions it made during its prior fiscal year and any distributions that were made to pay any taxes related to the operation of the institution. During its current fiscal year and the first six months of its subsequent fiscal year (18-month period), the institution is not required to report any distributions to the Department, provided that the institution does not make wage-equivalent distributions that exceed 150 percent of the total amount of wage-equivalent distributions it made during its prior fiscal year, less any distributions that were made to pay any

taxes related to the operation of the institution. However, if the institution makes wage-equivalent distributions that exceed 150 percent of the total amount of wage-equivalent distributions it made during its prior fiscal year less any distributions that were made to pay any taxes related to the operation of the institution at any time during the 18-month period, it must report each of those distributions no later than 21 days after they are made, and the Department recalculates the institution's composite score based on the cumulative amount of the distributions made at that time;

(B) For a distribution of dividends or return of capital, no later than 21 days after the dividends are declared or the amount of return of capital is approved; or

(C) For a related party receivable or other assets, no later than 21 days after that receivable/other assets are booked or occur.

(v) For a contribution and distribution described in paragraph (c)(2)(x) of this section, no later than 21 days after the distribution.

(vi) For the provisions relating to a publicly listed entity under paragraph (c)(2)(vi) or (d)(11) of this section, no later than 21 days after the date that such event occurs.

(vii) For any action by an accrediting agency, Federal, State, local, or Tribal authority that is either a mandatory or discretionary trigger, no later than 21 days after the date on which the institution is notified of the action.

(viii) For the creditor events described in paragraph (c)(2)(xi) of this section, no later than 21 days after the date on which the institution is notified of the action by its creditor.

(ix) For the other defaults, delinquencies, or creditor events described in paragraphs (d)(2)(i), (ii), (iii), and (iv) of this section, no later than 21 days after the event occurs, with an update no later than 21 days after the creditor waives the violation, or the creditor imposes sanctions or penalties, including sanctions or penalties imposed in exchange for or as a result of granting the waiver. For a monetary judgment subject to appeal or under appeal described in paragraph (d)(2)(v) of this section, no later than 21 days after the court enters the judgment, with an update no later than 21 days after the appeal is filed or the period for appeal expires without a notice of appeal being filed. If an appeal is filed, no later than 21 days after the decision on the appeal is issued.

(x) For the non-Federal educational assistance funds provision in paragraph (c)(2)(vii) of this section, no later than 45 days after the end of the institution's fiscal year, as provided in § 668.28(c)(3).

(xi) For an institution or entity that has submitted an application for a change in ownership under 34 CFR 600.20 that is required to pay a debt or incurs a liability from a settlement, arbitration proceeding, final judgment in a judicial proceeding, or a determination arising from an administrative proceeding described in paragraph (c)(2)(i)(B) or (C) of this section, the institution must report this no later than 21 days after the action. The reporting requirement in this paragraph (f)(1)(xi) is applicable to any action described in this section occurring through the end of the second full fiscal year after the change in ownership has occurred.

(xii) For a discontinuation of academic programs described in paragraph (d)(7) of this section, no later than 21 days after the discontinuation of programs.

(xiii) For a failure to meet any of the standards in paragraph (b) of this section, no later than 21 days after the institution ceases to meet the standard.

(xiv) For a declaration of financial exigency, no later than 21 days after the institution communicates its declaration to a Federal, State, Tribal, or foreign governmental agency or its accrediting agency.

(xv) If the institution, or an owner or affiliate of the institution that has the power, by contract or ownership interest, to direct or cause the direction of the management of policies of the institution, files for a State or Federal receivership, or an equivalent proceeding under foreign law, or has entered against it an order appointing a receiver or appointing a person of similar status under foreign law, no later than 21 days after either the filing for receivership or the order appointing a receiver or appointing a person of similar status under foreign law, as applicable.

(xvi) The institution closes locations that enroll more than 25 percent of its students no later than 21 days after the closure that meets or exceeds the thresholds in this paragraph (f)(1)(xvi).

(xvii) If the institution is directly or indirectly owned at least 50 percent by an entity whose securities are listed on a domestic or foreign exchange, and the entity discloses in a public filing that it is under investigation for possible violations of State, Federal, or foreign law, no later than 21 days after the public filing.

(xviii) For any other event or condition that is likely to have a significant adverse condition on the financial condition of the institution, no later than 21 days after the event or condition occurs.

(2) The Department may take an administrative action under paragraph (i) of this section against an institution, or determine that the institution is not financially responsible, if it fails to provide timely notice to the Department as provided under paragraph (f)(1) of this section, or fails to respond, within the timeframe specified by the Department, to any determination made, or request for information, by the Department under paragraph (f)(3) of this section.

(3)(i) In its timely notice to the Department under this paragraph (f), or in its response to a determination by the Department that the institution is not financially responsible because of a triggering event under paragraph (c) or (d) of this section that does not have a notice requirement set forth in this paragraph (f), in accordance with procedures established by the Department, the institution may—

(A) Show that the creditor waived a violation of a loan agreement under paragraph (d)(2) of this section. However, if the creditor imposes additional constraints or requirements as a condition of waiving the violation, or imposes penalties or requirements under paragraph (d)(2)(ii) of this section, the institution must identify and describe those penalties, constraints, or requirements and demonstrate that complying with those actions will not significantly affect the institution's ability to meet its financial obligations;

(B) Show that the triggering event has been resolved, or for obligations resulting from monetary judgments, awards, settlements, or administrative determinations that arise under paragraph (c)(2)(i)(A) or (D) of this section, that the institution can demonstrate that insurance will cover all of the obligation, or for purposes of recalculation under paragraph (e) of this section, that insurance will cover a portion of the obligation; or

(C) Explain or provide information about the conditions or circumstances that precipitated a triggering event under paragraph (d) of this section that demonstrates that the triggering event has not had, or will not have, a significant adverse effect on the financial condition of the institution.

(ii) The Department will consider the information provided by the institution in its notification of the triggering event in determining whether to issue a determination that the institution is not financially responsible.

(g) *Public institutions.* (1) The Department considers a domestic public

institution to be financially responsible if the institution—

(i) Notifies the Department that it is designated as a public institution by the State, local, or municipal government entity, Tribal authority, or other government entity that has the legal authority to make that designation; and

(ii) Provides a letter or other documentation acceptable to the Department and signed by an official of that government entity confirming that the institution is a public institution and is backed by the full faith and credit of the government entity in the following circumstances—

(A) Before the institution's initial certification as a public institution;

(B) Upon a change in ownership and request to be recognized as a public institution; or

(C) Upon request by the Department, which could include during the recertification of a public institution;

(iii) Is not subject to a condition of past performance under § 668.174; and

(iv) Is not subject to an automatic mandatory triggering event as described in paragraph (c) of this section or a discretionary triggering event as described in paragraph (d) of this section that the Department determines will have a significant adverse effect on the financial condition of the institution.

(2) The Department considers a foreign public institution to be financially responsible if the institution—

(i) Notifies the Department that it is designated as a public institution by the country or other government entity that has the legal authority to make that designation; and

(ii) Provides a letter or other documentation acceptable to the Department and signed by an official of that country or other government entity confirming that the institution is a public institution and is backed by the full faith and credit of the country or other government entity. This letter or other documentation must be submitted before the institution's initial certification, upon a change in ownership and request to be recognized as a public institution, and for the first re-certification of a public institution after July 1, 2024. Thereafter, the letter or other documentation must be submitted in the following circumstances—

(A) When the institution submits an application for re-certification following any period of provisional certification;

(B) Within 10 business days following a change in the governmental status of the institution whereby the institution is no longer backed by the full faith and credit of the government entity; or

(C) Upon request by the Department;

(iii) Is not subject to a condition of past performance under § 668.174; and

(iv) Is not subject to an automatic mandatory triggering event as described in paragraph (c) of this section or a discretionary triggering event as described in paragraph (d) of this section that the Department determines will have a significant adverse effect on the financial condition of the institution.

(h) *Audit opinions and disclosures.* Even if an institution satisfies all of the general standards of financial responsibility under paragraph (b) of this section, the Department does not consider the institution to be financially responsible if the institution's audited financial statements—

(1) Include an opinion expressed by the auditor that was an adverse, qualified, or disclaimed opinion, unless the Department determines that the adverse, qualified, or disclaimed opinion does not have a significant bearing on the institution's financial condition; or

(2) Include a disclosure in the notes to the institution's or entity's audited financial statements about the institution's or entity's diminished liquidity, ability to continue operations, or ability to continue as a going concern, unless the Department determines that the diminished liquidity, ability to continue operations, or ability to continue as a going concern has been alleviated. The Department may conclude that diminished liquidity, ability to continue operations, or ability to continue as a going concern has not been alleviated even if the disclosure provides that those concerns have been alleviated.

(i) *Administrative actions.* If the Department determines that an institution is not financially responsible under the standards and provisions of this section or under an alternative standard in § 668.175, or the institution does not submit its financial statements and compliance audits by the date and in the manner required under § 668.23, the Department may—

(1) Initiate an action under subpart G of this part to fine the institution, or limit, suspend, or terminate the institution's participation in the title IV, HEA programs;

(2) For an institution that is provisionally certified, take an action against the institution under the procedures established in § 668.13(d); or

(3) Deny the institution's application for certification or recertification to participate in the title IV, HEA programs.

■ 13. Section 668.174 is amended by:

■ a. Revising paragraph (a)(2) and (b)(2)(i).

■ b. Adding paragraph (b)(3).

■ c. Revising paragraph (c)(1).

The revisions and addition read as follows:

**§ 668.174 Past performance.**

(a) * * *

(2) In either of its two most recently submitted compliance audits had a final audit determination or in a Departmentally issued report, including a final program review determination report, issued in its current fiscal year or either of its preceding two fiscal years, had a program review finding that resulted in the institution's being required to repay an amount greater than five percent of the funds that the institution received under the title IV, HEA programs during the year covered by that audit or program review;

* * * * *

(b) * * *

(2) * * *

(i) The institution notifies the Department, within the time permitted and as provided under 34 CFR 600.21, that the person or entity referenced in paragraph (b)(1) of this section exercises substantial control over the institution; and

* * * * *

(3) An institution is not financially responsible if an owner who exercises substantial control, or the owner's spouse, has been in default on a Federal student loan, including parent PLUS loans, in the preceding five years, unless—

(i) The defaulted Federal student loan has been fully repaid and five years have elapsed since the repayment in full;

(ii) The defaulted Federal student loan has been approved for, and the borrower is in compliance with, a rehabilitation agreement and has been current for five consecutive years; or

(iii) The defaulted Federal student loan has been discharged, canceled, or forgiven by the Department.

(c) .* * *

(1) An ownership interest is defined in 34 CFR 600.31(b).

* * * * *

■ 14. Section 668.175 is amended by:

■ a. Revising paragraphs (b), (c), (d), and (f)(1) and (2); and

■ b. Adding paragraph (i).

The revisions and addition read as follows:

**§ 668.175 Alternative standard and requirements.**

* * * * *

(b) *Letter of credit or cash escrow alternative for new institutions.* A new institution that is not financially responsible solely because the Department determines that its composite score is less than 1.5, qualifies as a financially responsible institution by submitting an irrevocable letter of credit that is acceptable and payable to the Department, or providing other financial protection described under paragraph (h)(2)(i) of this section, for an amount equal to at least one-half of the amount of title IV, HEA program funds that the Department determines the institution will receive during its initial year of participation. A new institution is an institution that seeks to participate for the first time in the title IV, HEA programs.

(c) *Financial protection alternative for participating institutions.* A participating institution that is not financially responsible, either because it does not satisfy one or more of the standards of financial responsibility under § 668.171(b), (c), or (d), or because of an audit opinion or disclosure about the institution's liquidity, ability to continue operations, or ability to continue as a going concern described under § 668.171(h), qualifies as a financially responsible institution by submitting an irrevocable letter of credit that is acceptable and payable to the Department, or providing other financial protection described under paragraph (h)(2)(i) of this section, for an amount determined by the Department that is not less than one-half of the title IV, HEA program funds received by the institution during its most recently completed fiscal year, except that this paragraph (c) does not apply to a public institution. For purposes of a failure under § 668.171(b)(2) or (3), the institution must also remedy the issue(s) that gave rise to the failure to the Department's satisfaction.

(d) *Zone alternative.* (1) A participating institution that is not financially responsible solely because the Department determines that its composite score under § 668.172 is less than 1.5 may participate in the title IV, HEA programs as a financially responsible institution for no more than three consecutive years, beginning with the year in which the Department determines that the institution qualifies under the alternative in this paragraph (d).

(i)(A) An institution qualifies initially under this alternative if, based on the institution's audited financial statements for its most recently completed fiscal year, the Department determines that its composite score is in the range from 1.0 to 1.4; and

(B) An institution continues to qualify under this alternative if, based on the institution's audited financial statements for each of its subsequent two fiscal years, the Department determines that the institution's composite score is in the range from 1.0 to 1.4.

(ii) An institution that qualified under this alternative for three consecutive years, or for one of those years, may not seek to qualify again under this alternative until the year after the institution achieves a composite score of at least 1.5, as determined by the Department.

(2) Under the zone alternative, the Department—

(i) Requires the institution to make disbursements to eligible students and parents, and to otherwise comply with the provisions, under either the heightened cash monitoring or reimbursement payment method described in § 668.162;

(ii) Requires the institution to provide timely information regarding any of the following oversight and financial events—

(A) Any event that causes the institution, or related entity as defined in Accounting Standards Codification (ASC) 850, to realize any liability that was noted as a contingent liability in the institution's or related entity's most recent audited financial statements; or

(B) In accordance with Accounting Standards Update (ASU) No. 2015–01 and ASC 225 and taking into account the environment in which the entity operates, any losses that are unusual in nature, meaning the underlying event or transaction should possess a high degree of abnormality and be of a type clearly unrelated to, or only incidentally related to, the ordinary and typical activities of the entity, taking into account the environment in which the entity operates; infrequently occur, meaning the underlying event or transaction should be of a type that would not reasonably be expected to recur in the foreseeable future; or both;

(iii) May require the institution to submit its financial statement and compliance audits earlier than the time specified under § 668.23(a)(4); and

(iv) May require the institution to provide information about its current operations and future plans.

(3) Under the zone alternative, the institution must—

(i) For any oversight or financial event described in paragraph (d)(2)(ii) of this section for which the institution is required to provide information, in accordance with procedures established by the Department, notify the Department no later than 10 days after that event occur; and

(ii) As part of its compliance audit, require its auditor to express an opinion on the institution's compliance with the requirements under the zone alternative in this paragraph (d), including the institution's administration of the payment method under which the institution received and disbursed title IV, HEA program funds.

(4) If an institution fails to comply with the requirements under paragraph (d)(2) or (3) of this section, the Department may determine that the institution no longer qualifies under the alternative in this paragraph (d).

* * * * *

(f) * * *

(1) The Department may permit an institution that is not financially responsible to participate in the title IV, HEA programs under a provisional certification for no more than three consecutive years if—

(i) The institution is not financially responsible because it does not satisfy the general standards under § 668.171(b), its recalculated composite score under § 668.171(e) is less than 1.0, it is subject to an action or event under § 668.171(c), or an action or event under paragraph (d) of this section has a significant adverse effect on the institution as determined by the Department, or because of an audit opinion or going concern disclosure described in § 668.171(h); or

(ii) The institution is not financially responsible because of a condition of past performance, as provided under § 668.174(a), and the institution demonstrates to the Department that it has satisfied or resolved that condition; and

(2) Under the alternative in this paragraph (f), the institution must—

(i) Provide to the Department an irrevocable letter of credit that is acceptable and payable to the Department, or provide other financial protection described under paragraph (h) of this section, for an amount determined by the Department that is not less than 10 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year, except that this paragraph (f)(2)(i) does not apply to a public institution that the Department determines is backed by the full faith and credit of the State or equivalent governmental entity;

(ii) Remedy the issue(s) that gave rise to its failure under § 668.171(b)(2) or (3) to the Department's satisfaction; and

(iii) Comply with the provisions under the zone alternative, as provided under paragraph (d)(2) and (3) of this section.

* * * * *

(i) *Incorporation by reference.* The material listed in this paragraph (i) is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. This incorporation by reference (IBR) material is available for inspection at U.S. Department of Education and at the National Archives and Records Administration (NARA). Contact U.S. Department of Education at: Office of the General Counsel, 400 Maryland Avenue SW, Room 2C–136, Washington, DC 20202; phone: (202) 401–6000; *https://www2.ed.gov/about/offices/list/ogc/index.html?src=oc.* For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations* or email *fr.inspection@nara.gov.* The material may be obtained from the Financial Accounting Standards Board (FASB), 401 Merritt 7, P.O. Box 5116, Norwalk, CT 06856–5116; (203) 847–0700; *www.fasb.org≤.*

(1) Accounting Standards Codification (ASC) 850, Related Party Disclosures, Updated through September 10, 2018.

(2) [Reserved]

**§ 668.176 [Redesignated as § 668.177]**

■ 15. Section 668.176 is redesignated as § 668.177.

■ 16. A new § 668.176 is added to read as follows:

**§ 668.176 Change in ownership.**

(a) *Purpose.* To continue participation in the title IV, HEA programs during and following a change in ownership, institutions must meet the financial responsibility requirements in this section.

(b) *Materially complete application.* To meet the requirements of a materially complete application under 34 CFR 600.20(g)(3)(iii) and (iv)—

(1) An institution undergoing a change in ownership and control as provided under 34 CFR 600.31 must submit audited financial statements of its two most recently completed fiscal years prior to the change in ownership, at the level of the change in ownership or the level of financial statements required by the Department, that are prepared and audited in accordance with the requirements of § 668.23(d); and

(2) The institution must submit audited financial statements of the institution's new owner's two most recently completed fiscal years prior to the change in ownership that are prepared and audited in accordance with the requirements of § 668.23 at the highest level of unfractured ownership or at the level required by the Department.

(i) If the institution's new owner does not have two years of acceptable audited financial statements, the institution must provide financial protection in the form of a letter of credit or cash to the Department in the amount of 25 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year;

(ii) If the institution's new owner only has one year of acceptable financial statements, the institution must provide financial protection in the form of a letter of credit or cash to the Department in the amount of 10 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year; or

(iii) For an entity where no individual new owner obtains control, but the combined ownership of the new owners is equal to or exceeds the ownership share of the existing ownership, financial protection in the form of a letter of credit or cash to the Department in the amount of 25 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year, based on the combined ownership share of the new owners, except for any new owner that submits two years or one year of acceptable audited financial statements as described in paragraphs (b)(2)(i) and (ii) of this section.

(3) The institution must meet the financial responsibility requirements in this paragraph (b)(3). In general, the Department considers an institution to be financially responsible only if it—

(i) For a for-profit institution evaluated at the ownership level required by the Department for the new owner—

(A) Has not had operating losses in either or both of its two latest fiscal years that in sum result in a decrease in tangible net worth in excess of 10 percent of the institution's tangible net worth at the beginning of the first year of the two-year period. The Department may calculate an operating loss for an institution by excluding prior period adjustment and the cumulative effect of changes in accounting principle. For purposes of this section, the calculation of tangible net worth must exclude all related party accounts receivable/other assets and all assets defined as intangible in accordance with the composite score;

(B) Has, for its two most recent fiscal years, a positive tangible net worth. In applying the standard in this paragraph (b)(3)(ii)(B), a positive tangible net worth occurs when the institution's tangible assets exceed its liabilities. The calculation of tangible net worth excludes all related party accounts receivable/other assets and all assets classified as intangible in accordance with the composite score; and

(C) Has a passing composite score and meets the other financial requirements of this subpart for its most recently completed fiscal year.

(ii) For a nonprofit institution evaluated at the ownership level required by the Department for the new owner—

(A) Has, at the end of its two most recent fiscal years, positive net assets without donor restrictions. The Department will exclude all related party receivables/other assets from net assets without donor restrictions and all assets classified as intangibles in accordance with the composite score;

(B) Has not had an excess of net assets without donor restriction expenditures over net assets without donor restriction revenues over both of its two latest fiscal years that results in a decrease exceeding 10 percent in either the net assets without donor restrictions from the start to the end of the two-year period or the net assets without donor restriction in either one of the two years. The Department may exclude from net changes in fund balances for the operating loss calculation prior period adjustment and the cumulative effect of changes in accounting principle. In calculating the net assets without donor restriction, the Department will exclude all related party accounts receivable/other assets and all assets classified as intangible in accordance with the composite score; and

(C) Has a passing composite score and meets the other financial requirements of this subpart for its most recently completed fiscal year.

(iii) For a public institution, has its liabilities backed by the full faith and credit of a State or equivalent governmental entity.

(4) For a for-profit or nonprofit institution that is not financially responsible under paragraph (b)(3) of this section, provide financial protection in the form of a letter of credit or cash in an amount that is not less than 10 percent of the prior year title IV, HEA funding or an amount determined by the Department, and follow the zone requirements in § 668.175(d).

(c) *Acquisition debt.* (1) Notwithstanding any other provision in

this section, the Department may determine that the institution is not financially responsible following a change in ownership if the amount of debt assumed to complete the change in ownership requires payments (either periodic or balloon) that are inconsistent with available cash to service those payments based on enrollments for the period prior to when the payment is or will be due.

(2) For a for-profit or nonprofit institution that is not financially responsible under this section, provide financial protection in the form of a letter of credit or cash in an amount that is not less than 10 percent of the prior year title IV, HEA funding or an amount determined by the Department, and follow the zone requirements in § 668.175(d).

(d) *Terms of the extension.* To meet the requirements for a temporary provisional program participation agreement following a change in ownership, as described in 34 CFR 600.20(h)(3)(i), an institution must meet the following requirements:

(1) For a proprietary institution or a nonprofit institution—

(i) The institution must provide the Department a same-day balance sheet for a proprietary institution or a statement of financial position for a nonprofit institution that shows the financial position of the institution under its new owner, as of the day after the change in ownership, and that meets the following requirements:

(A) The same-day balance sheet or statement of financial position must be prepared in accordance with generally accepted accounting principles (GAAP) published by the Financial Accounting Standards Board and audited in accordance with generally accepted government auditing standards (GAGAS) published by the U.S. Government Accountability Office (GAO);

(B) As part of the same-day balance sheet or statement of financial position, the institution must include a disclosure that includes all related-party transactions, and such details as would enable the Department to identify the related party in accordance with the requirements of § 668.23(d). Such information must include, but is not limited to, the name, location, and description of the related entity, including the nature and amount of any transaction between the related party and the institution, financial or otherwise, regardless of when it occurred;

(C) Such balance sheet or statement of financial position must be a consolidated same-day financial statement at the level of highest unfractured ownership or at a level determined by the Department for an ownership of less than 100 percent;

(D) The same-day balance sheet or statement of financial position must demonstrate an acid test ratio of at least 1:1. The acid test ratio must be calculated by adding cash and cash equivalents to current accounts receivable and dividing the sum by total current liabilities. The calculation of the acid test ratio must exclude all related party receivables/other assets and all assets classified as intangibles in accordance with the composite score;

(E) A proprietary institution's same-day balance sheet must demonstrate a positive tangible net worth the day after the change in ownership. A positive tangible net worth occurs when the tangible assets exceed liabilities. The calculation of tangible net worth must exclude all related party accounts receivable/other assets and all assets classified as intangible in accordance with the composite score; and

(F) A nonprofit institution's statement of financial position must have positive net assets without donor restriction the day after the change in ownership. The calculation of net assets without donor restriction must exclude all related party accounts receivable/other assets and all assets classified as intangible in accordance with the composite score; and

(ii) If the institution fails to meet the requirements in paragraphs (d)(1)(i) of this section, the institution must provide financial protection in the form of a letter of credit or cash to the Department in the amount of at least 25 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year, or an amount determined by the Department, and must follow the zone requirements of § 668.175(d); and

(2) For a public institution, the institution must have its liabilities backed by the full faith and credit of a State, or by an equivalent governmental entity, or must follow the requirements of this section for a proprietary or nonprofit institution.

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Part III

## Environmental Protection Agency

40 CFR Part 751
Trichloroethylene (TCE); Regulation Under the Toxic Substances Control Act (TSCA); Proposed Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 751**

**[EPA–HQ–OPPT–2020–0642; FRL–8317–01–OCSPP]**

**RIN 2070–AK83**

## Trichloroethylene (TCE); Regulation Under the Toxic Substances Control Act (TSCA)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to address the unreasonable risk of injury to human health presented by trichloroethylene (TCE) under its conditions of use as documented in EPA's November 2020 Risk Evaluation for TCE and January 2023 revised risk determination for TCE pursuant to the Toxic Substances Control Act (TSCA). TCE is widely used as a solvent in a variety of industrial, commercial and consumer applications including for hydrofluorocarbon (HFC) production, vapor and aerosol degreasing, and in lubricants, greases, adhesives, and sealants. TSCA requires that when EPA determines a chemical substance presents unreasonable risk that EPA address by rule the unreasonable risk of injury to health or the environment and apply requirements to the extent necessary so the chemical no longer presents unreasonable risk. EPA determined that TCE presents an unreasonable risk of injury to health due to the significant adverse health effects associated with exposure to TCE, including non-cancer effects (liver toxicity, kidney toxicity, neurotoxicity, immunotoxicity, reproductive toxicity, and developmental toxicity) as well as cancer (liver, kidney, and non-Hodgkin lymphoma) from chronic inhalation and dermal exposures to TCE. TCE is a neurotoxicant and is carcinogenic to humans by all routes of exposure. The most sensitive adverse effects of TCE exposure are non-cancer effects (developmental toxicity and immunosuppression) for acute exposures and developmental toxicity and autoimmunity for chronic exposures. To address the identified unreasonable risk, EPA is proposing to: prohibit all manufacture (including import), processing, and distribution in commerce of TCE and industrial and commercial use of TCE for all uses, with longer compliance timeframes and workplace controls for certain processing and industrial and commercial uses (including proposed phaseouts and time-limited exemptions); prohibit the disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works, with a time-limited exemption for cleanup projects; and establish recordkeeping and downstream notification requirements.

**DATES:** Comments must be received on or before December 15, 2023. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before November 30, 2023.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2020–0465, through the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

**FOR FURTHER INFORMATION CONTACT:**

*For technical information contact:* Gabriela Rossner, Existing Chemicals Risk Management Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number (202) 565–2426; email address: *TCE.TSCA@epa.gov.*

*For general information contact:* The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Executive Summary

*A. Does this action apply to me?*

You may be potentially affected by the proposed action if you manufacture (defined under TSCA to include import), process, distribute in commerce, use, or dispose of TCE or products containing TCE. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities include:

- Crude Petroleum Extraction (NAICS code 211120);
- Fossil Fuel Electric Power Generation (NAICS code 221112);
- Other Electric Power Generation (NAICS code 221118);
- Broadwoven Fabric Mills (NAICS code 313210);
- Narrow Fabric Mills and Schiffli Machine Embroidery (NAICS code 313220);
- Nonwoven Fabric Mills (NAICS code 313230);
- Textile and Fabric Finishing Mills (NAICS code 313310);
- Fabric Coating Mills (NAICS code 313320);
- Wood Window and Door Manufacturing (NAICS code 321911);
- Prefabricated Wood Building Manufacturing (NAICS code 321992);
- Paper Bag and Coated and Treated Paper Manufacturing (NAICS code 322220);
- Petroleum Refineries (NAICS code 324110);
- All Other Petroleum and Coal Products Manufacturing (NAICS code 324199);
- Petrochemical Manufacturing (NAICS code 325110);
- Other Basic Inorganic Chemical Manufacturing (NAICS code 325180);
- Ethyl Alcohol Manufacturing (NAICS code 325193);
- All Other Basic Organic Chemical Manufacturing (NAICS code 325199);
- Plastics Material and Resin Manufacturing (NAICS code 325211);
- Medicinal and Botanical Manufacturing (NAICS code 325411);
- Pharmaceutical Preparation Manufacturing (NAICS code 325412);
- Paint and Coating Manufacturing (NAICS code 325510);
- Adhesive Manufacturing (NAICS code 325520);
- Polish and Other Sanitation Good Manufacturing (NAICS code 325612);
- Photographic Film, Paper, Plate and Chemical Manufacturing (NAICS code 325992);
- All Other Miscellaneous Chemical Product and Preparation Manufacturing (NAICS code 325998);
- Polystyrene Foam Product Manufacturing (NAICS code 326140);
- Urethane and Other Foam Product (except Polystyrene) Manufacturing (NAICS code 326150);
- Tire Manufacturing (except Retreading) (NAICS code 326211);
- Tire Retreading (NAICS code 326212);
- Rubber and Plastics Hoses and Belting Manufacturing (NAICS code 326220);
- Rubber Product Manufacturing for Mechanical Use (NAICS code 326291);
- All Other Rubber Product Manufacturing (NAICS code 326299);

- Pottery, Ceramics, and Plumbing Fixture Manufacturing (NAICS code 327110);
- Gypsum Product Manufacturing (NAICS code 327420);
- Iron and Steel Mills and Ferroalloy Manufacturing (NAICS code 331110);
- Iron and Steel Pipe and Tube Manufacturing from Purchased Steel (NAICS code 331210);
- Rolled Steel Shape Manufacturing (NAICS code 331221);
- Steel Wire Drawing (NAICS code 331222);
- Nonferrous Metal (except Aluminum) Smelting and Refining (NAICS code 331410);
- Copper Rolling, Drawing, Extruding, and Alloying (NAICS code.331420);
- Nonferrous Metal (except Copper and Aluminum) Rolling, Drawing and Extruding (NAICS code 331491);
- Secondary Smelting, Refining, and Alloying of Nonferrous Metal (except Copper and Aluminum) (NAICS code 331492);
- Nonferrous Metal Die-Casting Foundries (NAICS code 331523);
- Iron and Steel Forging (NAICS code 332111);
- Nonferrous Forging (NAICS code 332112);
- Custom Roll Forming (NAICS code 332114);
- Powder Metallurgy Part Manufacturing (NAICS code 332117);
- Metal Crown, Closure, and Other Metal Stamping (except Automotive) (NAICS code 332119);
- Metal Kitchen Cookware, Utensil, Cutlery, and Flatware (except Precious) Manufacturing (NAICS code 332215);
- Saw Blade and Handtool Manufacturing (NAICS code 332216);
- Metal Window and Door Manufacturing (NAICS code 332321);
- Sheet Metal Work Manufacturing (NAICS code 332322);
- Ornamental and Architectural Metal Work Manufacturing (NAICS code 332323);
- Power Boiler and Heat Exchanger Manufacturing (NAICS code 332410);
- Metal Tank (Heavy Gauge) Manufacturing (NAICS code 332420);
- Metal Can Manufacturing (NAICS code 332431);
- Other Metal Container Manufacturing (NAICS code 332439);
- Hardware Manufacturing (NAICS code 332510);
- Spring Manufacturing (NAICS code 332613);
- Other Fabricated Wire Product Manufacturing (NAICS code 332618);
- Machine Shops (NAICS code 332710);
- Precision Turned Product Manufacturing (NAICS code 332721);
- Bolt, Nut, Screw, Rivet and Washer Manufacturing (NAICS code 332722);
- Metal Heat Treating (NAICS code 332811);
- Metal Coating, Engraving (except Jewelry and Silverware), and Allied Services to Manufacturers (NAICS code 332812);
- Electroplating, Plating, Polishing, Anodizing and Coloring (NAICS code 332813);
- Industrial Valve Manufacturing (NAICS code 332911);
- Fluid Power Valve and Hose Fitting Manufacturing (NAICS code 332912);
- Plumbing Fixture Fitting and Trim Manufacturing (NAICS code 332913);
- Other Metal Valve and Pipe Fitting Manufacturing (NAICS code 332919);
- Ball and Roller Bearing Manufacturing (NAICS code 332991);
- Small Arms Ammunition Manufacturing (NAICS code 332992);
- Ammunition (except Small Arms) Manufacturing (NAICS code 332993);
- Small Arms, Ordnance, and Ordnance Accessories Manufacturing (NAICS code 332994);
- Fabricated Pipe and Pipe Fitting Manufacturing (NAICS code 332996);
- All Other Miscellaneous Fabricated Metal Product Manufacturing (NAICS code 332999);
- Farm Machinery and Equipment Manufacturing (NAICS code 333111);
- Lawn and Garden Tractor and Home Lawn and Garden Equipment Manufacturing (NAICS code 333112);
- Construction Machinery Manufacturing (NAICS code 333120);
- Mining Machinery and Equipment Manufacturing (NAICS code 333131);
- Oil and Gas Field Machinery and Equipment Manufacturing (NAICS code 333132);
- Food Product Machinery Manufacturing (NAICS code 333241);
- Semiconductor Machinery Manufacturing (NAICS code 333242);
- Sawmill, Woodworking, and Paper Machinery Manufacturing (NAICS code 333243);
- Printing Machinery and Equipment Manufacturing (NAICS code 333244);
- Other Industrial Machinery Manufacturing (NAICS code 333249);
- Optical Instrument and Lens Manufacturing (NAICS code 333314);
- Photographic and Photocopying Equipment Manufacturing (NAICS code 333316);
- Other Commercial and Service Industry Machinery Manufacturing (NAICS code 333318);
- Industrial and Commercial Fan and Blower and Air Purification Equipment Manufacturing (NAICS code 333413);
- Heating Equipment (except Warm Air Furnaces) Manufacturing (NAICS code 333414);
- Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing (NAICS code 333415);
- Industrial Mold Manufacturing (NAICS code 333511);
- Special Die and Tool, Die Set, Jig and Fixture Manufacturing (NAICS code 333514);
- Cutting Tool and Machine Tool Accessory Manufacturing (NAICS code 333515);
- Machine Tool Manufacturing (NAICS code 333517);
- Rolling Mill and Other Metalworking Machinery Manufacturing (NAICS code 333519);
- Turbine and Turbine Generator Set Unit Manufacturing (NAICS code 333611);
- Speed Changer, Industrial High-Speed Drive and Gear Manufacturing (NAICS code 333612);
- Mechanical Power Transmission Equipment Manufacturing (NAICS code 333613);
- Other Engine Equipment Manufacturing (NAICS code 333618);
- Air and Gas Compressor Manufacturing (NAICS code 333912);
- Measuring, Dispensing, and Other Pumping Equipment Manufacturing (NAICS code 333914);
- Elevator and Moving Stairway Manufacturing (NAICS code 333921);
- Conveyor and Conveying Equipment Manufacturing (NAICS code 333922);
- Overhead Traveling Crane, Hoist and Monorail System Manufacturing (NAICS code 333923);
- Industrial Truck, Tractor, Trailer and Stacker Machinery Manufacturing (NAICS code 333924);
- Power-Driven Hand Tool Manufacturing (NAICS code 333991);
- Welding and Soldering Equipment Manufacturing (NAICS code 333992);
- Packaging Machinery Manufacturing (NAICS code 333993);
- Industrial Process Furnace and Oven Manufacturing (NAICS code 333994);
- Fluid Power Cylinder and Actuator Manufacturing (NAICS code 333995);
- Fluid Power Pump and Motor Manufacturing (NAICS code 333996);
- Scale and Balance Manufacturing (NAICS code 333997);
- All Other Miscellaneous General Purpose Machinery Manufacturing (NAICS code 333999);
- Audio and Video Equipment Manufacturing (NAICS code 334310);
- Capacitor, Resistor, Coil, Transformer, and Other Inductor Manufacturing (NAICS code 334416);
- Electronic Connector Manufacturing (NAICS code 334417);

- Printed Circuit Assembly (Electronic Assembly) Manufacturing (NAICS code 334418);
- Other Electronic Component Manufacturing (NAICS code 334419);
- Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing (NAICS code 334511);
- Automatic Environmental Control Manufacturing for Residential, Commercial and Appliance Use (NAICS code 334512);
- Instruments and Related Products Manufacturing for Measuring, Displaying, and Controlling Industrial Process Variables (NAICS code 334513);
- Instrument Manufacturing for Measuring and Testing Electricity and Electrical Signals (NAICS code 334515);
- Electric Lamp Bulb and Part Manufacturing (NAICS code 335110);
- Residential Electric Lighting Fixture Manufacturing (NAICS code 335121);
- Commercial, Industrial and Institutional Electric Lighting Fixture Manufacturing (NAICS code 335122);
- Other Lighting Equipment Manufacturing (NAICS code 335129);
- Major Household Appliance Manufacturing (NAICS code 335220);
- Power, Distribution and Specialty Transformer Manufacturing (NAICS code 335311);
- Motor and Generator Manufacturing (NAICS code 335312);
- Switchgear and Switchboard Apparatus Manufacturing (NAICS code 335313);
- Relay and Industrial Control Manufacturing (NAICS code 335314);
- Storage Battery Manufacturing (NAICS code 335911);
- Fiber Optic Cable Manufacturing (NAICS code 335921);
- Current-Carrying Wiring Device Manufacturing (NAICS code 335931);
- Carbon and Graphite Product Manufacturing (NAICS code 335991);
- Automobile Manufacturing (NAICS code 336111);
- Light Truck and Utility Vehicle Manufacturing (NAICS code 336112);
- Heavy Duty Truck Manufacturing (NAICS code 336120);
- Motor Vehicle Body Manufacturing (NAICS code 336211);
- Truck Trailer Manufacturing (NAICS code 336212);
- Motor Home Manufacturing (NAICS code 336213);
- Travel Trailer and Camper Manufacturing (NAICS code 336214);
- Motor Vehicle Gasoline Engine and Engine Parts Manufacturing (NAICS code 336310);
- Motor Vehicle Electrical and Electronic Equipment Manufacturing (NAICS code 336320);
- Motor Vehicle Steering and Suspension Components (except Spring) Manufacturing (NAICS code 336330);
- Motor Vehicle Brake System Manufacturing (NAICS code 336340);
- Motor Vehicle Transmission and Power Train Parts Manufacturing (NAICS code 336350);
- Motor Vehicle Seating and Interior Trim Manufacturing (NAICS code 336360);
- Motor Vehicle Metal Stamping (NAICS code 336370);
- Other Motor Vehicle Parts Manufacturing (NAICS code 336390);
- Aircraft Manufacturing (NAICS code 336411);
- Aircraft Engine and Engine Parts Manufacturing (NAICS code 336412);
- Other Aircraft Part and Auxiliary Equipment Manufacturing (NAICS code 336413);
- Guided Missile and Space Vehicle Manufacturing (NAICS code 336414);
- Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing (NAICS code 336415);
- Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing (NAICS code 336419);
- Railroad Rolling Stock Manufacturing (NAICS code 336510);
- Ship Building and Repairing (NAICS code 336611);
- Boat Building (NAICS code 336612);
- Motorcycle, Bicycle and Parts Manufacturing (NAICS code 336991);
- Military Armored Vehicle, Tank and Tank Component Manufacturing (NAICS code 336992);
- All Other Transportation Equipment Manufacturing (NAICS code 336999);
- Wood Kitchen Cabinet and Counter Top Manufacturing (NAICS code 337110);
- Upholstered Household Furniture Manufacturing (NAICS code 337121);
- Nonupholstered Wood Household Furniture Manufacturing (NAICS code 337122);
- Metal Household Furniture Manufacturing (NAICS code 337124);
- Institutional Furniture Manufacturing (NAICS code 337127);
- Wood Office Furniture Manufacturing (NAICS code 337211);
- Surgical Appliance and Supplies Manufacturing (NAICS code 339113);
- Dental Equipment and Supplies Manufacturing (NAICS code 339114);
- Jewelry and Silverware Manufacturing (NAICS code 339910);
- Sporting and Athletic Goods Manufacturing (NAICS code 339920);
- Gasket, Packing, and Sealing Device Manufacturing (NAICS code 339991);
- Fastener, Button, Needle and Pin Manufacturing (NAICS code 339993);
- All Other Miscellaneous Manufacturing (NAICS code 339999);
- Metal Service Centers and Other Metal Merchant Wholesalers (NAICS code 423510);
- Industrial Supplies Merchant Wholesalers (NAICS code 423510);
- Other Chemical and Allied Products Merchant Wholesalers (NAICS code 424690);
- Paint, Varnish, and Supplies Merchant Wholesalers (NAICS code 424950);
- New Car Dealers (NAICS code 441110);
- Used Car Dealers (NAICS code 441120);
- Sporting Goods Stores (NAICS code 451110);
- Scheduled Passenger Air Transportation (NAICS code 481111);
- Other Support Activities for Air Transportation (NAICS code 481111);
- Other Warehousing and Storage (NAICS code 493190);
- Motion Picture and Video Production (NAICS code 512110);
- Other Financial Vehicles (NAICS code 525990);
- Research and Development in the Physical, Engineering, and Life Sciences (except Nanotechnology and Biotechnology) (NAICS code 541715);
- Research and Development in the Social Sciences and Humanities (NAICS code 541720);
- Offices of Other Holding Companies (NAICS code 551112);
- Carpet and Upholstery Cleaning Services (NAICS code 561740);
- Hazardous Waste Treatment and Disposal (NAICS code 562211);
- Solid Waste Landfill (NAICS code 562212);
- Materials Recovery Facilities (NAICS code 562920);
- Junior Colleges (NAICS code 611210);
- Colleges, Universities and Professional Schools (NAICS code 611310);
- General Automotive Repair (NAICS code 811111);
- Automotive Exhaust System Repair (NAICS code 811112);
- Automotive Transmission Repair (NAICS code 811113);
- Other Automotive Mechanical and Electrical Repair and Maintenance (NAICS code 811118);
- Automotive Body, Paint and Interior Repair and Maintenance (NAICS code 811121);
- Automotive Glass Replacement Shops (NAICS code 811122);
- Automotive Oil Change and Lubrication Shops (NAICS code 811191);

- All Other Automotive Repair and Maintenance (NAICS code 811198);
- Consumer Electronics Repair and Maintenance (NAICS code 811211);
- Computer and Office Machine Repair and Maintenance (NAICS code 811212);
- Communication Equipment Repair and Maintenance (NAICS code 811213);
- Other Electronic and Precision Equipment Repair and Maintenance (NAICS code 811219);
- Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance (NAICS code 811310);
- Home and Garden Equipment Repair and Maintenance (NAICS code 811411);
- Other Personal and Household Goods Repair and Maintenance (NAICS code 811490);
- Coin-Operated Laundries and Drycleaners (NAICS code 812310);
- Drycleaning and Laundry Services (except Coin-Operated) (NAICS code 812320); and
- Industrial Launderers (NAICS code 812332).

This action may also affect certain entities through pre-existing import certification and export notification rules under TSCA. Persons who import any chemical substance governed by a final TSCA section 6(a) rule are subject to the TSCA section 13 (15 U.S.C. 2612) import certification requirements and the corresponding regulations at 19 CFR 12.118 through 12.127; see also 19 CFR 127.28. Those persons must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, any persons who export or intend to export a chemical substance that is the subject of this proposed rule are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)), and must comply with the export notification requirements in 40 CFR part 707, subpart D.

If you have any questions regarding the applicability of this proposed action to a particular entity, consult the technical information contact listed under **FOR FURTHER INFORMATION CONTACT**.

*B. What is the Agency's authority for taking this action?*

Under TSCA section 6(a) (15 U.S.C. 2605(a)), if EPA determines through a TSCA section 6(b) risk evaluation that a chemical substance presents an unreasonable risk of injury to health or the environment, EPA must by rule apply one or more requirements listed in TSCA section 6(a) to the extent necessary so that the chemical substance or mixture no longer presents such risk.

*C. What action is the Agency taking?*

Pursuant to TSCA section 6(b), EPA determined that TCE presents an unreasonable risk of injury to health, without consideration of costs or other nonrisk factors, including an unreasonable risk to potentially exposed or susceptible subpopulations (PESS) identified as relevant to the 2020 Risk Evaluation for TCE by EPA, under the conditions of use (Refs. 1, 2). The term ''conditions of use'' is defined at TSCA section 3(4) (15 U.S.C. 2602(4)) to mean the circumstances under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of. A detailed description of the conditions of use that EPA evaluated in reaching its determination that TCE presents an unreasonable risk is included in Unit III.B.1. EPA notes that all TSCA conditions of use of TCE are subject to this proposal. Accordingly, to address the unreasonable risk, EPA is proposing, under TSCA section 6(a), to:

(i) Prohibit the manufacture (including import), processing, and distribution in commerce of TCE for all uses (including all consumer uses (see Unit III.B.1.f)), as described in Unit V.A.1., with longer compliance timeframes for manufacture and processing related to certain uses;

(ii) Prohibit the industrial and commercial use of TCE, as described in Unit V.A.1., with longer compliance timeframes for certain uses;

(iii) Prohibit the manufacture (including import) and processing of TCE as an intermediate for the manufacturing of hydrofluorocarbon134a (HFC–134a), following an 8.5-year phaseout, as described in Unit V.A.1.d.;

(iv) Prohibit the industrial and commercial use of TCE as a solvent for closed-loop batch vapor degreasing for rayon fabric scouring for end use in rocket booster nozzle production by Federal agencies and their contractors, following a 10-year phaseout, outlined in Unit V.A.1.e.;

(iv) For Department of Defense (DoD) naval vessels and their systems, and in the maintenance, fabrication, and sustainment for and of such vessels and systems, prohibit the industrial and commercial use of TCE as potting compounds for naval electronic systems and equipment; sealing compounds for high and ultra-high vacuum systems; bonding compounds for materials testing and maintenance of underwater systems and bonding of nonmetallic materials; and cleaning requirements (which includes degreasing using wipes, sprays, solvents and vapor degreasing) for: materials and components required for military ordinance testing; temporary resin repairs in vessel spaces where welding is not authorized; ensuring polyurethane adhesion for electronic systems and equipment repair and installation of elastomeric materials; various naval combat systems, radars, sensors, equipment; fabrication and prototyping processes to remove coolant and other residue from machine parts; machined part fabrications for naval systems; installation of topside rubber tile material aboard vessels; and vapor degreasing required for substrate surface preparation prior to electroplating processes, following a 10-year TSCA section 6(g) exemption, outlined in Unit V.A.3.;

(v) Prohibit the manufacture (including import), processing, distribution in commerce, and use of TCE as a processing aid for battery separator manufacturing, following a 10-year TSCA section 6(g) exemption, as described in Unit V.A.3.;

(vi) Prohibit the manufacture (including import), processing, distribution in commerce, and use of TCE as a laboratory chemical for essential laboratory activities and some research and development activities, following a 50-year TSCA section 6(g) exemption, as described in Unit V. A.3.;

(vii) Prohibit the manufacture (including import), processing, distribution in commerce, and industrial and commercial use of TCE as a solvent in closed loop vapor degreasing necessary for human-rated rocket engine cleaning by the National Aeronautics and Space Administration (NASA) and its contractors, following a 7-year TSCA section 6(g) exemption, as described in Unit V.A.3.;

(viii) Prohibit the emergency industrial and commercial use of TCE in furtherance of the NASA mission for specific conditions that are critical or essential and for which no technically and economically feasible safer alternative is available, following a 10-year TSCA section 6(g) exemption, as described in Unit V.A.3.;

(ix) Require strict workplace controls, including compliance with a TCE workplace chemical protection program (WCPP), which would include requirements for an inhalation exposure limit and dermal protection to limit exposure to TCE, for conditions of use with long term phaseouts or time-

limited exemptions under TSCA section 6(g), as described in Unit V.A.2.;

(x) Prohibit, due to worker risks, the disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works, with a 50-year TSCA section 6(g) exemption for cleanup projects, as described in Unit V.A.3.; and

(xi) Establish recordkeeping and downstream notification requirements, as described in Unit V.A.4.

In addition, EPA is proposing to amend the general provisions of 40 CFR part 751, subpart A, to define the following terms so that these definitions may be commonly applied to this and other rules under TSCA section 6 that would be codified under 40 CFR part 751: ''authorized person,'' ''ECEL,'' ''exposure group,'' ''owner or operator,'' ''potentially exposed person,'' ''regulated area,'' and ''retailer.''

EPA seeks public comment on all aspects of this proposed rule.

*D. Why is the Agency taking this action?*

Under TSCA section 6(a), ''[i]f the Administrator determines in accordance with subsection (b)(4)(A) that the manufacture, processing, distribution in commerce, use or disposal of a chemical substance or mixture, or that any combination of such activities, presents an unreasonable risk of injury to health or the environment, the Administrator shall by rule . . . apply one or more of the [section 6(a)] requirements to such substance or mixture to the extent necessary so that the chemical substance or mixture no longer presents such risk.'' TCE was the subject of a risk evaluation under TSCA section 6(b)(4)(A) that was issued in November 2020 (Ref. 1). In addition, EPA issued a revised unreasonable risk determination in January 2023 (Ref. 2), determining that TCE, as a whole chemical substance, presents an unreasonable risk of injury to health under the conditions of use. As a result, EPA is proposing to take action to the extent necessary so that TCE no longer presents such risk. The unreasonable risk is described in Unit III.B.2. and the conditions of use EPA evaluated in reaching its conclusion that TCE presents unreasonable risk are described in Unit III.B.1.

TCE's hazards are well established. EPA's 2020 Risk Evaluation for TCE considered the hazards associated with exposure to TCE and determined that TCE presents an unreasonable risk of injury to health due to the significant adverse health effects associated with exposure to TCE. While some of the risks of adverse effects from TCE exposure are experienced following acute single exposures, other risks are incurred following long-term repeated exposures. Risk of non-cancer effects, specifically fetal cardiac defects and autoimmunity following chronic exposure, are the most sensitive adverse effects. In addition, risks of other significant adverse outcomes associated with TCE exposure include: Non-cancer effects (liver toxicity, kidney toxicity, neurotoxicity, immunosuppression, reproductive toxicity, and developmental toxicity), as well as cancer effects (liver, kidney, and non-Hodgkin lymphoma). EPA is proposing requirements so that TCE would no longer present unreasonable risk to human health.

While EPA's proposal would ultimately result in a complete ban on TCE, the Agency recognizes that a phaseout of TCE for some TSCA conditions of use may be appropriate. The timeframes for the phaseouts differ across conditions of use and are described in fuller detail in Unit V.A.1.d. and e. One phaseout is for uses that may impact the Agency's efforts to address climate-damaging HFCs (and the associated adverse impacts on human health and the environment) under the American Innovation and Manufacturing Act of 2020 (AIM Act) (42 U.S.C. 7675). EPA proposes to implement a longer phaseout in tandem with strict workplace controls for the manufacturing (including import) and processing of TCE as an intermediate in the generation of HFC–134a, one of the regulated substances subject to a phasedown under the AIM Act (More information on HFC–134a is in Unit V.A.1.). While HFC–134a is one of the regulated substances subject to AIM Act 85% phasedown in generation and consumption by 2023, HFC–134a can be mixed with other substances to make lower global warming potential (GWP) blends that are likely to be used to facilitate the transition from certain other HFCs and HFC blends with higher global warming potentials in certain applications.

Additionally, the Agency recognizes that some conditions of use may not have alternatives readily available. As an example, EPA is proposing a longer phaseout timeframe for industrial and commercial use as a solvent for closed-loop batch vapor degreasing for rayon fabric scouring for end use in rocket booster nozzle production by Federal agencies and their contractors, in addition to the uses of TCE necessary for DoD vessels. Currently, substitutes and alternative processes do not meet the technical specifications required to clean the rayon fabric in order to safely produce rockets.

Additionally, EPA recognizes that some conditions of use may be important for national security applications or for other critical needs. For these reasons, EPA's proposal includes a 10-year exemption under TSCA section 6(g) for industrial and commercial use of TCE as a processing aid for battery separator manufacturing in the production of lead-acid and lithium battery separators, as well as for the manufacturing, processing, and distribution in commerce of TCE for this use (See Unit V.A.3.a.i.). EPA recognizes that lead-acid and lithium battery separators are essential components of batteries that power vehicles and systems in the U.S. supply chain for multiple critical infrastructure sectors within the national economy. Further, there are a number of critical uses required for DoD vessels. EPA is proposing a 10-year exemption under TSCA section 6(g) for DoD vessel requirements for potting, bonding and sealing compounds, and bonding and cleaning requirements for naval combat systems, radars, sensors, equipment, and fabrication and prototyping processes. Additionally, EPA is proposing a 50-year exemption under TSCA section 6(g) for the industrial and commercial use of TCE in laboratory use for essential laboratory activities which are particularly critical; for example, laboratory activities associated with ongoing environmental cleanup projects that fall under the Superfund program or other similar EPA authorities, in which it is necessary to use TCE as a laboratory chemical for the analysis of contaminated soil, air, and water samples (See Unit V.A.3.a.iii.).

EPA considered the potential impact of the prohibition of the total production volume of TCE regulated under TSCA on the availability of TCE for critical or essential uses, for uses essential to the national economy, national security, or critical infrastructure, and for uses for which longer phase-out timeframes are proposed. EPA concluded, based on information received through stakeholder engagement and professional judgment, that there would remain a sufficient supply of TCE in circulation for these uses. EPA requests comment on whether there would remain a sufficient supply of TCE in circulation to provide a source for those limited critical or essential uses exempted under TSCA section 6(g), as described in Unit V. (Ref. 3).

*E. What are the estimated incremental impacts of this action?*

EPA has prepared an Economic Analysis of the potential incremental

impacts associated with this rulemaking that can be found in the rulemaking docket (Ref. 3). As described in more detail in the Economic Analysis (Ref. 3) and in Units VII.D. and XI.D., EPA was unable to quantify all incremental costs of this proposed rule. The quantifiable cost of the proposed rule is estimated to be $33.1 million annualized over 20 years at a 3% discount rate and $40.6 million annualized over 20 years at a 7% discount rate. These costs take compliance with implementation of a WCPP into consideration, which would include an existing chemical exposure limit (ECEL) of 0.0011 ppm (1.1 ppb; 0.0059 mg/m$^3$) for inhalation exposures as an 8-hour time-weighted average (TWA), applicable personal protective equipment (PPE) requirements, and reformulation costs of numerous products. There are a number of notable unquantified costs. These are described in this Unit and more fully in section 7.11 of the Economic Analysis (Ref. 3).

Alternative products with similar cost and efficacy are available for most of the products that are formulated with TCE. However, for some applications, there may be additional unquantified costs associated with the alternatives or in cases where alternatives are not currently available. For instance, in some cases, some effort might be required by firms using TCE products to identify suitable alternatives, test them for their desired applications, learn how to use them safely and effectively, and implement new processes for using the alternative products. There may also be some safety-critical applications where alternatives would need to undergo extensive safety reviews and testing before they could replace the TCE products. The information to estimate how often these costs might be incurred or what the specific costs would be per-user or per-firm when they are incurred is not available. Therefore, EPA is unable to consider these costs quantitatively.

There also may be some unquantified costs associated with the implementation of a WCPP. EPA estimated a distribution for air monitoring results but since these data were not collected in the same way monitoring data under a WCPP would be collected, these estimated distributions are uncertain and therefore, the costs of the WCPP are uncertain. The WCPP costs also assume that when the exposure levels exceed the ECEL, compliance is achieved by implementing a respirator PPE program. However, the options require that feasible engineering and administrative controls are implemented before resorting to PPE use. These costs would be specific to individual firms, and EPA does not have sufficient information to estimate these costs.

The costs of alternative identification, testing, and potential process changes to battery separator manufacturers could not be estimated. And, if battery separator manufacturers are unable to transition to TCE-free production processes within the 10-year timeframe, there could be battery separator supply chain disruptions. According to one battery separator manufacturer submitting an exemption request to EPA, 80% of lead-acid and lithium-ion batteries are built using battery separators manufactured with TCE. According to the Battery Council International, the U.S. lead-acid battery industry provides $13.7 billion in gross domestic product. Both battery separator manufacturers submitting exemption requests noted that there was only one domestic battery separator manufacturer that does not use TCE for each of lead-acid and lithium batteries, and they asserted that the manufacturers would not have sufficient capacity to meet domestic battery separator demand on their own and could likely support less than half of the U.S. battery production need. In addition, they also noted that the domestic battery separator manufacturer that does not use TCE for lithium batteries uses a ''dry process'' instead of a ''wet process'', and the ''dry process'' does not allow for reliable manufacture of the 9–12 μm separators that are generally used for electric vehicle applications. However, the magnitude of economic impacts from a potential supply chain disruption is uncertain, particularly since EPA could take subsequent regulatory action to extend, modify, or eliminate the exemption on the basis of reasonably available information and adequate public justification.

EPA expects the processing of TCE as an intermediate for the manufacture of HFC–134a to decline over time, in light of the AIM Act requirements (Ref. 4). At some point, the domestic manufacture of HFC–134a may be discontinued. While the timing for this discontinuation is uncertain, it is unclear whether the proposed rule would hasten the closure of plants that use TCE to produce HFC–134a. There would be some unknown cost impacts associated with hastening the closure of these two plants.

Costs to both fluoroelastomer producers using TCE and those using TCE as an intermediate to manufacture hydrochloric acid (HCl) may include potential supply chain disruptions, which could not be estimated. It is expected that these facilities would need to adopt process and/or physical plant changes in order to comply with the proposed rule. EPA does not have sufficient information to estimate the costs of the prohibition to these sectors.

Additionally, EPA is proposing a 10-year phaseout for the industrial and commercial use of TCE as a solvent for closed-loop batch vapor degreasing for rayon fabric scouring for end use in rocket booster nozzle production by Federal agencies and their contractors, conditioned on Federal agencies performing within 5 years a final pre-launch test of rocket booster nozzles that have been produced without using TCE. EPA does not have information to estimate the cost of such a test. The disposal of TCE from cleanup projects to industrial pre-treatment, industrial treatment, or publicly owned treatment work would be prohibited after the section 6(g) exemption ends, 50 years after the rule is finalized. Cleanup sites would need to identify and implement alternative disposal or treatment methods, and would likely also need to renegotiate RCRA permits or CERCLA agreements to include those changes. These approaches could be more costly to implement and/or increase the duration of cleanups allowing any potential environmental or human health impacts to continue for a longer period of time. The information to estimate how often these costs might be incurred or what the specific costs would be per site when they are incurred is not available. Furthermore, the number of sites affected by this prohibition is unknown.

Finally, EPA could not estimate any potential business closures or off-shoring of businesses that might result from the proposed rule. Vapor degreasing is one use of TCE where switching to a suitable alternative may be challenging and where closing or off-shoring may be a compliance strategy. EPA estimates that 366 facilities still use TCE in vapor degreasers, a majority of which are small businesses. There is no standard generally accepted approach for estimating the cost impacts of a firm closure. Despite information EPA has sought from stakeholders, including through a Small Business Advocacy Review (SBAR) Panel, it is still unclear as to the entire impact of a prohibition of TCE vapor degreasing.

The actions proposed in this rulemaking are expected to achieve health benefits for the American public, some of which can be monetized and others that, while tangible and significant, cannot at present be monetized. The monetized benefits of this rulemaking are approximately $18.1 to $21.5 million annualized over 20

years at a 3% discount rate and $8.2 to $10.3 million annualized over 20 years at a 7% discount rate. The monetized benefits only include liver, kidney, and non-Hodgkin's lymphoma cancers.

There are a number of non-cancer endpoints associated with exposure to TCE, including liver toxicity, kidney toxicity, reproductive effects, neurotoxicity, immunotoxicity effects and fetal cardiac defects (Ref. 1). There is human evidence for hepatitis accompanying immune-related generalized skin diseases, jaundice, hepatomegaly, hepatosplenomegaly, and liver failure in TCE-exposed workers and changes in the proximal tubules of the kidney following exposure to TCE, and occupational studies have shown increased levels of kidney damage (proximal tubules) and end-stage renal disease in TCE-exposed workers. Evidence exists to associate TCE with reproductive effects. Most human studies support an association between TCE exposure and alterations in sperm density and quality, as well as changes in sexual drive or function and serum endocrine levels. Fewer epidemiological studies exist linking decreased incidence of fecundability (time-to-pregnancy) and menstrual cycle disturbances in women with TCE exposures. Human studies have consistently reported vestibular system-related symptoms such as headaches, dizziness, and nausea following TCE exposure. Several newer epidemiological studies have found an association between TCE exposure and neurodegenerative disorders such as amyotrophic lateral sclerosis and Parkinson's disease (Ref. 1). EPA does not have sufficient information to estimate the monetized benefits of the proposed rule with respect to these non-cancer effects, and therefore monetized benefits are likely underestimated.

EPA does estimate that there are 52,595 workers and occupational non-users (ONUs, or people who do not directly handle the chemical, but are in close proximity) exposed to TCE and of those, approximately 982 pregnant workers and ONUs annually that may potentially benefit from a reduced risk of fetal cardiac defects resulting from reduced TCE exposure. Although EPA has not developed a complete estimate of the monetized benefits associated with avoiding fetal cardiac defects, as described in the Economic Analysis (Ref. 3), Arth, Tinker et al. (Ref. 5) estimated a mean annual cost of $41,166 (2013$) (median $14,552) for each fetal cardiac defects-associated hospitalization. For critical fetal cardiac defects, mean and median costs were estimated at $79,011 and $29,886 (2013$), respectively for each incidence. In addition to hospitalization costs, individuals with fetal cardiac defects will likely incur healthcare costs associated with physician visits and outpatient care. They are also more likely to require specialized healthcare such as medications, physical or speech therapy, or treatment for developmental or behavioral problems (Ref. 6). Additional social costs may include caregiver burden and mental health services (Ref. 7), as well as non-market costs such as pain and suffering and fetal cardiac defect-related mortality. Because these costs are not accounted for, monetized benefits are likely underestimated. The severity of specific types of fetal cardiac defects and associated costs will vary depending on the type of heart defect. EPA requests comment on information that would allow EPA to quantify the magnitude of avoided risk of fetal cardiac defects due to reductions in TCE exposure under the proposed rulemaking.

Additionally, to the extent that the proposed rule reduces the amount of TCE in drinking water systems and thereby exposures to populations using those drinking water sources, there could be potential health-related benefits related to improved drinking water quality that EPA was unable to quantify.

## II. Background

### *A. Overview of TCE*

This proposed rule applies to TCE (CASRN 79–01–6) and is intended to address the unreasonable risk of injury to health that EPA has identified for TCE. TCE is a volatile organic compound (VOC) used in industry as well as in commercial and consumer products. The total aggregate annual production volume ranged from 100 to 250 million pounds between 2016 and 2019 according to CDR (Ref. 8). The majority of TCE is processed as an intermediate during the manufacture of refrigerants, specifically HFC–134a, which accounts for about 83.6% of TCE's annual production volume (Ref. 1). TCE is also used as a solvent, frequently in cleaning and degreasing (including spot cleaning, vapor degreasing, cold cleaning, and aerosol degreasing), which accounts for another 14.7% of TCE production volume, leaving approximately 1.7% for other uses. As outlined in Unit III.B.1., TCE is used as a solvent in a variety of commercial and consumer applications including lubricants, adhesives and sealants, paints and coatings, and other miscellaneous products.

### *B. Regulatory Actions Pertaining to TCE*

TCE is subject to numerous Federal laws and regulations in the United States and is also subject to regulation by some States and other countries. A summary of EPA regulations pertaining to TCE, as well as other Federal, State, and international regulations (Ref. 9) is in the docket and in Appendix A of the 2020 Risk Evaluation for TCE (Ref. 1).

C. Consideration of Occupational Safety and Health Administration (OSHA) Occupational Health Standards in TSCA Risk Evaluations and TSCA Risk Management Actions

Although EPA must consider and factor in, to the extent practicable, certain non-risk factors as part of TSCA section 6(a) rulemaking (see TSCA section 6(c)(2)), EPA must nonetheless still ensure that the selected regulatory requirements apply ''to the extent necessary so that the chemical substance or mixture no longer presents [unreasonable] risk.'' This requirement to eliminate unreasonable risk is distinguishable from approaches mandated by some other laws, including the Occupational Safety and Health Act (OSH Act), which includes both significant risk and feasibility (technical and economic) considerations in the setting of standards.

Congress intended for EPA to consider occupational risks from chemicals it evaluates under TSCA, among other potential exposures, as relevant and appropriate. As noted previously, TSCA section 6(b) requires EPA to evaluate risks to PESS identified as relevant by the Administrator. TSCA section 3(12) defines the term ''potentially exposed or susceptible subpopulation'' as ''a group of individuals within the general population identified by the Administrator who, due to either greater susceptibility or greater exposure, may be at greater risk than the general population of adverse health effects from exposure to a chemical substance or mixture, such as infants, children, pregnant women, workers, or the elderly.''

The OSH Act similarly requires OSHA to evaluate risk specific to workers prior to promulgating new or revised standards and requires OSHA standards to substantially reduce significant risk to the extent feasible, even if workers are exposed over a full working lifetime. *See* 29 U.S.C. 655(b)(5); *Indus. Union Dep't, AFL–CIO* v. *Am. Petroleum Inst.,* 448 U.S. 607, 642 (1980) (plurality opinion).

Thus, the standards for chemical hazards that OSHA promulgates under the OSH Act share a broadly similar

purpose with the standards that EPA promulgates under TSCA section 6(a). The control measures OSHA and EPA require to satisfy the objectives of their respective statutes may also, in many circumstances, overlap or coincide. However, as this unit outlines, there are important differences between EPA's and OSHA's regulatory approaches and jurisdiction, and EPA considers these differences when deciding whether and how to account for OSHA requirements (Ref. 9) when evaluating and addressing potential unreasonable risk to workers so that compliance requirements are clearly explained to the regulated community.

1. OSHA Requirements

OSHA's mission is to ensure that employees work in safe and healthful conditions. The OSH Act establishes requirements that each employer comply with the General Duty Clause of the Act (29 U.S.C. 654(a)), as well as with occupational safety and health standards issued under the Act.

a. General Duty Clause of the OSH Act

The General Duty Clause of the OSH Act requires employers to keep their workplaces free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees. The General Duty Clause is cast in general terms, and does not establish specific requirements like exposure limits, PPE, or other specific protective measures that EPA could potentially consider when developing its risk evaluations or risk management requirements. OSHA, under limited circumstances, has cited the General Duty Clause for regulating exposure to chemicals. To prove a violation of the General Duty Clause, OSHA must prove employer or industry recognition of the hazard, the hazard was causing or likely to cause death or serious physical harm, and a feasible method to eliminate or materially reduce the hazard was available. In rare situations, OSHA has cited employers for violation of the General Duty Clause where exposures were below a chemical-specific permissible exposure limit (PEL), a TWA based on an employee's average airborne exposure in any 8-hour work shift of a 40-hour work week which shall not be exceeded (Ref. 10). In such situations, OSHA must demonstrate that the employer had actual knowledge that the PEL was inadequate to protect its employees from death or serious physical harm. Because of the heavy evidentiary burden on OSHA to establish violations of the General Duty Clause, it is not frequently used to cite employers for employee exposure to chemical hazards.

b. OSHA Standards

OSHA standards are issued pursuant to the OSH Act and are found in title 29 of the CFR. There are separate standards for general industry, laboratories, construction, maritime and agriculture sectors, and general standards applicable to a number of sectors (*e.g.,* OSHA's Respiratory Protection standard). OSHA has numerous standards that apply to employers who operate chemical manufacturing and processing facilities, as well as to downstream employers whose employees may be occupationally exposed to hazardous chemicals.

OSHA sets legally enforceable limits on the airborne concentrations of hazardous chemicals, referred to as PELs, established for employers to protect their workers against the health effects of exposure to hazardous substances (29 CFR part 1910, subpart Z, part 1915, subpart Z, and part 1926, subparts D and Z). Under section 6(a) of the OSH Act, OSHA was permitted an initial 2-year window after the passage of the Act to adopt ''any national consensus standard and any established Federal standard.'' 29 U.S.C. 655(a). OSHA used this authority in 1971 to establish PELs that were adopted from Federal health standards originally set by the Department of Labor through the Walsh-Healy Act, in which approximately 400 occupational exposure limits (OELs) were selected based on the American Conference of Governmental Industrial Hygienists (ACGIH) 1968 list of Threshold Limit Values (TLVs). In addition, about 25 exposure limits recommended by the American Standards Association (now called the American National Standards Institute or ANSI) were adopted as PELs.

Following the 2-year window provided under section 6(a) of the OSH Act for adoption of national consensus and existing Federal standards, OSHA has issued health standards following the requirements in section 6(b) of the Act. OSHA has established approximately 30 PELs under section 6(b)(5) as part of comprehensive substance-specific standards that include additional requirements for protective measures such as use of PPE, establishment of regulated areas, exposure assessment, hygiene facilities, medical surveillance, and training. These ancillary provisions in substance-specific OSHA standards further mitigate residual risk that could be present due to exposure at the PEL.

Many OSHA PELs have not been updated since they were established in 1971, including the PEL for TCE. In many instances, scientific evidence has accumulated suggesting that the current limits of many PELs are not sufficiently protective. On October 10, 2014, OSHA published a **Federal Register** document in which it recognized that many of its PELs are outdated and inadequate for ensuring protection of worker health (79 FR 61384). In addition, health standards issued under section 6(b)(5) of the OSH Act must reduce significant risk only to the extent that it is technologically and economically feasible. OSHA's legal requirement to demonstrate that its section 6(b)(5) standards are technologically and economically feasible at the time they are promulgated often precludes OSHA from imposing exposure control requirements sufficient to ensure that the chemical substance no longer presents a significant risk to workers. As described in that document, while new advancements or developments in science and technology from the time a PEL is promulgated may improve the scientific basis for making findings of significant risk, technical feasibility or economic feasibility, OSHA has been unable to update most of the PELs established in 1971 and they remain at levels at which they were initially adopted (79 FR 61384, October 10, 2014). One example of how industries have evolved in the intervening 50 years as to what is technologically and economically feasible is the halogenated solvent cleaning industry, which, in response to EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP) promulgated under section 112 of the 1990 Clean Air Act Amendments (see National Emissions Standards for Halogenated Solvent Cleaning, 40 CFR part 63, subpart T), has made equipment improvements that conserve solvent resources and reduce workplace exposure.

In sum, the great majority of OSHA's chemical standards are outdated or do not sufficiently reduce risk to workers. While it is possible in some cases that the OSHA standards for some chemicals reviewed under TSCA will eliminate unreasonable risk, based on EPA's experience thus far in conducting occupational risk assessments under TSCA, EPA believes that OSHA chemical standards would in general be unlikely to address unreasonable risk to workers within the meaning of TSCA, since TSCA section 6(b) unreasonable risk determinations may account for unreasonable risk to more sensitive endpoints (derived from scientific

studies that had not yet been conducted at the time OSHA promulgated its standards) and working populations than OSHA's risk evaluations typically contemplate, and EPA is obligated to apply TSCA section 6(a) risk management requirements to the extent necessary so that the unreasonable risk is no longer presented.

Because the requirements and application of TSCA and OSHA regulatory analyses differ, and because OSHA's chemical-specific standards are decades old and may include outdated assumptions regarding the most sensitive end-point and/or the technological and economic feasibility of the standards, it is necessary for EPA to conduct risk evaluations and, where it finds unreasonable risk to workers, develop risk management requirements for chemical substances that OSHA also regulates, and it is expected that EPA's findings and requirements may sometimes diverge from OSHA's. However, it is also appropriate that EPA consider the chemical standards that OSHA has already developed to limit the compliance burden to employers by aligning management approaches required by the agencies, where alignment will adequately address unreasonable risk to workers. Unit II.C.2. discusses EPA's consideration of OSHA standards in its risk evaluation and management strategies under TSCA.

2. Consideration of OSHA Standards in TSCA Risk Evaluations

When characterizing the risk during risk evaluation under TSCA, EPA believes it is appropriate to evaluate the levels of risk present in scenarios where no mitigation measures are assumed to be in place for the purpose of determining unreasonable risk (see Unit II.C.2.a.). However, the Agency acknowledges that, in some cases, mitigation measures are already in place. It should be noted that there are some cases where scenarios may reflect certain mitigation measures, such as (*e.g.,* in instances where exposure estimates are based on monitoring data at facilities that have existing engineering controls in place). For example, the Halogenated Solvent Cleaning NESHAP, first promulgated in 1994 and last updated in 2007, established standards reflecting the maximum achievable control technology for major and certain area sources, standards reflecting generally available control technology for other area sources, and facility-wide emission limits for certain halogenated solvent cleaning machines. Consequently, emissions monitoring from facilities meeting the NESHAP would reflect emissions reduction resulting from existing engineering controls already in place to meet the standards.

In addition, EPA believes it may be appropriate to also evaluate the levels of risk present in scenarios considering applicable OSHA requirements as well as scenarios considering industry or sector best practices for industrial hygiene that are clearly articulated to the Agency. EPA may evaluate risk under scenarios that consider industry or sector best practices for industrial hygiene that are clearly articulated to the Agency, when doing so serves to inform its risk management efforts. Characterizing risks using scenarios that reflect different levels of mitigation can help inform potential risk management actions by providing information that could be used during risk management to tailor risk mitigation appropriately to address any unreasonable risk identified (see Unit II.C.2.b. and Unit II.C.3.).

a. Risk Characterization for Unreasonable Risk Determination

When making unreasonable risk determinations as part of TSCA risk evaluations, EPA cannot assume as a general matter that all workers are always equipped with and appropriately using sufficient PPE, although EPA does not question the veracity of public comments received on the 2020 Risk Evaluation for TCE regarding the occupational safety practices often followed by industry respondents. When characterizing the risk to human health from occupational exposures during risk evaluation under TSCA, EPA believes it is appropriate to evaluate the levels of risk present in scenarios where PPE is not assumed to be used by workers. This approach of not assuming PPE use by workers considers the risk to PESS (workers and occupational non-users (ONUs)) who may not be covered by OSHA standards, such as self-employed individuals and public sector workers who are not covered by a State Plan. Mitigation scenarios included in the EPA risk evaluation (*e.g.,* scenarios considering use of PPE) likely represent current practice in many facilities where companies effectively address worker and bystander safety requirements. However, the Agency cannot assume that all facilities across all uses of the chemical substance will have adopted these practices for the purposes of making the TSCA risk determination.

Therefore, EPA makes its determinations of unreasonable risk based on scenarios that do not assume compliance with OSHA standards, including any applicable exposure limits or requirements for use of respiratory protection or other PPE. Making unreasonable risk determinations based on such scenarios should not be viewed as an indication that EPA believes there are no occupational safety protections in place at any location, or that there is widespread noncompliance with applicable OSHA standards. Rather, it reflects EPA's recognition that unreasonable risk may exist for subpopulations of workers that may be highly exposed because they are not covered by OSHA standards, such as self-employed individuals and public sector workers who are not covered by an OSHA State Plan, or because their employer is out of compliance with OSHA standards, or because EPA finds unreasonable risk for purposes of TSCA notwithstanding existing OSHA requirements.

b. Risk Evaluation To Inform Risk Management Requirements

In addition to the scenarios described previously, EPA risk evaluations may characterize the levels of risk present in scenarios considering applicable OSHA requirements (*e.g.,* chemical-specific PELs and/or chemical-specific health standards with PELs and additional ancillary provisions) as well as scenarios considering industry or sector best practices for industrial hygiene that are clearly articulated to the Agency to help inform risk management decisions.

3. Consideration of OSHA Standards in TSCA Risk Management Actions

When undertaking risk management actions, EPA: (1) Develops occupational risk mitigation measures to address any unreasonable risk identified by EPA, striving for compatibility with applicable OSHA requirements and industry best practices, including appropriate application of the hierarchy of controls, when those measures would address an unreasonable risk; and (2) Ensures that EPA requirements apply to all potentially exposed workers in accordance with TSCA requirements. Consistent with TSCA section 9(d), EPA consults and coordinates TSCA activities with OSHA and other relevant Federal agencies for the purpose of achieving the maximum applicability of TSCA while avoiding the imposition of duplicative requirements.

Informed by the mitigation scenarios and information gathered during the risk evaluation and risk management process, the Agency might propose rules that require risk management practices that may be already common practice in many or most facilities. Adopting clear, broadly applicable regulatory standards will foster compliance across all

facilities (ensuring a level playing field) and assure protections for all affected workers, especially in cases where current OSHA standards may not apply to them or not be sufficient to address the unreasonable risk.

For evaluation scenarios which involve OSHA chemical-specific PELs, EPA's risk evaluation in some cases may illustrate that limiting exposure to OSHA's PEL would result in acceptable levels of risk under TSCA under certain conditions of use. In these cases, TSCA risk management requirements could incorporate and reinforce requirements in OSHA standards and ensure that risks are addressed, including for circumstances where OSHA requirements are not applicable (*e.g.,* public sector workers not covered by an OSHA State plan, and self-employed workers) by asserting TSCA compliance/enforcement as well. EPA's risk evaluation may also find unreasonable risk under TSCA associated with some occupational conditions of use (see Unit III.B.1.f.), even when the applicable OSHA requirements are being met. In these cases, EPA would need to develop risk management requirements beyond those included in OSHA's standards.

4. TCE and OSHA Requirements

EPA incorporated the considerations described in Unit II.C. into the 2020 Risk Evaluation for TCE, the January 2023 revised unreasonable risk determination for TCE, and this rulemaking. Specifically, in the TSCA 2020 Risk Evaluation for TCE, EPA presented risk estimates based on workers' exposures with and without respiratory protection. EPA determined that even when respirators are used by workers, most of the conditions of use evaluated drove the unreasonable risk. Additional consideration of OSHA standards in the revised unreasonable risk determination is discussed further in the **Federal Register** document announcing that document (Ref. 11). In Unit III.B.3. and Unit V.A.2.b.iii., EPA outlines the importance of considering the hierarchy of controls used by the industrial hygiene community (hereafter referred to as ''hierarchy of controls'') when developing risk management actions in general, and specifically when determining if and how regulated entities may meet a risk-based exposure limit for TCE. The hierarchy of controls is a prioritization of exposure control strategies from most preferred to least preferred techniques. The control strategies include elimination of the hazard, substitution with a less hazardous substance, engineering controls, administrative controls such as training or exclusion zones with warning signs, and, finally, use of PPE (Ref. 12). Under the hierarchy of controls, the use of respirators and dermal PPE should only be considered after all other steps have been taken to reduce exposures. As discussed in Units V.A. and VI.A.1., EPA's risk management approach would not rely solely or primarily on the use of respirators and dermal PPE to address unreasonable risk to workers; instead, EPA is proposing prohibitions for all conditions of use, with a WCPP for certain occupational conditions of use before the prohibitions are fully implemented. The WCPP would require consideration of the hierarchy of controls before use of respirators and other PPE. The WCPP is discussed in full in Units V.A.2. and VI.A.1.b.

In accordance with the approach described in Unit II.C.3., EPA intends for this regulation to be as compatible as possible with the existing OSHA standards, with additional requirements as necessary to address the unreasonable risk. One notable difference between the WCPP and the OSHA standards are the exposure limits. The WCPP would include an ECEL of either 0.0011 ppm (1.1 ppb) or 0.0040 ppm (4.0 ppb) as an 8-hour TWA; exposures at or below each ECEL would not result in unreasonable risk for chronic cancer and non-cancer and acute non-cancer inhalation endpoints (See Unit IV.A. for further discussion about an ECEL of 0.0011 ppm and Unit IV.B. for further discussion about an ECEL of 0.0040 ppm. Refer to Unit VI.A. for discussion about why EPA is considering two TCE ECELs and EPA's related request for public comment). EPA recognizes that for TCE, either ECEL would be significantly lower than the OSHA PEL (100 ppm as an 8-hour TWA). In addition to the distinctions in statutory requirements described in this unit, EPA has identified several factors contributing to the differences in these levels, outlined here.

The TSCA ECEL value for TCE is a lower value than the OSHA PEL (and other existing OELs, discussed in Unit II.C.5.) for many reasons, including that the PEL, established in 1971, may not fully capture either the complete database of studies considered in the 2020 Risk Evaluation for TCE or more recent advances in modeling and scientific interpretation of toxicological data applied in the calculation of the TCE ECEL. The proposed numeric ECEL values considered for incorporation into the WCPP are derived from the analysis in the 2020 Risk Evaluation for TCE, which EPA considers to represent the best available science under TSCA section 26(h) because it was subject to peer review and is the result of a systematic review process that considered reasonably available information in order to identify relevant adverse health effects. Additionally, by using the information from the 2020 Risk Evaluation for TCE, the ECEL incorporates advanced modeling and peer-reviewed methodologies, and accounts for exposures to potentially exposed and susceptible subpopulations, as required by TSCA.

For TCE, the EPA ECEL is an 8-hour occupational inhalation exposure limit, and it takes into consideration the uncertainties identified in the 2020 Risk Evaluation for TCE. For TCE, EPA derived two distinct ECEL values.

The ECEL of 0.0011 ppm is based on the most sensitive overall human health endpoint of developmental toxicity, specifically, fetal cardiac defects based on rat data from Johnson et al., 2003 (Refs. 1, 13). It represents the concentration at which an individual, including a member of a PESS, especially older pregnant workers and ONUs (the group identified as most susceptible to cardiac defects in their developing fetus based on epidemiological data), would be unlikely to suffer adverse effects if exposed for a single 8-hr workday. This value is also protective of health effects that could present following chronic or lifetime exposures under typical occupational exposure scenarios. The ECEL of 0.0011 ppm incorporates a benchmark margin of exposure of 10 to account for inter- and intra-species toxicodynamic variability. In addition to the ECEL, as part of this rulemaking, EPA is proposing an ECEL action level, which is a value equal to half of the ECEL, that would trigger additional monitoring to ensure that workers are not exposed to concentrations above the ECEL. Exposure monitoring and establishing a baseline of TCE exposure for potentially exposed persons, as well as identifying the lowest achievable exposure level in a facility, is further discussed in Unit V.A.2.

The ECEL of 0.0040 ppm is based on chronic autoimmunity, representing the most protective exposure limit from the best overall acute and chronic non-cancer endpoints under TSCA of immunosuppression and autoimmunity, respectively (Refs. 14, 46, 1). The ECEL of 0.0040 ppm is based on elevated anti-double stranded DNA (anti-dsDNA) and single-stranded DNA (ssDNA) antibodies following chronic exposure based on mouse data from Keil et al, 2009 (Ref. 1). The ECEL based on autoimmunity was derived from the PBPK model-adjusted assumptions of 8-

hour daily exposure and elevated respiratory rate for workers, and it incorporates a benchmark MOE of 30 to account for inter- and intra-species toxicodynamic variability as well as the absence of a no-effect level in the study (Ref. 1).

The OSHA PEL for TCE of 100 ppm as an 8-hour TWA was established in 1971. OSHA is required to promulgate a standard that reduces significant risk to the extent that it is technologically and economically feasible to do so (81 FR 16285) at the time of promulgation. As part of a 1989 air contaminants standard for 428 toxic substances, OSHA lowered the PEL to 50 ppm based on a quantitative cancer risk assessment and technological feasibility analysis (See 54 FR 2332, 2432(1989)). This rulemaking was later vacated by court order, which held that OSHA failed to establish that: (1) the existing PELs presented a significant risk of material health impairment; (2) the new standards eliminated or substantially lessened the risk; and (3) the new PELs were economically or technologically feasible (Ref. 15). As a result, the PEL for TCE reverted to the original PEL of 100 ppm. The basis of the 100 ppm PEL is unclear; however, most original PELs were based on acute health effects only observable at higher concentrations and did not take into account more sensitive repeated dose studies, including the studies used to inform the TCE ECEL, that were not available at the time the PEL was established (see, *e.g.,* 79 FR 61383, 61388). As discussed in Units II.D., III.B., and VIII.D., the TSCA ECELs for the TCE WCPP are based on the 2020 Risk Evaluation for TCE and represent the best available science. As described in Unit II.C.1., in a 2014 request for information OSHA described how, while new developments in science and technology from the time the PEL for TCE was established in 1971 may improve the scientific basis for making findings of significant risk, technical feasibility, or economic feasibility that is required under section 6(b)(5) of the OSH Act, OSHA has been unable to update the PEL for TCE and it remains at the level that was originally adopted in 1971 (79 FR 61383, October 10, 2014).

5. TCE and Other Occupational Exposure Limits

EPA is aware of other OELs for TCE, including the ACGIH TLV, the California Division of Occupational Safety and Health (Cal/OSHA) PEL, and the National Institute for Occupational Safety and Health (NIOSH) Recommended Exposure Limit (REL).

The 8-hour TWA TLV currently recommended by the ACGIH is 10 ppm, based on a most recent update in 2007. This TLV is based on central nervous system (CNS) effects occurring at 100 ppm and above (Ref. 16). Kidney toxicity, cancer, and developmental toxicity were also indicated at high doses. Overall, the 10 ppm TLV does not seem to be directly derived from any particular endpoint and can be considered only a semi-quantitative estimate. The TLV report did not cite either the immune study used as the basis of EPA's alternative ECEL of 0.0040 ppm (Keil et al., 2009), nor did it cite Johnson et al., 2003, which is the basis of EPA's proposed ECEL of 0.0011 ppm. Notably, the most recent TLV report was released prior to publication of Keil et al., 2009, and the TLV was not directly derived from any particular endpoint or hazard value. Among other cited studies that are discussed in the 2020 Risk Evaluation, the TLV report only discusses LOAELs and did not apply benchmark dose modeling, PBPK modeling, or any uncertainty factors that would have contributed to a reduced exposure limit. The report does identify TCE as a suspected human carcinogen and discusses epidemiological evidence for several cancers, but there is no consideration of low-dose linear extrapolation that would have resulted in a substantially lower TLV.

The current NIOSH REL is based on the ''lowest feasible level'' standard applied to carcinogens, labeled as ''Ca (potential occupational carcinogen), minimize exposure concentrations'' (Ref. 17), as well as a 2 ppm 60-minute ceiling REL value when used as an anesthetic agent and a 25 ppm 10-hour TWA REL for other exposures. As described in NIOSH's Appendix A, the non-quantitative value applied to carcinogens is based on the lowest feasible concentration (Ref. 18). The 25 ppm TWA was based on concerns for CNS effects at higher doses and a review of industrial hygiene reports supporting the feasibility of a 25-ppm limit. Notably, this ceiling limit is from 1990, over a decade before publication of any of the key studies EPA used for risk determination or ECEL derivation.

The 2007 Cal/OSHA PEL is 25 ppm, lower than the OSHA PEL and equivalent to the NIOSH REL TWA (Ref. 19). According to Cal/OSHA, the origin of the Cal/OSHA PEL is not clear but is assumed to be based on the NIOSH REL threshold value, which cited CNS effects and liver cancer in animals (Ref. 20).

*D. Summary of EPA's Risk Evaluation Activities on TCE*

In December 2016, EPA selected TCE as one of the first 10 chemicals for risk evaluation under TSCA section 6 (15 U.S.C. 2605) (81 FR 91927, December 19, 2016) (FRL–9956–47). EPA published the scope of the TCE risk evaluation (82 FR 31592, July 7, 2017) (FRL–9963–57), and, after receiving public comments, published the problem formulation in June 2018 (83 FR 26998, June 11, 2018) (FRL–9978–40). In February 2020, EPA published a draft risk evaluation (85 FR 11079, February 26, 2020) (FRL–10005–52), and after public comment and peer review by the Science Advisory Committee on Chemicals (SACC), EPA issued the 2020 Risk Evaluation for TCE in November 2020 in accordance with TSCA section 6(b) (85 FR 75010, November 24, 2020) (FRL–10016–91). EPA subsequently issued a draft revised TSCA unreasonable risk determination for TCE (87 FR 40520, July 7, 2022) (FRL–9945–01–OCSPP) and after public notice and receipt of comments, published a final revised Unreasonable Risk Determination for TCE in January 2023 (88 FR 1222, January 9, 2023) (FRL–9945–02–OCSPP). The 2020 Risk Evaluation for TCE and supplemental materials are in docket EPA–HQ–OPPT–2019–0500, with the January 2023 final revised unreasonable risk determination and additional materials supporting the risk evaluation process in docket EPA–HQ–OPPT–2016–0737, on *https://www.regulations.gov.*

1. 2020 Risk Evaluation

In the 2020 Risk Evaluation for TCE, EPA evaluated risks associated with 54 conditions of use within the following categories: manufacture (including import), processing, distribution in commerce, industrial and commercial use, consumer use, and disposal (Ref. 1). Descriptions of these conditions of use are in Unit III.B.1.

The 2020 Risk Evaluation for TCE identified significant adverse health effects associated with short- and long-term exposure to TCE, including non-cancer effects (immunosuppression and developmental toxicity) from acute inhalation exposures and dermal exposures, and non-cancer effects (liver toxicity, kidney toxicity, neurotoxicity, autoimmunity, reproductive toxicity, and developmental toxicity) and cancer (liver, kidney, and non-Hodgkin lymphoma) from chronic inhalation exposures to TCE. A further discussion of the hazards of TCE is in Unit III.B.2.

In the 2020 Risk Evaluation for TCE, EPA documented its unreasonable risk

policy determination for TCE and based it on the immunotoxicity endpoint rather than the most sensitive endpoint (developmental toxicity). The 2020 Risk Evaluation for TCE included a robust scientific description of the developmental toxicity endpoint, specifically fetal cardiac defects, and the analysis in the risk evaluation supporting the developmental toxicity endpoint noted that this endpoint presents lower PODs (Ref. 1). EPA identified the risk of fetal cardiac defects most strongly associated with offspring of older mothers, and therefore included risk estimates for fetal cardiac defects that account for susceptible mothers and their offspring in addition to PESS groups with other susceptibilities (*e.g.,* diabetes, infection status, drug exposure, stress, and metabolic sensitivity due to increased enzymatic activity of cytochrome P450 2E1 (CYP2E1)) (Ref. 1). EPA recognizes that there are differing views about the appropriateness of EPA's policy decision in 2020 to use the immunotoxicity endpoint as the basis for EPA's unreasonable risk determination. EPA also notes that the endpoint selected as the basis for the TSCA section 6 unreasonable risk determination in the risk evaluation that is the basis for this proposed rule should not necessarily be construed as appropriate for or consistent with the basis for other Agency assessments such as the Integrated Risk Information System (IRIS) assessment for TCE or for actions taken by other agency programs. Further, EPA has received numerous comments on EPA's 2020 TSCA Risk Evaluation policy choice regarding endpoint selection that have raised concerns pertaining to political interference and scientific integrity, among other issues. In recognition of this history, EPA is therefore requesting comment on the use of the more sensitive developmental toxicity endpoint to inform TCE risk management decisions. In particular, EPA notes that this proposed rule for regulating the unreasonable risk of TCE demonstrates that both the immunotoxicity and developmental toxicity endpoints support the proposed prohibitions, discussed in detail in Unit IV.

2. Revised Unreasonable Risk Determination

EPA has been revisiting specific aspects of its first ten TSCA existing chemical risk evaluations, including the 2020 Risk Evaluation for TCE, to ensure that the risk evaluations upon which risk management decisions are made better align with TSCA's objective of protecting human health and the environment. For TCE, EPA revised the original unreasonable risk determination based on the 2020 Risk Evaluation for TCE and issued a final revised unreasonable risk determination in January 2023 (Ref. 2). EPA revised the risk determination for the 2020 Risk Evaluation for TCE pursuant to TSCA section 6(b) and Executive Order 13990, (entitled ''Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis'') and other Administration priorities (Refs. 21, 22, 23). The revisions consisted of making the risk determination for the whole chemical substance rather than for individual conditions of use (which resulted in the revised risk determination superseding the prior ''no unreasonable risk'' determinations and withdrawing the associated TSCA section 6(i)(1) ''no unreasonable risk'' order); and clarifying that the risk determination does not reflect an assumption that all workers are always provided and appropriately wear PPE. (Ref. 2).

In determining whether TCE presents unreasonable risk under the conditions of use, EPA considered relevant risk-related factors, including, but not limited to: the effects of the chemical substance on health (including cancer and non-cancer risks) and human exposure to the substance under the conditions of use (including duration, magnitude, and frequency of exposure); the effects of the chemical substance on the environment and environmental exposure under the conditions of use; the population exposed (including any PESS); the severity of hazard (including the nature of the hazard, the irreversibility of the hazard); and uncertainties.

EPA determined that TCE presents an unreasonable risk of injury to health. The unreasonable risk determination, based on immunotoxicity and cancer, is driven by risks to workers and ONUs (workers who do not directly handle the chemical but perform work in an area where the chemical is present) due to occupational exposures to TCE (*i.e.,* during manufacture, processing, industrial and commercial uses, and disposal); and to consumers and bystanders associated with consumer uses of TCE due to exposures from consumer use of TCE and TCE-containing products. Though the revised unreasonable risk determination was based on cancer and the best overall non-cancer endpoints for use in risk evaluation under TSCA (immunosuppression effects for acute inhalation and dermal exposures, and autoimmunity effects for chronic inhalation and dermal exposures), consistent with the 2020 Risk Evaluation for TCE, the Agency is proposing to base the risk management requirements for the WCPP on a more sensitive endpoint to account for particular health effects identified in the underlying 2020 Risk Evaluation for TCE relevant to PESS, as discussed in Unit IV.A. and V.A.2.

EPA did not identify unreasonable risk of injury to the environment for TCE. The TCE conditions of use that EPA evaluated and whose risk support EPA's determination that the chemical substance poses unreasonable risk to health, are listed in the unreasonable risk determination (Ref. 2) and also in Unit III.B.

3. Fenceline Screening Analysis

The 2020 Risk Evaluation for TCE excluded the assessment of certain exposure pathways that were or could be regulated under another EPA-administered statute (see section 1.4.2 of the November 2020 Risk Evaluation for TCE (Ref. 1). This resulted in the surface water, drinking water, and ambient air pathways for TCE exposure not being assessed for human health risk to the general population. In June 2021, EPA made a policy announcement on the path forward for TSCA chemical risk evaluations, indicating that EPA would, among other things, examine whether the exclusion of certain exposure pathways from the risk evaluations could lead to a failure to adequately protect fenceline communities (Ref. 24). EPA then conducted a screening analysis to identify whether there may be risks to people living near the fenceline of facilities releasing TCE.

In order to assess whether there are no risks of concern or whether there may be risks of concern to the general population in proximity to a facility releasing TCE, EPA developed the TSCA Screening Level Approach for Assessing Ambient Air and Water Exposures to Fenceline Communities Version 1.0, which was presented to the SACC in March 2022, with a report issued by the SACC on May 18, 2022 (Ref. 25). This screening level approach, which EPA believes is very effective in accurately assessing where fenceline exposures are of no concern is discussed in Unit VII.A.

## III. Regulatory Approach

### *A. Background*

Under TSCA section 6(a), if the Administrator determines, through a TSCA section 6(b) risk evaluation that the manufacture (including import), processing, distribution in commerce, use, or disposal of a chemical substance

or mixture, or any combination of such activities, presents an unreasonable risk of injury to health or the environment, EPA must by rule apply one or more of the following requirements to the extent necessary so that the chemical substance or mixture no longer presents such risk.

- Prohibit or otherwise restrict the manufacturing, processing, or distribution in commerce of the substance or mixture, or limit the amount of such substance or mixture which may be manufactured, processed, or distributed in commerce (TSCA section 6(a)(1)).
- Prohibit or otherwise restrict the manufacturing, processing, or distribution in commerce of the substance or mixture for a particular use or above a specific concentration for a particular use (TSCA section 6(a)(2)).
- Limit the amount of the substance or mixture which may be manufactured, processed, or distributed in commerce for a particular use or above a specific concentration for a particular use specified (TSCA section 6(a)(2)).
- Require clear and adequate minimum warning and instructions with respect to the substance or mixture's use, distribution in commerce, or disposal, or any combination of those activities, to be marked on or accompanying the substance or mixture (TSCA section 6(a)(3)).
- Require manufacturers and processors of the substance or mixture to make and retain certain records or conduct certain monitoring or testing (TSCA section 6(a)(4)).
- Prohibit or otherwise regulate any manner or method of commercial use of the substance or mixture (TSCA section 6(a)(5)).
- Prohibit or otherwise regulate any manner or method of disposal of the substance or mixture, or any article containing such substance or mixture, by its manufacturer or processor or by any person who uses or disposes of it for commercial purposes (TSCA section 6(a)(6)).
- Direct manufacturers or processors of the substance or mixture to give notice of the unreasonable risk determination to distributors, certain other persons, and the public, and to replace or repurchase the substance or mixture (TSCA section 6(a)(7)).

As described in Unit III.B.3., EPA analyzed how the TSCA section 6(a) requirements could be applied to address the unreasonable risk, so that TCE no longer presents such unreasonable risk. EPA's proposed regulatory action and a primary alternative regulatory action are described in Unit V. EPA is requesting public comment on all elements of the proposed regulatory action and the alternative regulatory action and is providing notice that based on consideration of comments and any new information submitted to EPA during the comment period on this proposed rule, EPA may in the final rule modify elements of the proposed regulatory action. The public should understand that public comments could result in changes to elements of the proposed and alternative regulatory actions when this rulemaking is finalized. For example, elements such as timeframes for phase out could be lengthened or shortened, ECELs could be modified, or the WCPP could have conditions added or eliminated.

Under the authority of TSCA section 6(g), EPA may consider granting a time-limited exemption from a requirement of a TSCA section 6(a) rule for a specific condition of use if EPA finds that: (1) The specific condition of use is a critical or essential use for which no technically and economically feasible safer alternative is available, taking into consideration hazard and exposure; (2) Compliance with the requirement, as applied with respect to the specific condition of use, would significantly disrupt the national economy, national security, or critical infrastructure; or (3) The specific condition of use, as compared to reasonably available alternatives, provides a substantial benefit to health, the environment, or public safety. Based on reasonably available information, EPA has analyzed the need for an exemption and has found that TSCA section 6(g) exemptions are warranted for certain conditions of use, as detailed in Unit V.A.3. EPA is requesting public comment regarding the need for exemptions from the rule (and under what specific circumstances), including exemptions from the proposed regulatory action and the primary alternative regulatory action, pursuant to the provisions of TSCA section 6(g).

TSCA section 6(c)(2)(A) requires EPA, in proposing and promulgating TSCA section 6(a) rules, to consider and include a statement addressing certain factors, including the costs and benefits and the cost effectiveness of the regulatory action and of the one or more primary alternative regulatory actions considered by the Administrator. A description of all TSCA section 6 requirements considered in developing this proposed regulatory action is in Unit III.B.3., and Unit VI.B. includes more information regarding EPA's consideration of exemptions and alternatives. TSCA section 6(c)(2)(C) requires that, in deciding whether to prohibit or restrict in a manner that substantially prevents a specific condition of use and in setting an appropriate transition period for such action, EPA consider, to the extent practicable, whether technically and economically feasible alternatives that benefit health or the environment will be reasonably available as substitutes when the proposed prohibition or restriction takes effect. Unit VI.B. includes more information regarding EPA's consideration of alternatives, and Units IV. and VII. provide more information on EPA's considerations more broadly under TSCA section 6(c)(2).

EPA carried out required consultations as described in this unit and also considered impacts on children's environmental health as part of its approach to developing this TSCA section 6 regulatory action.

1. Consultations

EPA conducted consultations and outreach in developing this proposed regulatory action. The Agency held a federalism consultation from July 22, 2021, until October 22, 2021, as part of this rulemaking process and pursuant to Executive Order 13132. This included a background presentation on September 9, 2021, and a consultation meeting on July 22, 2021. During the consultation, EPA met with State and local officials early in the process of developing the proposed action in order to receive meaningful and timely input into its development (Ref. 26). During the consultation, participants and EPA discussed preemption; the authority given under TSCA section 6 to regulate identified unreasonable risk; which activities would be potentially regulated in the proposed rule; TSCA reporting requirements; key local constituencies; and the relationship between TSCA and existing statutes, particularly the Clean Water Act (CWA) and the Safe Drinking Water Act (SDWA) (Ref. 26).

TCE is not manufactured (including imported), processed, distributed in commerce, or regulated by Tribal governments. However, EPA consulted with Tribal officials during the development of this proposed action (Ref. 27). The Agency held a Tribal consultation from May 17, 2021, to August 20, 2021, with meetings on June 15 and July 8, 2021. Tribal officials were given the opportunity to meaningfully interact with EPA risk managers concerning the current status of risk management. During the consultation, participants and EPA discussed concerns from Tribal members about the TCE OSHA exposure limit being outdated, Tribal interest in seeing TCE

banned, and concerns that third party disposal may be occurring near Tribal lands, with a particular interest in protecting workers at publicly owned treatment works (Ref. 27). EPA received no written comments as part of this consultation.

In addition to the formal consultations, EPA also conducted outreach to advocates of communities that might be subject to disproportionate risk from the exposures to TCE, such as communities with environmental justice concerns. EPA's Environmental Justice (EJ) consultation occurred from June 3, 2021, through August 20, 2021. On June 16 and July 6, 2021, EPA held public meetings as part of this consultation. These meetings were held pursuant to Executive Orders 12898 and 14008. EPA received three written comments following the EJ meetings, in addition to oral comments provided during the consultation (Refs. 28, 29, 30). In general, commenters supported strong regulation of TCE to protect lower-income communities and workers, strong outreach to affected communities, encouraged EPA to follow the National Institute for Occupational Safety and Health (NIOSH) hierarchy of controls, favored prohibitions, and noted the uncertainty, and, in some cases, inadequacy, of personal protective equipment (Ref. 31).

As required by section 609(b) of the Regulatory Flexibility Act (RFA), EPA convened a Small Business Advocacy Review (SBAR) Panel to obtain advice and recommendations from small entity representatives (SERs) that potentially would be subject to this proposed rule's requirements (Ref. 32). EPA met with SERs before and during Panel proceedings, on October 28, 2022, and January 31, 2023. Panel recommendations are in Unit XI.C. and in the Initial Regulatory Flexibility Analysis (Ref. 33), the Panel report is in the docket (Ref. 32).

Units XI.C., XI.E., XI.F., and XI.J. provide more information regarding the consultations.

2. Other Stakeholder Engagement

In addition to the formal consultations described in Unit XI., EPA held a webinar on December 15, 2020, providing an overview of the TSCA risk management process and the risk evaluation findings for TCE. EPA also presented on the risk evaluation and risk management under TSCA for TCE at a Small Business Administration small business roundtable on December 18, 2020. At both events EPA staff provided an overview of the TSCA risk management process and the findings in the 2020 Risk Evaluation for TCE (Ref. 34). Attendees of these meetings were given an opportunity to voice their concerns regarding the risk evaluation and risk management.

Furthermore, EPA engaged in discussions with representatives from different industries, non-governmental organizations, technical experts and users of TCE. A list of external meetings held during the development of this proposed rule is in the docket (Ref. 35); meeting materials and summaries are also in the docket. The purpose of these discussions was to create awareness and educate stakeholders and regulated entities on the provisions for risk management required under TSCA section 6(a); explain the risk evaluation findings; obtain input from manufacturers, processors, distributors, users, academics, advisory councils, and members of the public health community about uses of TCE; identify workplace practices, engineering controls, administrative controls, PPE, and industrial hygiene plans currently in use or feasibly adoptable to reduce exposure to TCE under the conditions of use; understand the importance of TCE in the various uses subject to this proposed rule; compile knowledge about critical uses, substitute chemicals or alternative methods; identify various standards and performance specifications; and generate potential risk reduction strategies. EPA has met with, or otherwise communicated with, a variety of companies, trade associations and non-governmental public interest organizations to discuss the topics outlined in this paragraph; a list of external meetings held during the development of this proposed rule is in the docket (Ref. 35).

3. Children's Environmental Health

The EPA 2021 Policy on Children's Health (Ref. 36) requires EPA to protect children from environmental exposures by consistently and explicitly considering early life exposures (from conception, infancy, early childhood and through adolescence until 21 years of age) and lifelong health in all human health decisions through identifying and integrating children's health data and information when conducting risk assessments. TSCA section 6(b)(4)(A) also requires EPA to conduct risk evaluations ''to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment . . . including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation by the Administrator, under the conditions of use.'' Infants, children, and pregnant women are listed as examples of subpopulations based on lifestage that may be considered relevant ''potentially exposed or susceptible subpopulations'' in the TSCA section 3(12) definition of that term. In addition, TSCA section 6(a) requires EPA to apply one or more risk management requirements under TSCA section 6(a) so that TCE no longer presents an unreasonable risk (including unreasonable risk to PESS). Furthermore, TSCA 6(c)(2)(B) requires EPA to ''factor in, to the extent practicable,'' the considerations under TSCA section 6(c)(2)(A) when selecting among prohibitions and other restrictions in TSCA section 6(a) rules, including taking into consideration the magnitude of exposure to human health, as further discussed in Unit IV.

The 2020 Risk Evaluation for TCE evaluated the hazards of TCE to all lifestages. Evidence of developmental hazards were observed for increased resorptions, fetal cardiac defects and decreased rearing activity (*i.e.,* neurotoxicity). These effects occur in the offspring exposed either *in utero* or postnatally, with older pregnant women identified as especially susceptible to cardiac defects in their developing fetus based on epidemiological data. Adverse health effects to reproduction following TCE exposure include decreased normal sperm morphology and hyperzoospermia along with delayed onset of birth. The most sensitive non-cancer hazard identified for non-reproductive or developmental effects is autoimmunity following chronic exposure to TCE.

The 2020 Risk Evaluation for TCE considered impacts on both children and adults from occupational and consumer use from inhalation and dermal exposures, as applicable. The 2020 Risk Evaluation for TCE identified consumers and bystanders associated with use of TCE-containing consumer products as potentially exposed and susceptible subpopulations due to greater exposure. Consumer users are considered to include adults as well as children as young as 11. Bystanders in the home exposed via inhalation are considered to include any age group from infant (including breast-fed infants) to adult (including elderly), including pregnant women and individuals of reproductive age. Younger lifestages are likely exposed to higher internal dose concentrations of TCE than adults due to relative physiological differences in body weight, breathing rate, and other parameters. A further discussion on the magnitude of health effects and EPA's consideration of these health effects in this proposed rule is in Unit IV.

*B. Regulatory Assessment of TCE*

1. Description of Conditions of Use

This unit describes the TSCA conditions of use whose risk EPA evaluated and considered in making its unreasonable risk determination for the chemical substance TCE. Condition of use descriptions were obtained from EPA sources such as CDR use codes, the 2020 Risk Evaluation for TCE and related documents, as well as the Organisation for Economic Co-operation and Development harmonized use codes and stakeholder engagements. For additional description of the conditions of use, including process descriptions and worker activities considered in the risk evaluation, see the Problem Formulation of the 2020 Risk Evaluation for TCE, the 2020 Risk Evaluation for TCE, and supplemental files (Refs. 37, 1, 38). EPA acknowledges that some of the terms used in this unit may also be defined under other statutes; however, the descriptions here are intended to provide clarity to the regulated entities who would be subject to the provisions of this proposed rule under TSCA section 6(a).

a. Manufacturing

i. Domestic Manufacture

This condition of use refers to the making or producing of a chemical substance within the United States (including manufacturing for export), or the extraction of a component chemical substance from a previously existing chemical substance or a complex combination of substances. This description does not apply to TCE production as a byproduct, including during the manufacture of 1,2-dichloroethane, which EPA intends to consider in the risk evaluation for 1,2-dichloroethane (Ref. 39).

ii. Import

This condition of use refers to the act of causing a chemical substance or mixture to arrive within the customs territory of the United States.

b. Processing

i. Processing as a Reactant/Intermediate

This condition of use refers to processing TCE in chemical reactions for the manufacturing of another chemical substance or product, notably including but not limited to 1,1,1,2-tetrafluoroethane, an HFC also known as HFC–134a, which is used as a refrigerant and in fluorocarbon blends for refrigerants. This condition of use includes reuse of byproduct or residual TCE as a reactant.

ii. Processing: Incorporation Into a Formulation, Mixture, or Reaction Product

This condition of use refers to when TCE is added to a product (or product mixture) prior to further distribution of the product; such products include but are not limited to solvents (for cleaning or degreasing), adhesives and sealant chemicals, and solvents that become part of a product formulation or mixture (*e.g.,* lubricants and greases, paints and coatings, other uses).

iii. Processing: Incorporation Into Articles

This condition of use refers to when a chemical substance becomes an integral component of an article distributed for industrial, commercial, or consumer use.

iv. Processing: Repackaging

This condition of use refers to the preparation of a chemical substance for distribution in commerce in a different form, state, or quantity. This includes but is not limited to transferring the chemical from a bulk container into smaller containers.

v. Processing: Recycling

This condition of use refers to the process of managing used solvents that are collected, either on-site or transported to a third-party site, for commercial purpose other than disposal. Spent solvents can be restored via solvent reclamation/recycling. The recovery process may involve an initial vapor recovery or mechanical separation step followed by distillation, purification, and final packaging.

c. Industrial and Commercial Use

i. Industrial and Commercial Use as Solvent for Open-Top Batch Vapor Degreasing

This condition of use refers to the process of heating TCE to its volatilization point and using its vapor to remove dirt, oils, greases, and other surface contaminants (such as drawing compounds, cutting fluids, coolants, solder flux, and lubricants) from metal parts, electronics, or other articles in batch open-top vapor degreasers (OTVDs).

ii. Industrial and Commercial Use as Solvent for Closed-Loop Batch Vapor Degreasing

This condition of use refers to the process of heating TCE to its volatilization point and using its vapor to remove dirt, oils, greases, and other surface contaminants (such as drawing compounds, cutting fluids, coolants, solder flux, and lubricants) from metal parts, electronics, or other articles in batch closed-loop vapor degreasers.

iii. Industrial and Commercial Use as Solvent for In-Line Conveyorized Vapor Degreasing

This condition of use refers to the process of heating TCE to its volatilization point and using its vapors to remove dirt, oils, greases, and other surface contaminants from textiles, glassware, metal surfaces, and other articles using in-line conveyorized degreasing machines.

iv. Industrial and Commercial Use as Solvent for In-Line Web Cleaner Vapor Degreasing

This condition of use refers to the process of heating TCE to its volatilization point and using its vapors to remove dirt, oils, greases, and other surface contaminants from textiles, glassware, metal surfaces, and other articles using in-line web cleaning degreasing machines.

v. Industrial and Commercial Use as Solvent for Cold Cleaning

This condition of use refers to the industrial and commercial use of TCE as a non-boiling solvent in cold cleaning to dissolve oils, greases and other surface contaminants from textiles, glassware, metal surfaces, and other articles.

vi. Industrial and Commercial Use as a Solvent for Aerosol Spray Degreaser/Cleaner and Mold Release

This condition of use refers to industrial and commercial use of TCE in aerosol degreasing as an aerosolized solvent spray, typically applied from a pressurized can, to remove residual contaminants from fabricated parts or machinery (including circuit boards and electronics). This description also applies to the use of TCE in products to remove dirt, grease, stains, spots, and foreign matter, including but not limited to release agent residues, from molds and casting surfaces.

vii. Industrial and Commercial Use as a Lubricant and Grease in Tap and Die Fluid

This condition of use refers to industrial and commercial use of TCE in products such as, but not limited to, metalworking, cutting, and tapping fluid to reduce friction, heat generation and wear, to assist in metal shaping, and to protect the part being shaped from oxidation. This description does not apply to use of TCE in products intended as penetrating lubricant, which are described in a different condition of use.

viii. Industrial and Commercial Use as a Lubricant and Grease in Penetrating Lubricant

This condition of use refers to the industrial and commercial use of TCE in products as a lubricant and grease in penetrating lubricant, to reduce friction, heat generation and wear between surfaces. This description does not apply to use of TCE in products intended as metalworking, cutting and tapping fluids, which are described in a different condition of use.

ix. Industrial and Commercial Use as an Adhesive and Sealant in Solvent-Based Adhesives and Sealants; Tire Repair Cement/Sealer; Mirror Edge Sealant

This condition of use refers to industrial and commercial use of TCE in adhesive and sealant products to promote bonding between other substances, promote adhesion of surfaces, or prevent seepage of moisture or air.

x. Industrial and Commercial Use as a Functional Fluid in Heat Exchange Fluid

This condition of use refers to the industrial and commercial use of TCE as a functional fluid in heat exchange fluid used to transmit or to remove heat from another material in a closed system.

xi. Industrial and Commercial Use in Paints and Coatings as a Diluent in Solvent-Based Paints and Coating

This condition of use refers to industrial and commercial use of TCE in paints and coatings that are applied to surfaces to enhance properties such as, but not limited to, water repellency, gloss, fade resistance, ease of application, or foam prevention.

xii. Industrial and Commercial Use in Cleaning and Furniture Care Products in Carpet Cleaner and Wipe Cleaning

This condition of use refers to the industrial and commercial use of TCE in products to remove dirt, grease, stains, spots, and foreign matter from furniture and furnishings, including but not limited to carpets and rugs. This description also applies to use of TCE in degreasing and cleaning products to remove dirt, grease, stains, spots, and foreign matter from furniture and furnishings or to cleanse, sanitize, bleach, scour, polish, protect, or improve the appearance of surfaces through wipe cleaning. This description does not apply to the use of TCE as a spot remover for laundry and dishwashing, which is described in a different condition of use.

xiii. Industrial and Commercial Use in Laundry and Dishwashing Products in Spot Remover

This condition of use refers to industrial and commercial use of TCE as a solvent in products for cleaning in laundry and dishwashing applications to remove dirt, grease, stains, spots, and foreign matter from garments and dishware.

xiv. Industrial and Commercial Use in Arts, Crafts, and Hobby Materials in Fixatives and Finishing Spray Coatings

This condition of use refers to the industrial and commercial use of TCE in aerosol products, such as, but not limited to, fixatives, shellacs, or other spray applied coatings intended to cover or hold other arts and crafts materials to a surface.

xv. Industrial and Commercial Use in Corrosion Inhibitors and Anti-Scaling Agents

This condition of use refers to the industrial and commercial use of TCE in corrosion inhibitors and anti-scaling agents as a chemical substance used to prevent or retard corrosion or the formation of scale. As a corrosion inhibitor, TCE is used to prevent or retard corrosion on metallic materials. As an anti-scaling agent, TCE is added to products to prevent the build-up of inorganic oxide deposits.

xvi. Industrial and Commercial Use in Processing Aids in Process Solvent Used in Battery Manufacture; Process Solvent Used in Polymer Fabric Spinning, Fluoroelastomer Manufacture and Alcantara Manufacture; Extraction Solvent Used in Caprolactam Manufacture; Precipitant Used in Beta-Cyclodextrin Manufacture

This condition of use refers to industrial and commercial use of TCE as a processing aid. A process solvent is a chemical substance used to improve the processing characteristics or the operation of process equipment when added to a process or to a substance or mixture to be processed. The chemical substance is not intended to become a part of the reaction product nor has function in the reaction product.

xvii. Industrial and Commercial Use as Ink, Toner, and Colorant Products in Toner Aid

This condition of use refers to the industrial and commercial use of TCE in ink, toner, and colorant products in toner aid as chemical substance used for writing, printing, creating an image on paper and other substrates, or applied to substrates to change their color or hide images. This includes but is not limited to pigmented liquids, toners or powders contained in cartridges, bottles, or other dispensers used in printers and copy machines. This category includes printing inks for commercial applications.

xviii. Industrial and Commercial Use in Automotive Care Products in Brake and Parts Cleaner

This condition of use refers to the industrial and commercial use of TCE in products to remove dirt, grease, stains, and foreign matter from interior and exterior vehicle surfaces. This description includes but is not limited to use of products for motorized vehicle maintenance and their parts.

xix. Industrial and Commercial Use in Apparel and Footwear Care Products in Shoe Polish

This condition of use refers to the industrial or commercial use of TCE in apparel and footwear care products as post-market waxes, polishes, or other mediums and applied to footwear, textiles, or fabrics to impart color or other desirable properties.

xx. Industrial and Commercial Use in Hoof Polish, Gun Scrubber, Pepper Spray, Other Miscellaneous Industrial and Commercial Uses

This condition of use refers to the industrial and commercial use of TCE in which it is expected to act similar to a cleaning solvent used to remove dirt or other contaminants from substrates. This description also refers to other miscellaneous products which contain TCE as an additive to impart or enhance desirable properties of another material (*e.g.,* adhesive, sealant, propellant). Additionally, this condition of use refers to the industrial and commercial use of TCE, often in small quantities, in a laboratory for chemical analysis (*e.g.,* to test hot mix asphalt binder content, as a reference standard, etc.), chemical synthesis, extracting and purifying other chemicals, dissolving other substances, and similar activities.

d. Consumer Use

i. Consumer Use as a Solvent in Brake and Parts Cleaner

This condition of use refers to the consumer use of TCE in products to remove dirt, grease, stains, and foreign matter from interior and exterior vehicle surfaces, particularly in brake cleaner and parts cleaner.

ii. Consumer Use as a Solvent in Aerosol Electronic Degreaser/Cleaner

This condition of use refers to the consumer use of TCE as a solvent in degreasing and cleaning products used

to remove dirt, grease, stains, spots, and foreign matter through a process that uses an aerosolized solvent spray, typically applied from a pressurized can, to remove residual contaminants from electronics.

iii. Consumer Use as a Solvent in Liquid Electronic Degreaser/Cleaner

This condition of use refers to the consumer use of TCE as a solvent in degreasing and cleaning products used to remove dirt, grease, stains, spots, and foreign matter through a process that uses a liquid solvent to remove residual contaminants from electronics.

iv. Consumer Use as a Solvent in Aerosol Spray Degreaser/Cleaner

This condition of use refers to the consumer use of TCE as a solvent in degreasing and cleaning products used to remove dirt, grease, stains, spots, and foreign matter through a process that uses an aerosolized solvent spray, typically applied from a pressurized can, to remove residual contaminants from metals and other fabricated materials not described elsewhere in this unit.

v. Consumer Use as a Solvent in Liquid Degreaser/Cleaner

This condition of use refers to the consumer use of TCE as a solvent in liquid degreasing and cleaning products used to remove dirt, grease, stains, spots, and foreign matter from metals and other fabricated materials not described elsewhere.

vi. Consumer Use as a Solvent in Aerosol Gun Scrubber

This condition of use refers to the consumer use of TCE as a solvent in aerosol products in which it is expected to act similar to a cleaning solvent used to remove residue, dirt, grease, or other contaminants, in particular but not limited to gun scrubber.

vii. Consumer Use as a Solvent in Liquid Gun Scrubber

This condition of use refers to the consumer use of TCE as a solvent in liquid products in which it is expected to act similar to a cleaning solvent used to remove residue, dirt, grease, or other contaminant, in particular but not limited to gun scrubber.

viii. Consumer Use as a Solvent in Mold Release

This condition of use refers to the consumer use of TCE in mold release products to create barriers to prevent certain materials from adhering to each other, and assist in the removal of dirt, grease, oils, and other contaminants from metal molds.

ix. Consumer Use as a Solvent in Aerosol Tire Cleaner

This condition of use refers to the consumer use of TCE as an additive in aerosol products to impart or enhance desirable properties of another material, particularly in use as tire cleaner.

x. Consumer Use as a Solvent in Liquid Tire Cleaner

This condition of use refers to the consumer use of TCE as an additive in liquid products to impart or enhance desirable properties of another material, particularly in use as tire cleaner.

xi. Consumer Use as a Lubricant and Grease in Tap and Die Fluid

This condition of use refers to the consumer use of TCE in products to reduce friction, heat generation and wear between solid surfaces, particularly in tap and die fluid.

xii. Consumer Use as a Lubricant and Grease in Penetrating Lubricant

This condition of use refers to the consumer use of TCE in products to reduce friction, heat generation and wear between solid surfaces, particularly in penetrating lubricant.

xiii. Consumer Use as an Adhesive and Sealant in Solvent-Based Adhesive and Sealants

This condition of use refers to the consumer use of TCE as a solvent in single or two component products used to fasten other materials together or prevent the passage of liquid or gas. This description does not apply to products for mirror edge sealant or tire repair, which are described in different conditions of use.

xiv. Consumer Use as an Adhesive and Sealant in Mirror Edge Sealant

This condition of use refers to the consumer use of TCE in single or two component products used to fasten other materials together or prevent the passage of liquid or gas, particularly in mirror edge sealant.

xv. Consumer Use as an Adhesive and Sealant in Tire Repair Cement/Sealer

This condition of use refers to the consumer use of TCE in single or two component products used to fasten other materials together or prevent the passage of liquid or gas, particularly in cement or sealant for tire repair.

xvi. Consumer Use as a Cleaning and Furniture Care Product in Carpet Cleaner

This condition of use refers to the consumer use of TCE as a solvent in cleaning and furniture care products used to remove dirt, grease, stains, spots, foreign matter, and residual contaminants, particularly in carpet cleaner.

xvii. Consumer Use as a Cleaning and Furniture Care Product in Aerosol Spot Remover

This condition of use refers to the consumer use of TCE as a solvent in cleaning and furniture care products used to remove dirt, grease, stains, spots, and foreign matter through a process that uses an aerosolized solvent spray, typically applied from a pressurized can, to remove residual contaminants, particularly in aerosol spot remover.

xviii. Consumer Use as a Cleaning and Furniture Care Product in Liquid Spot Remover

This condition of use refers to the consumer use of TCE as a solvent in cleaning and furniture care products in the form of a solid or liquid cleaner, used to remove dirt, grease, stains, spots, foreign matter, and residual contaminants, particularly in liquid spot remover.

xix. Consumer Use in Arts, Crafts, and Hobby Materials in Fixative and Finishing Spray Coatings

This condition of use refers to the consumer use of TCE in arts, crafts, and hobby products that uses an aerosolized solvent spray, typically applied from a pressurized can, intended to cover or hold other arts and crafts materials to a surface, particularly in fixative and finishing spray coatings.

xx. Consumer Use in Apparel and Footwear Products in Shoe Polish

This condition of use refers to the consumer use of TCE in apparel and footwear care products as post-market waxes, polishes, or other mediums and applied to footwear, textiles, or fabrics to impart color or other desirable properties.

xxi. Consumer Use in Fabric Spray

This condition of use refers to the consumer use of TCE in aerosol products, typically applied from a pressurized can, as an additive to enhance desirable properties of another material, particularly in fabric spray and as an anti-fray spray.

xxii. Consumer Use in Film Cleaner

This condition of use refers to the consumer use of TCE in products as an additive to impart or enhance the desirable properties of another material, particularly in film cleaner.

xxiii. Consumer Use in Hoof Polish

This condition of use refers to the consumer use of TCE as an additive to impart or enhance desirable properties of another material, particularly in hoof polish.

xxiv. Consumer Use in Toner Aid

This condition of use refers to the consumer use of TCE in products as an additive to impart or enhance the desirable properties of another material, particularly in toner aid.

e. Disposal

This condition of use refers to the process of disposing of generated waste streams of TCE that are collected either on-site or transported to a third-party site. This includes the mixing of TCE with wastewater and the discharge of TCE-contaminated wastewater pursuant to a NPDES permit, and specifically includes discharge to industrial pre-treatment, industrial treatment, or publicly owned treatment works. While EPA views the disposal condition of use under TSCA broadly (see, *e.g.,* EPA's proposed regulation on certain conditions of use of chrysotile asbestos (Ref. 40), for the purpose of this rulemaking under TSCA section 6(a), based on the underlying analysis in the 2020 TCE risk evaluation, EPA's proposed regulations specifically address the risk to PESS from disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works. EPA recognizes that this includes activities that may not be considered disposal under other statutes, such as RCRA and the CWA.

f. Terminology in This Proposed Rule

For purposes of this proposed rulemaking, ''occupational conditions of use'' refers to the TSCA conditions of use described in Units III.B.1.a., b., c., and e. Although EPA identified both industrial and commercial uses in the 2020 Risk Evaluation for TCE for purposes of distinguishing scenarios, the Agency clarified then and clarifies now that EPA interprets the authority over ''any manner or method of commercial use'' under TSCA section 6(a)(5) to reach both.

Additionally, in the 2020 Risk Evaluation for TCE, EPA identified and assessed all known, intended, and reasonably foreseen industrial, commercial, and consumer uses of TCE in order to determine whether TCE as a whole chemical substance presents unreasonable risk to health and the environment. EPA determined that a substantial amount of the industrial, commercial, and consumer uses of TCE evaluated in the 2020 Risk Evaluation for TCE present unreasonable risk of injury to health. As such, for purposes of this risk management rulemaking, ''consumer use'' refers to all consumer uses including known, intended, and reasonably foreseen consumer uses for TCE. Likewise, for the purpose of this risk management rulemaking ''industrial and commercial use'' refers to all industrial and commercial uses, including known, intended, or reasonably foreseen TCE industrial and commercial use.

EPA is not proposing to incorporate the descriptions of known, intended, or reasonably foreseen conditions of use in Unit III.B.1.a. through e. into the regulatory text as definitions because these conditions of use represent those evaluated in the 2020 Risk Evaluation for TCE, whereas the regulatory text applies to all consumer and industrial/commercial uses. EPA requests comment on whether EPA should promulgate definitions for those conditions of use evaluated in the 2020 Risk Evaluation for TCE, and, if so, whether the descriptions in this unit are consistent with the conditions of use evaluated in the 2020 Risk Evaluation for TCE and whether they provide a sufficient level of detail to improve the clarity and readability of the regulation if EPA were to promulgate a regulation controlling industrial and commercial conditions of use that pertained only to the listed industrial and commercial conditions of use evaluated in the 2020 Risk Evaluation for TCE.

EPA further notes that this proposed rule does not apply to any substance excluded from the definition of ''chemical substance'' under TSCA section 3(2)(B)(ii) through (vi). Those exclusions include, but are not limited to, any pesticide (as defined by the Federal Insecticide, Fungicide, and Rodenticide Act) when manufactured, processed, or distributed in commerce for use as a pesticide; and any food, food additive, drug, cosmetic, or device, as defined in section 201 of the Federal Food, Drug, and Cosmetic Act (FFDCA), when manufactured, processed, or distributed in commerce for use as a food, food additive, drug, cosmetic or device.

2. Description of Unreasonable Risk Under the Conditions of Use

EPA has determined that TCE presents an unreasonable risk of injury to human health under the conditions of use based on acute and chronic non-cancer risks and chronic cancer risks (Ref. 2). As described in the TSCA section 6(b) 2020 Risk Evaluation for TCE, EPA identified non-cancer adverse effects from acute and chronic inhalation and dermal exposures to TCE, and for cancer from chronic inhalation and dermal exposures to TCE (Ref. 1). In the TCE risk characterization, the endpoints identified by EPA as the basis for the unreasonable risk determination in the Risk Conclusions were immunosuppression effects for acute inhalation and dermal exposures, and autoimmunity effects for chronic inhalation and dermal exposures (Ref. 1). Additional risks associated with other non-cancer adverse effects (*e.g.,* developmental toxicity, immunosuppression, liver toxicity, kidney toxicity, neurotoxicity, autoimmunity, and reproductive toxicity) were identified for acute and chronic inhalation and dermal exposures, as well as cancer (liver, kidney, and non-Hodgkin lymphoma) for chronic inhalation and dermal exposures. EPA also concluded, based on EPA's Guidelines for Carcinogen Risk Assessment (Ref. 41), that TCE is considered to be carcinogenic by all routes of exposure and calculated cancer risks from chronic inhalation and dermal exposures (Ref. 1). Unit IV. summarizes the health effects and the magnitude of the exposures.

To make the unreasonable risk determination for TCE, EPA evaluated exposures to potentially exposed or susceptible subpopulations including workers, ONUs, consumer users, and bystanders to consumer use by using reasonably available monitoring and modeling data for inhalation and dermal exposures. (Ref. 1). EPA conducted a screening-level analysis to assess potential risks from the air and water pathways to fenceline communities. A discussion of EPA's analysis and the expected effects of this rulemaking on fenceline communities is in Unit VII.A.

For the 2020 Risk Evaluation for TCE, and as discussed in Unit II.D.1. and Unit III.A.3., EPA considered PESS. EPA identified the following groups as PESS: workers and ONUs, including men and women of reproductive age, adolescents, and biologically susceptible subpopulations; and consumer users (age 11 and older) and bystanders (of any age group, including infants, toddlers, children, and elderly), including biologically susceptible subpopulations. Additionally, older pregnant women are identified as especially susceptible to cardiac defects in their developing fetus based on

epidemiological data (Ref. 1). All PESS are included in the quantitative and qualitative analyses described in the 2020 Risk Evaluation for TCE and were considered in the determination of unreasonable risk for TCE (Ref. 1, 2). As discussed in Unit II.D. and Unit IV.B., the 2020 Risk Evaluation for TCE excluded the air and water exposure pathways to the general population from the published risk evaluations and may have caused some risks to be unaccounted for in the risk evaluation. EPA considers these groups a subset of the general population and categorizes them as fenceline communities; they may also be considered PESS. See Unit VII.A. for further discussion on assessing and protecting against risk to fenceline communities.

3. Description of TSCA Section 6 Requirements for Risk Management

EPA examined the TSCA section 6(a) requirements (listed in Unit III.A.) to identify which ones have the potential to address the unreasonable risk for TCE.

As required, EPA developed a proposed regulatory action and one or more primary alternative regulatory actions, which are described in Units V.A. and V.B., respectively. To identify and select a regulatory action, EPA considered the two routes of exposure driving the unreasonable risk, inhalation and dermal, and the exposed populations. For occupational conditions of use (see Unit III.B.1.f.), EPA considered how it could directly regulate manufacturing (including import), processing, distribution in commerce, industrial and commercial use, or disposal to address the unreasonable risk. EPA does not have direct authority to regulate consumer use. Therefore, EPA considered how it could exercise its authority under TSCA to regulate the manufacturing (including import), processing, and/or distribution in commerce of TCE at different points in the supply chain to eliminate exposures or restrict the availability of TCE and TCE-containing products for consumer use in order to address the unreasonable risk.

As required by TSCA section 6(c)(2), EPA considered several factors, in addition to identified unreasonable risk, when selecting among possible TSCA section 6(a) requirements. To the extent practicable, EPA factored into its decisions the effects of TCE on health, which is described in Unit IV. EPA also factored into its decisions, to the extent practicable: the effects of TCE on the environment and the magnitude of exposure to TCE of human beings and the environment, the benefits of TCE for various uses, and the reasonably ascertainable economic consequences of the rule. In evaluating the reasonably ascertainable economic consequences of the rule, EPA considered: (i) The likely effect of the rule on the national economy, small business, technological innovation, the environment, and public health; (ii) The costs and benefits of the proposed regulatory action and one or more primary alternative regulatory actions considered; and (iii) The cost effectiveness of the proposed regulatory action and of the one or more primary alternative regulatory actions considered. See Unit VII. for further discussion related to TSCA section 6(c)(2)(A) considerations, including the statement of effects of the proposed rule with respect to these considerations.

EPA also considered the regulatory authority under TSCA and other, statutes such as the OSH Act, Consumer Product Safety Act (CPSA), and other EPA-administered statutes, to examine: (1) Whether there are opportunities for all or part of risk management action on TCE to be addressed under other statutes, such that a referral may be warranted under TSCA sections 9(a) or section 9(b); or (2) Whether TSCA section 6(a) regulation could include alignment of requirements and definitions in and under existing statutes to minimize confusion to the regulated entities and the general public.

In addition, EPA followed other TSCA requirements such as considering the availability of alternatives when contemplating prohibition or a substantial restriction (TSCA section 6(c)(2)(C), as outlined in Unit VI.B.), and setting proposed compliance dates in accordance with the requirements in TSCA section 6(d)(1) (described in the proposed and alternative regulatory action in Unit V.).

To the extent information was reasonably available, when selecting regulatory actions, EPA considered pollution prevention and the hierarchy of controls adopted by OSHA and NIOSH, with the goal of identifying risk management control methods that are permanent, feasible, and effective. EPA also considered how to address the unreasonable risk while providing flexibility to the regulated entities where appropriate. EPA considered the information presented in the 2020 Risk Evaluation for TCE, as well as additional input from stakeholders (as described in Unit III.A.), and anticipated compliance strategies from regulated entities.

Taken together, these considerations led EPA to the proposed regulatory action and primary alternative regulatory actions described in Unit V. Additional details related to how the requirements in this unit were incorporated into development of those actions are in Unit VI.

## IV. Considerations of Health Effects of TCE

TSCA section 6(a) rules must be promulgated ''in accordance with subsection (c)(2).'' TSCA section 6(c)(2)(A) requires EPA, in proposing and promulgating TSCA section 6(a) rules, to ''consider and publish a statement based on reasonably available information'' with respect to listed criteria, including the effects and magnitude of exposure to human health and the environment, the benefits of the chemical substance for various uses, and the reasonably ascertainable economic consequences of the rule. Under TSCA section 6(c)(2)(B), EPA must ''factor in, to the extent practicable,'' the considerations under TSCA section 6(c)(2)(A) when selecting among prohibitions and other restrictions in TSCA section 6(a) rules. This section discusses the health effects of TCE. Other TSCA section 6(c)(2) considerations are discussed further in Unit VII.

EPA's analysis of the health effects of TCE is in the 2020 Risk Evaluation (Ref. 1). This unit presents a summary of that information and an explanation of how EPA considered that information in developing the proposed and alternative regulatory options.

TCE has a large database of human health toxicity data. The 2020 Risk Evaluation for TCE identified several endpoints, such as kidney toxicity, immunotoxicity, or developmental toxicity, and often a single endpoint was examined by multiple studies. For acute exposures, EPA identified non-cancer effects (developmental toxicity and immunosuppression). For chronic exposures, EPA identified non-cancer effects (liver toxicity, kidney toxicity, neurotoxicity, autoimmunity, reproductive toxicity, and developmental toxicity) as well as cancer (liver, kidney, and non-Hodgkin lymphoma), with kidney cancer identified as acting through a mutagenic mode of action (Ref. 1). As discussed in this unit, the 2020 Risk Evaluation for TCE contains quantitative risk estimates using several points of departure (PODs), including both the immunotoxicity endpoints as well as the more sensitive developmental toxicity endpoints, specifically fetal cardiac defects, and both demonstrate that TCE presents risk.

Additionally, in developing the 2020 Risk Evaluation for TCE, EPA analyzed

the reasonably available information to ascertain whether some human subpopulations may have greater exposure or greater susceptibility than the general population to the hazard posed by the chemical substance. Factors affecting susceptibility examined in the reasonably available studies on TCE include lifestage, sex, genetic polymorphisms, race/ethnicity, preexisting health status, lifestyle factors, and nutrition status. Groups of individuals for which one or several of these factors apply may be considered PESS (Ref. 1).

*A. ECEL Value of 0.0011 ppm Based on Developmental Toxicity (Proposed)*

Because TSCA section 6(c)(2)(B) directs EPA to factor in, to the extent practicable, the health effects of TCE under TSCA section 6(c)(2)(A), TSCA section 6(c) thereby provides EPA with the flexibility to tailor the regulatory restrictions to account for particular health effects identified in the underlying risk evaluation. With this consideration, EPA found that, in some cases, a regulatory option that could reduce exposures such that they would achieve the benchmark margin of exposure for the most sensitive non-cancer endpoint (developmental toxicity) would address any risk for other non-cancer endpoints. Older pregnant workers and ONUs, who may be especially susceptible to TCE-induced cardiac defects in their developing fetus, are classified as a PESS, and the associated POD and risk estimates were included in the 2020 Risk Evaluation in consideration of PESS groups. EPA has carefully considered the health effects of TCE on pregnant workers and ONUs as part of the Agency's development of proposed requirements that would be applicable to certain occupational conditions of use of TCE. In order for this rulemaking to appropriately address risk to all workers and ONUs exposed to TCE through the occupational conditions of use for which EPA is proposing an ECEL associated with a WCPP, EPA has factored in consideration of additional health effects applicable to PESS, including older pregnant workers and ONUs (the group identified as most susceptible to fetal cardiac defects) pursuant to TSCA section 6(c)(2), and is proposing an ECEL value of 0.0011 ppm based on developmental toxicity (Ref. 13).

In the risk characterization section of the 2020 Risk Evaluation for TCE, EPA acknowledged that fetal cardiac defects are an acute, non-cancer endpoint of concern for older pregnant women, while also acknowledging uncertainty surrounding the use of this endpoint to inform the determination of whether TCE presents unreasonable risk of injury to health for all affected human populations. In the 2020 Risk Evaluation for TCE, EPA presented the Agency's findings with respect to different endpoints and characterized the immunotoxicity endpoints as the ''best overall'' non-cancer endpoints for use in the risk conclusions and risk determination. The endpoints were characterized in this way precisely because of the quantitative uncertainties surrounding the use of the fetal cardiac defects endpoint and other considerations. Further, as noted in Unit II.D.1., EPA has received numerous comments on EPA's 2020 TSCA Risk Evaluation policy choice regarding endpoint selection that have raised concerns pertaining to political interference and scientific integrity, among other issues. Among the non-cancer adverse health effects, the drivers for EPA's whole chemical unreasonable risk determination for TCE under TSCA were identified as immunotoxicity, acute immunosuppression, and chronic autoimmunity from inhalation and dermal exposures (Ref. 2). EPA received significant feedback on this aspect of the 2020 Risk Evaluation for TCE, including focused attention on this issue from the SACC and public commenters reacting to the draft Risk Evaluation for TCE (Ref. 42). Moreover, based on the discussion included in the peer review report of the 2020 Risk Evaluation, EPA also concluded that reasonable scientists would not disallow the use of the fetal cardiac defects studies, and that therefore other EPA program reliance on the fetal cardiac defects endpoint is scientifically valid (*e.g.,* IRIS).

The 2020 Risk Evaluation for TCE identified the developmental toxicity endpoint of fetal cardiac defects, which presents a lower POD than the immunotoxicity endpoints. The magnitude of the unreasonable risk from exposures to TCE would have been greater had the Agency relied upon the developmental toxicity endpoint (Ref. 1). Specifically, EPA identified the risk of fetal cardiac defects most strongly associated with offspring of older mothers, and therefore included risk estimates for fetal cardiac defects that account for susceptible mothers and their offspring in addition to PESS groups with other susceptibilities (*e.g.,* diabetes, infection status, drug exposure, stress, and metabolic sensitivity due to increased enzymatic activity of cytochrome P450 2E1 (CYP2E1) (Ref. 1).

EPA developed the ECEL for the most sensitive health endpoint (developmental toxicity) in support of risk management efforts on TCE under TSCA, to identify that ambient exposures that are kept at or below the 8-hour ECEL of 0.0011 ppm would protect against risk of injury to health due to fetal cardiac defects, if those levels can be achieved. In addition, EPA expects that at the acute non-cancer ECEL of 0.0011 ppm, any potentially exposed person in the workplace would be protected against other non-cancer effects resulting from occupational exposures, as well as excess risk of cancer (Ref. 13). EPA expects that if a facility were able to meet the ECEL (0.0011 ppm) requirement associated with the WCPP under the proposed regulatory action outlined in Unit V.A.2., it would protect PESS during the phaseout period before the full prohibition.

*B. ECEL Value of 0.0040 ppm Based on Immunotoxicity (Primary Alternative)*

In other risk management actions under TSCA section 6, EPA has proposed basing its worker protection requirements, such as an ECEL, on a single acute or chronic exposure endpoint that provided the basis for the unreasonable risk determination (Ref. 40). While EPA is proposing a different basis for the ECEL for the WCPP for TCE (0.0011 ppm) (to protect a sensitive PESS), EPA recognizes that among the non-cancer adverse health effects of TCE, the drivers for EPA's whole chemical unreasonable risk determination for TCE under TSCA were identified as immunotoxicity, namely acute immunosuppression and chronic autoimmunity from inhalation and dermal exposures (Ref. 2). For this reason, the primary alternative regulatory action provided by EPA includes a WCPP with a different ECEL (0.0040 ppm), based on the endpoint that drives the unreasonable risk. As described in more detail in Unit V.B.2., reducing exposures to or below the ECEL of 0.0040 ppm would address that component of the unreasonable risk of injury to health from TCE that is driven by inhalation exposures in an occupational setting (Refs. 1, 14). If ambient exposures are kept at or below the 8-hour ECEL of 0.0040 ppm, EPA expects that workers and ONUs would be protected against not only the chronic non-cancer effects for autoimmunity described in this unit, but also effects resulting from acute non-cancer exposure (immunosuppression) and cancer.

As described in Unit V.A.2., for the ECEL value of 0.0011 ppm, proposed as

part of the WCPP, EPA requests comment on the use of TSCA section 6(c)(2) to tailor the risk management actions where necessary to protect PESS. Also, as described in Unit V.B.2., EPA is requesting comment on the use of the ECEL value of 0.0040 ppm in the WCPP in the alternative regulatory action. Specifically, EPA is requesting comment on the selection of the fetal cardiac defects endpoint for the ECEL of 0.0011 ppm in the proposed regulatory action, rather than the immunotoxicity endpoint on which the unreasonable risk determination is based, which would result in an ECEL of 0.0040 ppm. EPA is also requesting comment on additional ways to protect workers and ONUs who are or may become pregnant.

## V. Proposed and Primary Alternative Regulatory Actions

This unit describes the proposed regulatory action by EPA so that TCE will no longer present an unreasonable risk of injury to health. In addition, as indicated by TSCA section 6(c)(2)(A), EPA must consider the costs and benefits and the cost effectiveness of the proposed regulatory action and one or more primary alternative regulatory actions. In the case of TCE, the proposed regulatory action is described in Unit V.A. and the primary alternative regulatory action considered is described in Unit V.B. An overview of the proposed regulatory action and primary alternative regulatory action for each condition of use is in Unit V.C. The rationale for the proposed and primary alternative regulatory actions and associated compliance timeframes are discussed in this unit and in more detail in Unit VI.A.

### *A. Proposed Regulatory Action*

EPA is proposing under TSCA section 6(a) to: Prohibit all manufacture (including import), processing, distribution in commerce, and industrial and commercial use of TCE for all uses (including all consumer uses), with longer timeframes and workplace controls for certain processing and industrial and commercial uses (including proposed phaseouts and TSCA section 6(g) exemptions); prohibit the disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works with a 50-year TSCA section 6(g) exemption for cleanup projects; and establish recordkeeping and downstream notifications requirements. Prohibitions on manufacturing (including import) and processing, including staggered implementation timeframes to account for the supply chain, are outlined in Unit V.A.1.a.; prohibitions on industrial and commercial uses and distribution in commerce are outlined in Unit V.A.1.b.; and prohibitions related to consumer uses are outlined in Unit V.A.1.c.

EPA is proposing longer compliance timeframes (with workplace controls) for prohibitions on certain conditions of use. The timeframe for a prohibition or phaseout under TSCA section 6(d) must begin as soon as practicable, but not later than 5 years, with the full implementation of the prohibition or phase-out requirements occurring as soon as practicable and providing for a reasonable transition period. For a TSCA section 6(g) exemption for a specific condition of use, EPA must establish a time limit as reasonable on a case-by-case basis as long as the exemption meets the criteria under TSCA section 6(g)(1). First, EPA is proposing to prohibit the manufacturing (including import) and processing of TCE as an intermediate for the manufacture of HFC–134a through an 8.5-year phaseout, as outlined in Unit V.A.1.d. Second, EPA is proposing a 10-year phaseout for the industrial and commercial use of TCE as a solvent for closed-loop batch vapor degreasing for rayon fabric scouring for end use in rocket booster nozzle production for Federal agencies and their contractors, conditioned on a final pre-launch test within 5 years of rocket booster nozzles that have been produced without using TCE, as outlined in Unit V.A.1.e. Third, EPA is proposing a time-limited exemption for 10 years under a TSCA section 6(g) exemption related to prohibitions on the industrial and commercial use of TCE as a processing aid for battery separator manufacturing, as outlined in Unit V.A.3.b.i. Fourth, EPA is proposing a time-limited exemption for 10 years under a TSCA section 6(g) exemption related to prohibitions on industrial uses of TCE for DoD vessel requirements for potting, bonding and sealing compounds, and bonding and cleaning requirements for naval combat systems, radars, sensors, equipment, and fabrication and prototyping processes, as outlined in Unit V.A.3.b.ii. Fifth, EPA is proposing a time-limited exemption for 50 years under a TSCA section 6(g) exemption related to prohibitions on the industrial and commercial use of TCE in laboratory use for essential laboratory activities and some research and development activities, as outlined in Unit V.A.3.b.iii. Sixth, EPA is proposing a time-limited exemption for 7 years under a TSCA section 6(g) exemption related to prohibitions on the industrial and commercial use of TCE as a solvent in closed loop vapor degreasing necessary for human-rated rocket engine cleaning by NASA and its contractors. Seventh, EPA is proposing a time-limited exemption for 10 years under a TSCA section 6(g) exemption for emergency industrial and commercial use of TCE for specific conditions of use which are critical or essential in furtherance of NASA's mission and for which no technically and economically safer alternative is available. Where conditions of use would be prohibited under timeframes longer than one year, EPA's proposal aims to align with elements of existing OSHA regulations and industrial hygiene best practices to the extent possible by implementing a Workplace Chemical Protection Program (WCPP). The WCPP includes requirements for an inhalation exposure limit and glove requirements to limit exposure to TCE until the prohibitions take effect, as outlined in Unit V.A.2. Lastly, EPA is proposing to prohibit certain disposal of TCE (specifically, the disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works), as outlined in Unit V.A.1.f., with a time limited 50-year exemption for cleanup projects as outlined in Unit V.A.3.b.iv; and establish recordkeeping and downstream notification requirements, as outlined in Unit V.A.4. EPA requests comment on the applicability to the private sector of proposed regulatory actions pertaining specifically to Federal agencies, namely industrial uses for DoD vessel requirements and closed-loop batch vapor degreasing for rayon fabric scouring for rocket booster nozzle production. EPA requests comment on the extent to which the private sector would be affected by a prohibition on these uses.

#### 1. Prohibitions of Manufacturing, Processing, Distribution in Commerce, Use, and Disposal

##### a. Prohibitions on Manufacturing (Including Import) and Processing of TCE

EPA is proposing to prohibit the manufacturing (including import) and processing of TCE based on the unreasonable risk to workers and ONUs driven by these conditions of use (Ref. 2). As the manufacture and processing of TCE presents and unreasonable risk to health in the United States, the manufacture and processing of TCE for export would also be prohibited in accordance with TSCA section 12(a)(2).

As discussed in Units III.B.3. and VI.A., based on the Agency's consideration of alternatives under TSCA section 6(c)(2)(C), uncertainty

relative to the feasibility of exposure reduction to sufficiently address the unreasonable risk across the broad range of occupational environments and activities that occur in manufacturing (including import) and processing conditions of use, and the irreversible health effects associated with TCE exposures, EPA has determined that prohibition is the best way to address the unreasonable risk.

EPA is proposing that the prohibitions on manufacturing (including import) and processing of TCE would follow a staggered schedule, due to supply chain considerations. EPA proposes that the compliance dates for the proposed prohibitions described in this unit, such that the requirements would come into effect in 90 days (3 months) for manufacturers and in 180 days (6 months) for processors, with different timeframes related to specific conditions of use. Specifically, for processing TCE as a reactant/intermediate, EPA is proposing that the compliance dates for the proposed prohibitions described in this unit would come into effect in 1.5 years for manufacturers and 2 years for processors. There are additional exceptions from the prohibition for the manufacturing and processing associated with certain processing and industrial and commercial uses, including those described later in this unit (for which EPA is proposing longer compliance timeframes, including phaseouts (see Units V.A.1.b., d., and e.) or time-limited exemptions under TSCA section 6(g) (see Unit V.A.3.b.)). The rationale for longer timeframes for certain conditions of use is described in Unit VI.A.1.

b. Prohibitions on Industrial and Commercial Use and Distribution in Commerce of TCE

EPA is proposing to prohibit the industrial and commercial use of TCE, based on the unreasonable risk to workers and ONUs driven by these conditions of use (Ref. 2). As discussed in Units III.B.3. and VI.A., based on consideration of alternatives under TSCA section 6(c)(2)(C), uncertainty relative to the feasibility of exposure reduction to sufficiently address the unreasonable risk across the broad range of work environments and activities represented by industrial and commercial uses of TCE, and the irreversible health effects associated with TCE exposures, EPA has determined that prohibition is the best way to address the unreasonable risk. However, in consideration of the challenges several sectors may encounter in adopting alternatives to TCE, EPA is proposing longer compliance timeframes for certain uses under this prohibition.

EPA is proposing compliance dates for the proposed prohibitions that would come into effect for most industrial and commercial users 270 days after the publication date of the final rule. However, EPA is proposing longer compliance timeframes under this prohibition for some industrial and commercial uses and for the associated manufacturing (including import), processing, and distribution in commerce. Specifically, for two batch vapor degreasing conditions of use (open-top and closed-loop), EPA is proposing that the compliance dates for the proposed prohibitions described in this unit would come into effect in 180 days for manufacturers, in 270 days (9 months) for processors, specifically for processing into a formulation and for recycling, and in 1 year for the industrial and commercial uses of TCE in open-top and closed-loop batch vapor degreasers (see Unit III.B.1.c.i. and ii. for descriptions of these conditions of use and Unit VI.A.1. for a rationale for the slightly longer timeframe). For a sub-set of the closed-loop batch vapor degreasing condition of use (industrial and commercial use of TCE as a solvent for closed-loop batch vapor degreasing for rayon fabric scouring for end use in rocket booster nozzle production for Federal agencies and their contractors) EPA is proposing that the compliance dates for the proposed prohibitions described in this unit would come into effect in five or 10 years for manufacturers, processors, distributors, and industrial and commercial users, depending on whether the conditions of the phaseout are met (see Unit V.A.1.e. for a description of the conditions of this proposed exemption, and Unit VI.A.1. for the rationale for this timeframe). Also, EPA is proposing that the compliance dates for the proposed prohibitions described in this unit would come into effect for commercial use of TCE as a processing aid in 1.5 years for manufacturers, in 2 years for processors, and in 2 years for industrial and commercial use of TCE in: processing aid in process solvent used in battery manufacture; process solvent used in polymer fiber spinning, fluoroelastomer manufacture and Alcantara manufacture; extraction solvent used in caprolactam manufacture; and precipitant used in beta-cyclodextrin manufacture (see Unit III.B.1.c.xvi. for a description of this condition of use and Unit V.A.1. for a rationale for the different timeframe).

To aid with implementation of the compliance dates for the proposed prohibitions on manufacturing, processing, and industrial and commercial use of TCE, and ensure that those prohibitions effectively address the unreasonable risk identified, EPA is also proposing prohibitions on distribution in commerce of TCE. Generally, for most conditions of use EPA is proposing that the compliance date for the proposed prohibition on distributors in commerce of TCE would come into effect 180 days (6 months) following publication of the final rule. In instances where EPA is proposing a prohibition on manufacturing and processing TCE for a particular industrial and commercial use that is later than 180 days after publication of the final rule, the compliance date for the proposed prohibition on distribution in commerce would be the same as the compliance date of the proposed prohibition on manufacturing and processing TCE.

As noted in Unit III.B.1.f., this proposal does not apply to any substance excluded from the definition of ''chemical substance'' under TSCA section 3(2)(B)(ii) through (vi). EPA requests comment on the impacts, if any, that a prohibition on the processing of TCE into a formulation, mixture or reaction product in other chemical products and preparations, or other aspects of this proposal, may have on the production and availability of any pesticide or other substance excluded from the TSCA definition of ''chemical substance.'' EPA also requests comment on whether it should consider a *de minimis* level of TCE in formulations to account for impurities (*e.g.,* 0.1% or 0.5%) when finalizing the prohibitions described in this unit, and, if so, information on and rationale for any level that should be considered *de minimis.*

When proposing the compliance dates described in this unit as required under TSCA section 6(d), EPA considered irreversible health effects associated with TCE exposure. EPA has no reasonably available information indicating that the proposed compliance dates are not practicable for the activities that would be prohibited, or that additional time is needed for products to clear the channels of trade. However, EPA requests comment on whether additional time is needed, for example, for products to clear the channels of trade, or for implementing the use of substitutes; comments should include documentation such as the specific use of the chemical throughout the supply chain; concrete steps taken to identify, test, and qualify substitutes for those uses (including details on the substitutes tested and the specific

certifications that would require updating); and estimates of the time required to identify, test, and qualify substitutes with supporting documentation. EPA also requests comment on whether these are the appropriate types of information for use in evaluating compliance requirements, and whether there are other considerations that should apply. EPA may finalize significantly shorter or longer compliance timeframes based on consideration of public comments.

c. Prohibitions of Manufacturing, Processing, and Distribution in Commerce of TCE for Consumer Use

The consumer uses evaluated in the 2020 Risk Evaluation for TCE constitute all known, intended, and reasonably foreseen consumer uses of TCE. As described in this unit, EPA is proposing to prohibit all manufacturing (including import) and processing of TCE to address the unreasonable risk to workers and ONUs driven by those conditions of use (Ref. 2). EPA does not believe any delays are necessary for prohibitions on manufacture (including import), processing, or distribution in commerce of TCE for consumer use. EPA notes that not only did all but one of the 24 consumer uses of TCE evaluated in the 2020 Risk Evaluation for TCE support the unreasonable risk determination for TCE (Refs. 1, 2), but also the manufacture (including import) and processing of TCE for consumer uses generally supports EPA's unreasonable risk determination for workers and ONUs, as further discussed in Unit V.A. For these reasons, and based on considerations of the severity of the hazards of TCE, EPA is proposing to prohibit the manufacturing (including import), processing, and distribution in commerce of TCE for all uses, which includes all consumer uses.

EPA is proposing that the compliance dates for the proposed prohibitions described in this unit relevant to consumer uses would come into effect for manufacturers 90 days (3 months) and for processors 180 days (6 months) after the publication date of the final rule in the **Federal Register**. EPA is also proposing prohibitions on distribution in commerce of TCE for consumer uses to aid with effective implementation of the prohibitions on manufacturing and processing, and to address the unreasonable risk to consumers and bystanders. EPA proposes that the compliance dates for the proposed prohibition on distribution in commerce of TCE for consumer use would come into effect 180 days (6 months) after the publication date of the rule in the **Federal Register**. EPA considered the risk of irreversible health effects associated with TCE exposure when proposing these compliance dates. EPA has no reasonably available information indicating these proposed compliance dates are not practicable for the activities that would be prohibited or that additional time is needed for products to clear the channels of trade. However, EPA requests comment on whether additional time is needed, for example, for products to clear the channels of trade, or for implementing the use of substitutes; comments should include the considerations described in Unit V.A.1.b. EPA may finalize significantly shorter or longer compliance timeframes based on consideration of public comments.

EPA also requests comment on whether it should consider a *de minimis* level of TCE in formulations to account for impurities (*e.g.,* 0.1% or 0.5%) when finalizing the prohibitions described in this unit, and, if so, information on and rationale for any level that should be considered *de minimis.*

d. Phaseout of TCE for Processing as an Intermediate for the Manufacture of HFC–134a.

As described in this unit, EPA is proposing a longer phaseout timeframe for the manufacturing (including import) and processing of TCE as an intermediate for the manufacture of HFC–134a (1,1,1,2-Tetrafluroethane; CAS Number 811–97–2). EPA is proposing an 8.5-year phaseout subject to the requirements discussed in this unit. All other processing of TCE as a reactant/intermediate would be subject to the proposed prohibitions described in Unit V.A.1.b. EPA is proposing to require a phaseout for processing of TCE as an intermediate for the manufacture of HFC–134a, which EPA expects would begin at the final rule's effective date and end 8.5 years after the publication of the final rule. Associated with this phaseout, EPA would require the establishment of the TCE WCPP, outlined in Unit V.A.2., within 6 months after publication of the final rule, as workplace protections during the period of the phaseout. To set the phaseout volumes, EPA would require any facility processing TCE as an intermediate to manufacture HFC–134a in the United States to establish a baseline of the annual quantity of TCE processed by the facility as a feedstock to manufacture HFC–134a. EPA is proposing to require that within 6 months after the publication of the final rule the manufacturer could use the average of any 12 consecutive months in the 36 months preceding the publication of the final rule to calculate their baseline, based on records that demonstrate how the baseline annual volume was calculated. Following the establishment of a baseline volume, the regulated entity would then be required to implement a 4-step phaseout process; specifically, the phaseout would be a 25 percent reduction from the baseline volume every 2 years as follows: (1) 2.5 years after the publication of the final rule each manufacturer of HFC–134a who processes TCE as an intermediate would not be permitted to process TCE as an intermediate at an annual volume greater than 75 percent of the baseline; (2) 4.5 years after the publication of the final rule each manufacturer of HFC–134a who processes TCE as an intermediate would not be permitted to process TCE as an intermediate at an annual volume greater than 50 percent of the baseline; (3) 6.5 years after the publication of the final rule each manufacturer of HFC–134a who processes TCE as an intermediate would not be permitted to process TCE as an intermediate at an annual volume greater than 25 percent of the baseline; and (4) 8.5 years after the publication of the final rule each manufacturer of HFC–134a would be prohibited from processing TCE as an intermediate.

EPA notes that the prohibition for manufacture (including importing), processing, and distribution in commerce of TCE for this condition of use would occur after 8.5 years to account for availability of TCE through the supply chain during the period of the phaseout of processing of TCE as an intermediate for the manufacture of HFC–134a. This timeframe would be longer than the prohibitions on manufacturing and processing TCE described in Unit V.A.1.a.

EPA is also proposing to require regulated entities to keep records of the annual quantity of TCE purchased and processed from the year 2023 until the termination of all processing of TCE as an intermediate. EPA requests comment on whether additional recordkeeping requirements are warranted or additional time would be needed, for example, to begin the phaseout of processing TCE as an intermediate for the manufacture of HFC–134a.

EPA notes, per TSCA section 6(c)(2)(C), that although the use of TCE to produce HFC–134a would be prohibited eventually due to unreasonable risk, the use of PCE to produce HFC–134a is proposed to continue in perpetuity under a WCPP (88 FR 39652, July 16, 2023). As such, the refrigerant would remain available while protecting workers.

e. Phaseout of TCE in industrial and Commercial Use as a Solvent for Closed-Loop Batch Vapor Degreasing for Rayon Fabric Scouring for Rocket Booster Nozzle Production

EPA is proposing a longer phaseout timeframe for industrial and commercial use as a solvent for closed-loop batch vapor degreasing for rayon fabric scouring for end use in rocket booster nozzle production by Federal agencies and their contractors. This is the industrial and commercial use of TCE in a closed-loop batch vapor degreaser to clean, or 'scour,' rayon fabric to remove sizing (*i.e.,* protective filler or glaze on textiles), oils, and other contaminants from the rayon fabric that is used to line the inside of rocket booster nozzles; the degreasing is essential in preparing the rayon fabric before a carbonization process ahead of being used in the rocket booster nozzles. If contaminants are not removed properly from the rayon, the result could include nozzle failure (Ref. 43). More information on this use and the rationale for the phaseout are in Unit VI.A.1. For this sub-set of the vapor degreasing condition of use, when conducted by Federal agencies and their contractors, EPA is proposing a 10-year phaseout subject to the requirements discussed in this unit. (All other industrial and commercial use of TCE as a solvent for vapor degreasing, including use of TCE in closed-loop batch vapor degreasing of other parts or materials, would be subject to the proposed prohibitions described in Unit V.A.1.b.). For the phaseout, EPA is proposing that within 5 years of the publication date of the final rule the Federal agency that is the end user of the rayon fabric for rocket booster nozzle production (*e.g.,* the U.S. Department of Defense (DOD) or the NASA) would need to conduct a final pre-launch test of rocket boosters without using TCE; this test is further discussed in Unit VI.A.1.a. By 10 years from the publication date of the final rule, the phaseout would be complete and industrial and commercial use of TCE as a solvent for closed-loop batch vapor degreasing, including for rayon fabric scouring for end use in rocket booster nozzle production by Federal agencies and their contractors, would be prohibited. As part of this phaseout, EPA would require a TCE WCPP, described in Unit V.A.2., within 6 months after publication of the final rule, as workplace protections during the period of the phaseout until the full prohibition takes effect. Additionally, this phaseout would include recordkeeping requirements beginning 6 months after publication of the final rule related to the rayon fabric scouring for end use in rocket booster nozzle production. The entity must have records indicating that their closed-loop batch vapor degreasing with TCE is for rayon fabric scouring for end use in rocket booster nozzle production for a Federal agency or a contractor. Beginning 5 years after the publication of the final rule, to continue to use TCE for closed-loop batch vapor degreasing for this specific use, the user must have records from a Federal agency indicating that a final pre-launch test for the rayon fabric scouring has been conducted with an alternative chemical or process.

f. Prohibition of Disposal of TCE to Industrial Pre-Treatment, Industrial Treatment, or Publicly Owned Treatment Works

Due to the unreasonable risk to workers exposed to TCE while performing industrial wastewater pre-treatment and treatment, EPA is proposing to prohibit this mode of disposal of TCE (*i.e.,* generated wastewater that contains TCE that is collected on site or transported to a third party site, and includes the mixing of TCE with wastewater and the discharge of TCE-contaminated wastewater) (description of disposal for the purposes of this rulemaking is in Unit III.B.2.d.). TSCA section 6(a) provides EPA the authority to prohibit or otherwise regulate any manner or method of disposal of a chemical substance by its manufacturer, processor, or any other person who uses or disposes of it for commercial purposes. EPA is proposing to prohibit the disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works. Facilities generating solid waste with TCE concentrations above the RCRA regulatory level of 0.5 mg/L using the Toxicity Characteristic Leaching Procedure (see 40 CFR 261.24) would need to manage TCE separately from wastewater and dispose of TCE through a different disposal mechanism, due to the prohibition in RCRA against using dilution as a substitute for appropriate treatment (see 40 CFR 268.3), while following the appropriate RCRA requirements when handling waste containing TCE. Dilution of hazardous waste (including by mixing it with wastewater) as a substitution for adequate treatment is prohibited under RCRA (see 40 CFR 268.3).

EPA is proposing that the compliance date for the proposed prohibition described in this unit would be 270 days (9 months) after the publication date of the final rule for manufacturers, processors, distributors, and industrial and commercial users disposing of TCE to wastewater. EPA has no information indicating that the proposed compliance dates would not be practicable for purposes of finding an alternative disposal method, or that additional time would be needed, for example, for facilities to transition to an alternative disposal method. EPA's understanding is that only 1 percent of TCE is disposed of as wastewater. However, EPA requests comment on whether the 270-day proposed compliance date is practicable, whether additional time is needed, for example, for a regulated entity to implement a change to their disposal processes or to transition to alternative disposal methods, including what those alternative disposal methods would be, and their cost and feasibility. EPA is also proposing, as described in Unit V.A.3., a time-limited exemption for 50 years under TSCA section 6(g) for disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works for the purpose of cleanup projects of TCE-contaminated groundwater and other wastewater.

2. WCPP for Certain Conditions of Use

a. Overview

As described in Unit III.B.3., EPA is required to issue a regulation applying one or more of the TSCA section 6(a) requirements to the extent necessary so that the unreasonable risk of injury to health or the environment from a chemical substance is no longer presented. The TSCA section 6(a) requirements provide EPA the authority to limit or restrict a number of activities, alone or in combination, including the manufacture, processing, distribution in commerce, commercial use, and disposal of the chemical substance. Given this authority, EPA may find it appropriate in certain circumstances to propose requirements under a WCPP for certain occupational conditions of use (*e.g.,* manufacturing, processing, industrial and commercial use). However, for the reasons described in Unit VI., including the challenges of reliably reducing exposure below the ECEL and being able to monitor at the appropriate action level, EPA's proposed requirement for the TCE WCPP is that owners or operators ensure that no person is exposed to TCE in excess of the ECEL as an 8-hr TWA to the extent possible (supported by documentation further described in Unit V.A.2.d.i.) rather than (as has been proposed in other rules under TSCA section 6) a requirement that exposures do not exceed the ECEL. Due to these

challenges, as well as the severity of the hazard from TCE, EPA notes that long-term implementation of the WCPP would not be a feasible means of addressing TCE unreasonable risk and thus EPA believes that prohibition of the COUs would ultimately be necessary to address the unreasonable risk. Furthermore, when selecting among proposed prohibitions and other restrictions that would apply to those occupational conditions of use, EPA has also factored in considerations relating to health effects on PESS, including on older pregnant workers and ONUs (the group identified as most susceptible to fetal cardiac defects), further discussed in Units V.A.1. and VI.A. For the time period before which a prohibition would become effective, for several conditions of use, EPA is proposing a TCE WCPP to address to the extent possible the unreasonable risk. The WCPP would include a TCE ECEL of 0.0011 ppm, the associated implementation requirements, and may include other components, such as dermal protection, as described in this unit.

EPA uses the term ''potentially exposed person'' in this unit and in the regulatory text to include workers, ONUs, employees, independent contractors, employers, and all other persons in the work area who may be exposed to TCE under the conditions of use for which a WCPP would apply. EPA's intention is to require a comprehensive WCPP that would put additional protections in place to reduce the unreasonable risk from TCE to potentially exposed persons directly handling the chemical or in the area where the chemical is being used, until the prohibition compliance date.

Similarly, the risk evaluation for TCE did not distinguish between employers, contractors, or other legal entities or businesses that manufacture, process, distribute in commerce, use, or dispose of TCE. EPA uses the term ''owner or operator'' to describe the entity responsible for implementing the WCPP for workplaces where an applicable condition of use is occurring and TCE is present. The term includes any person who owns, leases, operates, controls, or supervises such a workplace.

An ECEL is a risk-based inhalation exposure threshold. The ECEL would be accompanied by monitoring, training, recordkeeping, and other requirements so that exposures to TCE are reduced to the extent possible (as supported by documentation further described in Unit V.A.2.d.i.). With an ECEL, the WCPP provides the least uncertainty regarding the protection afforded to workers, requires regulated entities to consider more protective controls in the hierarchy, and lessens the burden on workers. Under this proposal, regulated entities would have some flexibility in the manner in which they implement modifications, within certain parameters outlined in this unit, or otherwise aim to prevent exceedances of the ECEL at their facilities. Therefore, EPA generally refers to the ECEL and ancillary requirements as a non-prescriptive approach. This unit includes a summary of the proposed TCE WCPP, including a description of the proposed ECEL of 0.0011 ppm; proposed implementation requirements and an EPA ECEL action level; proposed monitoring requirements; a description of potential exposure controls, which consider the hierarchy of controls; information that may be used to inform respirator selection; proposed glove requirements; and additional requirements proposed for recordkeeping, and worker training, participation, and notification. This unit also describes proposed compliance timeframes for these proposed requirements.

EPA does not believe that long-term implementation of the WCPP would be a feasible means of addressing unreasonable risk indefinitely; thus prohibition of the use of TCE for affected COUs is ultimately necessary to address the risk so that it is no longer unreasonable, due to the severity of the hazard, the magnitude of the exposures, and the challenges of consistently reducing exposures below the low TCE ECEL in a way that is consistent with the hierarchy of controls, further described in Unit VI.A.1. However, for the conditions of use which would continue for longer than a year, as well as during the proposed TSCA section 6(g) time-limited exemption, EPA is proposing the WCPP to reduce to the extent possible the unreasonable risk from TCE during the time period before compliance dates for the proposed prohibition would come into effect. EPA is not proposing the WCPP for uses that would be prohibited within 1 year from the effective date of the final rule. Based on reasonably available information, EPA expects that the ECEL is likely to be exceeded and that compliance with the WCPP would require large investments into PPE and engineering controls at facilities. For this reason, EPA's proposal aims to encourage facilities engaged in uses that would be prohibited within a year from finalization to focus their resources on the transition to alternatives to TCE. EPA is requesting comment on how entities could demonstrate that they are reducing exposures to the extent possible (including considerations for technological feasibility) and is also requesting comment on whether EPA's requirement should be that entities ensure that exposures are reduced below the ECEL, rather than to the extent possible or lowest achievable level described further in Unit V.A.2.d.i. Should regulated entities be able to consistently demonstrate compliance with an ECEL through effective controls, EPA requests comments regarding replacing the proposed prohibitions with compliance with the WCPP.

b. Existing Chemical Exposure Limit (ECEL)

i. ECEL and ECEL Action Level

To reduce exposures in the workplace and eliminate the unreasonable risk of injury to health resulting from inhalation exposures to TCE identified under the occupational conditions of use in the TSCA 2020 Risk Evaluation for TCE, EPA is proposing an ECEL of 0.0011 parts per million (ppm) (0.0059 $mg/m^3$) for inhalation exposures to TCE as an 8-hour TWA. As described in Unit IV.A., this ECEL is based on developmental toxicity, the most sensitive acute and chronic non-cancer health endpoint, specifically calculated based on the occupational acute, non-cancer human equivalent concentration (HEC) for fetal cardiac defects (Ref. 13). EPA is proposing to establish requirements for an ECEL as part of the WCPP until the prohibition compliance date for certain conditions of use that would be permitted to continue for longer than a year after the effective date of the final rule, including the conditions of use described in Unit V.A.1.a., as well as the conditions of use that would be subject to the phaseout described in Unit V.A.1.d. and the TSCA section 6(g) exemptions described in Unit V.A.3.

Each owner or operator of a workplace where these conditions of use occur would be responsible for compliance with the ECEL and the associated requirements. EPA's description for how the requirements related to an ECEL would reduce the unreasonable risk resulting from inhalation exposures and the rationale for this regulatory approach is outlined in Units III.B.3. and V.A.

In order for this rulemaking to appropriately reduce risk to all potentially exposed persons that may be exposed to TCE through the occupational conditions of use for which EPA is proposing compliance with the WCPP as a protection measure,

EPA has factored in consideration of additional health effects applicable to PESS pursuant to TSCA section 6(c)(2), outlined in Unit VI.A. EPA developed the ECEL for the most sensitive health endpoint (fetal cardiac defects) in support of risk management efforts on TCE under TSCA, to identify at what level ambient exposures would protect against unreasonable risk of injury to health due to fetal cardiac defects. The level identified is an 8-hour ECEL of 0.0011 ppm, which, when possible to achieve, is the concentration at which an adult human would be unlikely to experience the specified adverse effects if exposed during a working lifetime, including susceptible subpopulations. In addition, at the acute non-cancer ECEL of 0.0011 ppm, any potentially exposed person in the workplace would be protected against other non-cancer effects resulting from occupational exposures, as well as excess risk of cancer (Ref. 13). However, as noted in Unit IV., EPA does not believe that long-term implementation of the WCPP with this low ECEL would be a feasible means of addressing unreasonable risk indefinitely, and EPA is uncertain if the ECEL and associated action level can be met reliably as discussed further in Unit VI.A.1.

EPA invites comment on the existing practices (*e.g.,* engineering controls, administrative controls, PPE) involving TCE for the conditions of use listed in Unit V.A.1.a., Unit V.A.1.d., and Unit V.A.3., whether activities may take place in closed systems, and the degree to which users of TCE in these sectors could successfully implement the WCPP, including an ECEL of 0.0011 ppm for TCE, dermal protection, and ancillary requirements described in Unit IV.A. EPA acknowledges that reducing and accurately detecting exposures from the current OSHA PEL of 100 ppm to the proposed TSCA ECEL of 0.0011 ppm would be very difficult. EPA also invites comment on the potential to develop future technologies (*e.g.,* engineering controls, administrative controls, PPE) involving TCE for the conditions of use listed in Unit V.A.1.a., Unit V.A.1.d., and Unit V.A.3., that would facilitate successful implementation of the WCPP, including an ECEL of 0.0011 ppm for TCE, dermal protection, and ancillary requirements described in Unit IV.A. EPA is also requesting comment on the feasibility of controlling worker exposures to TCE at or below the proposed ECEL, and the accuracy of measurements at this level. This is important for determining whether there are realistic and effective exposure controls that can be used by industry for effectively controlling exposures to levels at or below the ECEL. To the extent time is needed to ensure methods are available to accurately measure TCE at or below the ECEL, EPA is requesting comment on whether a phased approach to an ECEL is desirable; that is, an approach that would establish a timeframe for meeting the ECEL as well as a shorter timeframe for meeting a concentration level higher than the ECEL (but lower than the PEL) that is currently considered achievable. EPA welcomes data or information to demonstrate that meeting the proposed ECEL over a sustained period of time would be feasible and measurable.

EPA is also proposing to establish an ECEL action level of 0.00055 ppm as an 8-hour TWA for TCE. Air concentrations at or above the action level would trigger more frequent periodic monitoring of exposures to TCE, as described in this unit. EPA is proposing to adopt the action level approach in implementing the TSCA ECEL, similar to the action level approach used by OSHA in the implementation of OSHA standards, although the values differ due to differing statutory authorities. As explained by OSHA, due to the variable nature of employee exposures, compliance with an action level provides employers with greater assurance that their employees will not be exposed to concentrations above the PELs (Ref. 44). EPA agrees with this reasoning and, like OSHA, expects the inclusion of an ECEL action level will stimulate innovation within industry to reduce exposures to levels below the action level. Therefore, EPA has identified a need for an action level for TCE and is proposing a level that would be half the 8-hour ECEL, *which* is in alignment with the precedented approach established under most OSHA standards. EPA is soliciting comment regarding an ECEL action level that is half the ECEL and any associated provisions related to the ECEL action level when the ECEL is significantly lower than the OSHA PEL. EPA is also soliciting comment on whether the ECEL action level should be aligned with OSHA PEL action levels (typically set at half the limit) due to the fact that PEL accounts for technological feasibility and the action level is not necessarily designed to be health protective. Since exposure below the ECEL would be health protective, EPA seeks comment on whether the action level should be set at a different value closer to the ECEL that would trigger increased monitoring to ensure that the ECEL is not exceeded, and whether technological feasibility should be considered in setting the action level.

In summary, EPA is proposing that each owner or operator of a workplace subject to compliance with the TCE WCPP must ensure that no person is exposed to an airborne concentration of TCE in excess of 0.0011 ppm (0.0059 mg/m3) as an 8-hour TWA (ECEL), with an action level identified as 0.00055 ppm (0.0029 mg/m3) (ECEL action level) to the extent possible, as supported by documentation further described in Unit V.A.2.d.i.). For conditions of use for which the requirements to comply with the WCPP are being proposed, EPA expects that measurement of extremely low-ppm levels of TCE may present challenges to the regulated community. During the development of the TCE ECEL, EPA conducted a search to identify relevant NIOSH, OSHA, and EPA analytical methods that may be used to monitor for the presence of TCE in indoor air. While EPA identified analytical methods that may be used, based on information from stakeholders, EPA also recognizes that it may be difficult to operationalize routine use of these methods for detection at the low levels needed for the TCE ECEL and ECEL action level. Specifically, these methods may be challenging to use for personal breathing zone monitoring to detect lower air concentration levels at the ECEL and ECEL action level based on the developmental toxicity endpoint for fetal cardiac defects (Ref. 13). However, EPA acknowledges that in recent years commercial passive air sampling devices have improved and may be available for use for personal air sampling at extremely low-ppm levels of TCE (Ref. 45). EPA is requesting comment on personal air sampling devices that are capable of detecting indoor air TCE concentrations at or below the ECEL action level of 0.00055 ppm (0.0029 mg/m3) with the requisite precision and accuracy.

EPA acknowledges that the challenge of suitable personal breathing zone monitoring methods to detect TCE air concentration levels at the ECEL of 0.0011 ppm and ECEL action level of 0.00055 ppm could cause difficulty in determining whether a workplace is in compliance with the ECEL. EPA is therefore requesting comment on whether to require compliance with an interim exposure level based on the limit of detection of established analytical methods. This interim level, unlike the ECEL, would not necessarily eliminate unreasonable risk, but rather reduce risk to an extent that corresponds to the air concentration that current analytical methods can reliably measure to and would be the exposure

limit during the period in which TCE is still in use until its eventual prohibition. EPA requests comment on setting such an interim level for TCE based on a limit of detection that is the lowest limit of detection using analytical methods developed by OSHA/NIOSH for personal breathing zone monitoring. More specifically, EPA requests comment on using OSHA Method 1001, which has a personal breathing zone limit of detection for TCE of 18 ppb, or 0.018 ppm, to set an interim exposure limit of 0.036 ppm, with an action level of 0.018 ppm (Ref. 46).

Under this approach, EPA would initially establish an exposure value that would be technically feasible to detect in the near-term, with a step down to the ECEL at a later date, until the applicable prohibition would take effect. This approach would significantly reduce exposures to TCE from the current OSHA PEL of 100 ppm by establishing an interim exposure value of 0.036 ppm and action level of 0.018 ppm, until advancements in technologies reliably support measurement at the ECEL or below. EPA requests comments that provide supported recommendations for one or more incremental exposure values and associated timelines for achieving the incremental exposure levels and the currently proposed ECEL of 0.0011 ppm, and comments that consider and provide information on the needed advancements in exposure monitoring methods, analytical methods, and exposure controls, including expected timelines for developing these capabilities.

The proposed requirements would be applicable to owners and operators of workplaces where manufacturing (including import), processing, and industrial and commercial use of TCE would be permitted to continue more than 1 year after the publication of the final rule. The proposed requirements would be applicable from the date of publication of the final rule until the prohibition compliance date for those conditions of use. However, the proposed requirements of the WCPP would not be applicable to owners and operators of workplaces where EPA is proposing to prohibit manufacturing and processing for certain industrial and commercial use and consumer uses within 1 year of the effective date of the final rule. The WCPP would also not be applicable to owners and operators of workplaces where EPA is proposing to prohibit distribution in commerce or disposal to industrial pre-treatment, industrial treatment, or publicly owned treatment works.

As described further in Unit VI.A.1., EPA believes that long-term implementation of the WCPP for continued use of TCE is not a feasible means of addressing unreasonable risk such that prohibition ultimately would be necessary to address the unreasonable risk.

ii. Monitoring Requirements

*Overview.* Monitoring requirements are a key component of implementing EPA's proposed WCPP. Initial monitoring for TCE would be critical for establishing a baseline of exposure for potentially exposed persons and for identifying the lowest achievable exposure level in a facility; similarly, periodic exposure monitoring would assure that exposures continue to be reduced to the lowest level achievable so that unreasonable risk of injury is reduced for potentially exposed persons in the workplace. Periodic exposure monitoring frequency could change if certain conditions are met, which are described in this unit. Additionally, in some cases, a change in workplace conditions with the potential to impact exposure levels would warrant additional monitoring, which is also described. To ensure compliance with monitoring activities, EPA proposes exposure monitoring recordkeeping requirements outlined in this unit.

*Initial exposure monitoring.* Under the proposed regulation, each owner or operator of a workplace where any condition of use subject to a WCPP is occurring would be required to perform initial exposure monitoring to determine the extent of exposure of potentially exposed persons to TCE. Initial monitoring would notify owner or operators of the magnitude of possible exposures, to their potentially exposed persons with respect to their unique work conditions and environments. The results of the initial exposure monitoring would be used to help determine the lowest achievable level in a facility, the frequency of future periodic monitoring, whether additional exposure controls are necessary (such as engineering controls, administrative controls, and/or respiratory protection), and whether the owner or operator would need to demarcate a regulated area as described in this unit.

EPA is proposing to require each owner or operator to establish an initial baseline monitoring sample to determine the magnitude of exposure for all persons who may be exposed to TCE within 180 days (6 months) after the date of publication of the final rule in the **Federal Register**. Where TCE is present in the workplace, each owner or operator would be required to determine each potentially exposed person's exposure by either taking a personal breathing zone air sample of each potentially exposed person or taking personal breathing zone air samples that are representative of each potentially exposed person's exposure performing the same or substantially similar operations in each work shift, in each job classification, and in each work area (hereinafter identified as an ''exposure group''). Representative 8-hour TWA exposures must be determined based on one or more samples representing full-shift exposures for each shift for each person in each job classification in each work area. Monitoring samples must be taken when and where the operating conditions are best representative of each potentially exposed person's full-shift exposures, and also must represent the highest TCE exposures likely to occur under reasonably foreseeable conditions of use. EPA expects that owners and operators would attempt to monitor a baseline for all of the tasks during the same timeframe; however, EPA understands that certain tasks occur less frequently, and EPA is soliciting comments regarding the timing of the initial exposure monitoring so that it would be representative of all tasks involving TCE where exposures may approach the ECEL. If the owner or operator chooses a representative sample, such sampling must include persons that are the closest to the source of TCE, so that the monitoring results are representative of the most highly exposed persons in the workplace. EPA is also soliciting comments regarding use of area source monitoring instead of personal breathing zone as a representative sample of exposures.

EPA also recognizes that some entities may already have exposure monitoring data. If the owner or operator has monitoring data conducted within five years prior to the effective date of the final rule and the monitoring would satisfy the monitoring requirements described in this unit, including the requirement that the data represent the highest TCE exposures likely to occur under reasonably foreseeable conditions of use, the owner or operator may rely on such earlier monitoring results for the initial baseline monitoring sample.

EPA proposes to require each owner or operator to perform exposure monitoring to identify the lowest achievable exposure level in relation to the ECEL value, and ensure to the extent possible (supported by documentation further described in Unit V.A.2.d.i) that no person is exposed to an airborne concentration of TCE in exceedance of

the ECEL. EPA requests comment on how owners and operators should identify the lowest achievable exposure level, what documentation would be needed to support that further reductions are not possible, and whether EPA should provide a definition of meeting the ECEL to the extent possible. Additionally, EPA requests comment on whether current monitoring methods (Ref. 13) are able to detect airborne concentrations at the ECEL and action level values. EPA expects that detection and adherence to extremely low-ppm levels of TCE may present challenges to some in the regulated community; therefore, EPA is also requesting comment on whether EPA should propose specific requirements following results indicating non-detectable concentrations of TCE (non-detects), or a requirement that a specific monitoring method be used.

*Periodic exposure monitoring.* EPA is proposing to require each owner or operator to conduct, for those exposure groups that exceed the following airborne concentration levels, the following periodic monitoring:

- If all samples taken during the initial exposure monitoring reveal a concentration below the ECEL action level (0.00055 ppm 8-hour TWA), the owner or operator must repeat the periodic exposure monitoring at least once every five years.
- If the initial or most recent exposure monitoring indicates that airborne exposure is above the ECEL (0.0011 ppm 8-hour TWA), the owner or operator must repeat the periodic exposure monitoring within 3 months of the most recent exposure monitoring.
- If the most recent exposure monitoring indicates that airborne exposure is at or above the ECEL action level (0.00055 ppm 8-hour TWA) but at or below the ECEL (0.0011 ppm 8-hour TWA), the owner or operator must repeat the periodic exposure monitoring within 6 months of the most recent exposure monitoring.
- If the most recent (non-initial) exposure monitoring indicates that airborne exposure is below the ECEL action level, the owners or operators must repeat such monitoring within 6 months of the most recent monitoring until two consecutive monitoring measurements taken at least seven days apart, are below the ECEL action level (0.00055 ppm 8-hour TWA), at which time the owner or operator must repeat the periodic exposure monitoring at least once every 5 years.

Additionally, in instances where an owner or operator does not manufacture, process, distribute, or use TCE for a condition of use for which the WCPP is proposed over the entirety of time since the last required periodic monitoring event, EPA is proposing that the owner or operator would be permitted to forgo the next periodic monitoring event. However, documentation of cessation of use of TCE would be required and periodic monitoring would be required to resume should the owner or operator restart any of the conditions of use listed in Unit V.A.2. for which the WCPP is proposed as a workplace protection measure.

The proposed periodic monitoring requirements are also outlined in Table 1. EPA requests comment on the timeframes for periodic monitoring outlined in this unit. EPA may finalize significantly shorter or longer compliance timeframes based on consideration of public comments. EPA requests comment on the ability for a facility to perform the proposed periodic monitoring requirements, specifically whether monitoring methods can detect the ECEL action level and ECEL value.

TABLE 1—PERIODIC MONITORING REQUIREMENTS

| Air concentration condition | Periodic monitoring requirement |
|---|---|
| If all initial exposure monitoring is below the ECEL action level (<0.00055 ppm 8-hour TWA). | Periodic exposure monitoring is required at least once every 5 years. |
| If the initial or most recent exposure monitoring indicates that airborne exposure is above the ECEL (>0.0011 ppm 8-hour TWA). | Periodic exposure monitoring is required within 3 months of the most recent exposure monitoring. |
| If the initial or most recent exposure monitoring indicates that airborne exposure is at or above the ECEL action level but at or below the ECEL (≥0.55 ppb 8-hour TWA, ≤0.0011 ppm 8-hour TWA). | Periodic exposure monitoring is required within 6 months of the most recent exposure monitoring. |
| If the two most recent (non-initial) exposure monitoring measurements, taken at least seven days apart within a 6-month period, indicate that airborne exposure is below the ECEL action level (<0.00055 ppm 8-hour TWA). | Periodic exposure monitoring is required within 5 years of the most recent exposure monitoring. |
| If the owner or operator engages in a condition of use for which compliance with the WCPP would be required but does not manufacture, process, use, or dispose of TCE in that condition of use over the entirety of time since the last required monitoring event. | The owner or operator may forgo its current periodic monitoring event. However, documentation of cessation of use of TCE as well as periodic monitoring would be required when the owner or operator resumes or starts any of the conditions of use for which compliance with the WCPP is proposed. |

*Additional exposure monitoring.* In addition to the initial and periodic exposure monitoring, EPA is proposing that each owner or operator conduct additional exposure monitoring whenever a change in the production, process, control equipment, personnel, or work practices that may reasonably be expected to result in new or additional exposures at or above the ECEL action level, or when the owner or operator has any reason to believe that new or additional exposures at or above the ECEL action level have occurred. In the event of start-up, shutdown, spills, leaks, ruptures or other breakdowns that may lead to employee exposure, EPA is proposing that each owner or operator must conduct additional initial exposure monitoring to potentially exposed persons (using personal breathing zone sampling) after the cleanup of the spill or repair of the leak, rupture or other breakdown. An additional exposure monitoring event may result in an increased frequency of periodic monitoring. For example, if the initial monitoring results from a workplace are above the ECEL action level, but below the ECEL, periodic monitoring is required every 6 months. If additional monitoring is performed because increased exposures are suspected, and the results are above the ECEL, subsequent periodic monitoring would have to be performed every 3 months. The required additional exposure monitoring should not delay implementation of any necessary cleanup or other remedial action to reduce the exposures to persons in the workplace.

*Other monitoring requirements.* For each monitoring event, EPA is proposing to require owners or operators ensure that their methods be accurate, to a confidence level of 95 percent, to within plus or minus 25 percent for airborne concentrations of TCE. Also, EPA is proposing to require use of appropriate sampling and analytical methods used to determine TCE exposure, including as relevant: (A) Use of an analytical method already approved by EPA, OSHA or NIOSH, or another analytical method that has been demonstrated to meet the proposed accuracy requirement at an appropriate limit of detection for the ECEL and ECEL action level; (B) Compliance with the Good Laboratory Practice Standards at 40 CFR part 792. Additionally, EPA is proposing to require owners and operators to re-monitor within 15 working days after receipt of the results of any exposure monitoring when results indicate non-detect or air monitoring equipment malfunction, unless an Environmental Professional as defined at 40 CFR 312.10 or a Certified Industrial Hygienist reviews the monitoring results and determines re-monitoring is not necessary.

EPA is also proposing to require that each owner or operator maintain exposure monitoring records that include the following information for each monitoring event:

(A) Dates, duration, and results of each sample taken;

(B) All measurements that may be necessary to determine the conditions (*e.g.,* work site temperatures, humidity, ventilation rates, monitoring equipment type and calibration dates) that may affect the monitoring results;

(C) Name, workplace address, work shift, job classification, and work area of the person monitored; documentation of all potentially exposed persons whose exposures the monitoring is intended to represent if using a representative sample; and type of respiratory protective device worn by the monitored person, if any;

(D) Use of appropriate sampling and analytical methods, such as analytical methods already approved by EPA, OSHA or NIOSH, or compliance with an analytical method verification procedure;

(E) Compliance with the Good Laboratory Practice Standards at 40 CFR part 792; and

(F) Information regarding air monitoring equipment, including: type, maintenance, calibrations, performance tests, limits of detection, and any malfunctions.

iii. Incorporation of the Hierarchy of Controls

EPA is proposing to require owners or operators to implement the WCPP in accordance with the hierarchy of controls and encourages the use of pollution prevention to control exposures whenever practicable. Pollution prevention, also known as source reduction, is any practice that reduces, eliminates, or prevents pollution at its source (*e.g.,* elimination and substitution). Similarly, the hierarchy of controls includes, in order of preference, elimination, substitution, engineering controls, and administrative controls, prior to relying on PPE as a means of controlling exposures (Ref. 12). EPA is proposing to require owners or operators to reduce inhalation exposures below the ECEL in accordance with the hierarchy of controls to the extent possible as supported by documentation further described in Unit V.A.2.d.i.). EPA expects that, for conditions of use for which EPA is proposing a WCPP as a protection measure, compliance at most workplaces would be part of an existing industrial hygiene program. Workplaces would have to institute one or a combination of elimination, substitution, engineering controls, or administrative controls to reduce exposures to the extent feasible (Ref. 12). If an owner or operator chooses to replace TCE with a substitute, EPA recommends that they carefully review the available hazard and exposure information on the potential substitutes to avoid a regrettable substitution.

If an effort to identify and implement feasible exposure controls, in accordance with the hierarchy of controls, such as elimination, substitution, engineering controls, and administrative controls is found not to be sufficient to reduce exposures to or below the ECEL for all persons in the workplace, EPA proposes to require each owner or operator to use such controls to reduce TCE concentrations in the workplace to the lowest levels achievable and, only after levels cannot be further reduced, supplement these controls using respiratory protection before persons are permitted to enter a regulated area, as described in this unit. In such cases, EPA would require that the owner or operator provide those persons exposed or who may be exposed to TCE by inhalation above the ECEL with respirators so that exposures can be reduced to the extent possible (supported by documentation further described in Unit V.A.2.d.i.). EPA also proposes to require that each owner or operator document their evaluation of elimination, substitution, engineering and administrative exposure control strategies and, if applicable, the reasons why they found these strategies infeasible to control exposures below the ECEL, in an exposure control plan as described in this unit. In addition, a regulated entity would be prohibited from rotating work schedules of potentially exposed persons to comply with the ECEL 8-hour TWA. EPA may require more, less, or different documentation regarding exposure control strategies in the final rule based on consideration of public comments. The Agency understands that certain engineering controls can reduce exposures to people inside the workplace but may lead to increased ventilation of TCE outside of the workplace, thereby potentially increasing risks of adverse health effects from exposures to TCE in ambient air to people in fenceline communities. EPA expects that processing and commercial use of TCE for the conditions of use for which the WCPP would apply will decrease ahead of the prohibition compliance dates (Ref. 3) and therefore expects that any risks to fenceline communities would also decrease. More information on EPA's analysis of ambient air and water pathways is in Unit VII.A. To understand more fully the potential impacts to fenceline communities of requirements to reduce workplace exposure to TCE, EPA is requesting comment on whether industry anticipates increased releases of TCE to outdoor air associated with the implementation of the WCPP. In order to avoid unintended increases in exposures to people from TCE emissions to ambient air, EPA requests comment on whether owners and operators should be required to attest in their exposure control plan that engineering controls selected do not increase emissions of TCE to ambient air outside of the workplace and document in their exposure control plan whether additional equipment was installed to capture emissions of TCE to ambient air. EPA requests comment on how such a requirement could impact the availability, feasibility, or cost of engineering controls as a means to reduce workplace exposures to or below the proposed ECEL.

iv. Regulated Area

Based on the exposure monitoring, EPA is proposing to require that owners or operators of workplaces subject to a WCPP as a protection measure demarcate any area where airborne concentrations of TCE exceed or are reasonably expected to exceed the ECEL. Regulated areas would be

demarcated using administrative controls, such as warning signs or highly visible signifiers, in multiple languages as appropriate (*e.g.,* based on languages spoken by potentially exposed persons), placed in conspicuous areas, and documented through training and recordkeeping. The owner or operator would be required to restrict access to the regulated area from anyone who is not an authorized user, which includes any potentially exposed person that lacks proper training, is not wearing required PPE as described in this unit or is otherwise unauthorized to enter. EPA is proposing to require owners and operators demarcate a regulated area, beginning 9 months after the date of publication of the final rule, or within 3 months after receipt of any exposure monitoring that indicates exposures exceeding the ECEL. EPA is soliciting comment on requiring warning signs to demarcate regulated areas, such as the requirements found in OSHA's General Industry Standard for Beryllium (29 CFR 1910.1024(m)(2)). EPA is also requesting comment on whether the owner or operator should be required to permit designated representatives of employees and other workers to enter regulated areas to observe exposure monitoring similar to typical OSHA Standard requirements, *e.g.,* 29 CFR 1910.1024(d)(7).

v. Notification of Monitoring Results

EPA proposes that the owner or operator must, within 15 working days after receipt of the results of any exposure monitoring, notify each person whose exposure is represented by that monitoring in writing, either individually to each potentially exposed person or by posting the information in an appropriate and accessible location, such as public spaces or common areas, outside the regulated area. This notice must include the exposure monitoring results, identification and explanation of the ECEL and ECEL action level in plain language, identification of the lowest achievable exposure level, if applicable, any corresponding required respiratory protection, if applicable, the quantity, location, manner of TCE use and identified releases of TCE that could result in exposure to TCE, and whether the airborne concentration of TCE exceeds the ECEL. The notice must also include a description of actions taken by the owner or operator to reduce inhalation exposures to or below the ECEL, if applicable, or refer to a document available to the potentially exposed persons which states the actions to be taken to reduce exposures. The notice would be required to be posted in multiple languages if necessary (*e.g.,* notice must be in a language that the potentially exposed person understands, including a non-English language version representing the language of the largest group of workers who cannot readily comprehend or read English).

c. Personal Protective Equipment (PPE) Program

Where elimination, substitution, engineering controls, and administrative controls are not feasible to reduce the air concentration to or below the ECEL for all potentially exposed persons, EPA is proposing to require implementation of a PPE program in alignment with OSHA's General Requirements for Personal Protective Equipment at 29 CFR 1910.132. Consistent with 29 CFR 1910.132, owners and operators would be required to provide PPE, including respiratory protection and dermal protection selected in accordance with the guidelines described in this unit, that is of safe design and construction for the work to be performed. EPA is proposing to require owners and operators ensure each potentially exposed person who is required by this unit to wear PPE to use and maintain PPE in a sanitary, reliable, and undamaged condition. Owners and operators would be required to select and provide PPE that properly fits each potentially exposed person who is required by this unit to use PPE and communicate PPE selections to each affected person.

As part of the PPE program, EPA is also proposing that owners and operators must comply with OSHA's general PPE training requirements at 29 CFR 1910.132(f) for application of a PPE training program, including providing training on proper use of PPE (*e.g.,* when and where PPE is necessary, proper application, wear, and removal of PPE, maintenance, useful life, and disposal of PPE). EPA is proposing that owners and operators would provide PPE training to each potentially exposed person who is required by this unit to wear PPE prior to or at the time of initial assignment to a job involving potential exposure to TCE. Owners and operators would also have to re-train each affected person at least once annually or whenever the owner or operator has reason to believe that a previously trained person does not have the required understanding and skill to properly use PPE, or when changes in the workplace or in the PPE to be used render the previous training obsolete.

This unit includes a description of the PPE Program, including proposed PPE as it relates to respiratory protection, proposed PPE as it relates to dermal protection, and other proposed requirements such as additional training for respirators and recordkeeping to support implementation of a PPE program.

i. Respiratory Protection

Where elimination, substitution, engineering and administrative controls are not feasible to reduce the air concentration to or below the ECEL, EPA proposes to set minimum respiratory PPE requirements based on an entity's most recent measured air concentration and the level of PPE that EPA determined would be needed to reduce exposure to the ECEL. In those circumstances, EPA is proposing to require a respiratory protection PPE program with worksite-specific procedures and elements for required respirator use. The respiratory protection PPE program proposed by EPA would be based on the most recent exposure monitoring concentration measured as an 8-hour TWA and would be administered by a suitably trained program administrator. EPA is also proposing to require each owner or operator select respiratory protection in accordance with the guidelines described in this unit and 29 CFR 1910.134(a) through (l), except (d)(1)(iii), for proper respirator use, maintenance, fit-testing, medical evaluation, and training. EPA is not proposing to cross reference 29 CFR 1910.134(d)(1)(iii) because the WCPP contains requirements for identifying TCE respiratory hazards in the workplace.

*Required Respiratory Protection.* EPA is proposing to require each owner or operator supply a respirator, selected in accordance with this unit, to each person who enters a regulated area within 3 months after the receipt of any exposure monitoring that indicates exposures exceeding the ECEL and thereafter must ensure that all persons within the regulated area are using the provided respirators whenever TCE exposures exceed or can reasonably be expected to exceed the ECEL. Given the risks associated with TCE exposure above the ECEL, prompt compliance with the respiratory protection requirements is important, but EPA expects that most owners or operators will need some time after the exposure monitoring results are received to acquire the correct respirators and establish a respiratory protection program, including training, fit-testing, and medical evaluations. While EPA believes that 3 months should be sufficient for this purpose, EPA is seeking comment on whether this timeframe should be shorter (*e.g.,*

within two weeks after the receipt of any exposure monitoring that indicates exposure exceeding the ECEL), given the severity of the effect. EPA is also proposing that owners or operators who would be required to administer a respiratory protection program must supply a respirator selected in accordance with 29 CFR 1910.134(d)(1) (except (d)(1)(iii)). Additionally, EPA is proposing that the owner or operator must ensure that all filters, cartridges, and canisters used in the workplace are labeled and color coded with the NIOSH approval label and that the label is not removed and remains legible. 29 CFR 1910.134(d)(3)(iii), which EPA is proposing to cross-reference, requires either the use of respirators with an end-of-life service indicator certified by NIOSH for the contaminant, in this case TCE, or implementation of a change schedule for canisters and cartridges that ensures that they are changed before the end of their service life. EPA is requesting comment on whether there should be a requirement to replace cartridges or canisters after a certain number of hours, such as the requirements found in OSHA's General Industry Standard for 1,3-Butadiene (29 CFR 1910.1051(h)), or a requirement for a minimum service life of non-powered air-purifying respirators such as the requirements found in OSHA's General Industry Standard for Benzene (29 CFR 1910.1028(g)(3)(D)).

EPA is proposing the following requirements for respiratory protection, based on the exposure monitoring concentrations measured as an 8-hour TWA that exceed the ECEL (0.0011 ppm). EPA is proposing to establish minimum respiratory protection requirements, such that any respirator affording a higher degree of protection than the following proposed requirements may be used. This unit includes respirator selection requirements for respirators of assigned protection factors (APFs) of 1,000 or greater.

- If the measured exposure concentration is at or below 0.0011 ppm (1.1 ppb): no respiratory protection is required.
- If the measured exposure concentration is above 0.0011 ppm (1.1 ppb) and less than or equal to 0.0055 ppm (5.5 ppb) (5 times ECEL): Any NIOSH-certified air-purifying quarter mask respirator (APF 5).
- If the measured exposure concentration is above 0. 0055 ppm (5.5 ppb) and less than or equal to 0.011 ppm (11.0 ppb) (10 times ECEL): Any NIOSH-certified air-purifying half mask or full facepiece respirator equipped with NIOSH-approved organic vapor cartridges or canisters; or any negative pressure (demand mode) supplied air respirator equipped with a half mask (APF 10).
- If the measured exposure concentration is above 0.0011 ppm (1.1 ppb) and less than or equal to 0.0275 ppm (27.5 ppb) (25 times ECEL): Any NIOSH-certified air-purifying full facepiece respirator equipped with NIOSH-approved organic vapor cartridges or canisters; any NIOSH-certified powered air-purifying respirator equipped with NIOSH-approved organic vapor cartridges; or any NIOSH-certified continuous flow supplied air respirator equipped with a hood or helmet (APF 25).
- If the measured exposure concentration is above 0.0275 ppm (27.5 ppb and less than or equal to 0.055 ppm (55.0 ppb) (50 times ECEL): Any NIOSH-certified air-purifying full facepiece respirator equipped with NIOSH-approved organic vapor cartridges or canisters; any NIOSH-certified powered air-purifying respirator equipped with a tight-fitting half facepiece and NIOSH-approved organic vapor cartridges or canisters; any NIOSH-certified negative pressure (demand mode) supplied-air respirator equipped with a full facepiece; any NIOSH-certified continuous flow supplied-air respirator equipped with a tight-fitting half facepiece; any NIOSH-certified pressure-demand or other positive pressure mode supplied-air respirator equipped with a tight-fitting half facepiece; or any NIOSH-certified negative pressure (demand mode) self-contained breathing apparatus respirator equipped with a full facepiece (APF 50).
- If the measured exposure concentration is above 0.055 ppm (55.0 ppb) and less than or equal to 1.1 ppm (1,100 ppb) (1,000 times ECEL): Any NIOSH-certified powered air-purifying respirator equipped with a full facepiece and NIOSH-approved organic vapor cartridges or canisters; or any NIOSH-certified supplied air respirator equipped with a full facepiece and operated in a continuous flow mode or pressure demand or other positive pressure mode (APF 1,000).
- If the measured exposure concentration is greater than 1.1 ppm (1,100 ppb) (1,000 times ECEL) or the concentration is unknown: Any NIOSH-certified self-contained breathing apparatus (SCBA) equipped with a full facepiece and operated in a pressure demand or other positive pressure mode; or any NIOSH-certified supplied air respirator equipped with a full facepiece and operated in a pressure demand or other positive pressure mode in combination with an auxiliary SCBA operated in a pressure demand or other positive pressure mode (APF 10,000).

EPA proposes to require that owners and operators document respiratory protection used and PPE program implementation. EPA proposes to require that owners and operators document in the exposure control plan or other documentation of the facility's safety and health program information relevant to respiratory program, including records on the name, workplace address, work shift, job classification, work area, and type of respirator worn (if any) by each potentially exposed person, maintenance, and fit-testing, as described in 29 CFR 1910.134(f), and training in accordance with 29 CFR 1910.132(f) and 29 CFR 1910.134(k).

ii. Dermal Protection

EPA is proposing to require use and provision of chemically resistant gloves by potentially exposed persons in combination with specific activity training (*e.g.,* glove selection (type, material), expected duration of glove effectiveness, actions to take when glove integrity is compromised, storage requirements, procedure for glove removal and disposal, chemical hazards) for tasks where dermal exposure can be expected to occur. EPA is proposing that owners and operators must also consider other glove factors, such as compatibility of multiple chemicals used simultaneously while wearing TCE-resistant gloves or with glove liners, permeation, degree of dexterity required to perform a task, and temperature, as identified in the Hand Protection section of OSHA's Personal Protection Equipment Guidance (Ref. 47), when selecting appropriate PPE. Furthermore, owners and operators can select gloves that have been tested in accordance with the American Society for Testing Material (ASTM) F739 ''Standard Test Method for Permeation of Liquids and Gases through Protective Clothing Materials under Conditions of Continuous Contact.'' EPA requests comment on the degree to which additional guidance related to use of gloves might be necessary. Additionally, EPA requests comment on whether EPA should incorporate additional dermal protection requirements into the exposure control plan or require consideration of the hierarchy of controls for dermal exposures.

d. General WCPP Requirements

i. Exposure Control Plan

EPA proposes to require that owners and operators document their exposure control strategy and implementation in

an exposure control plan or through adding EPA-required information to any existing documentation of the facility's safety and health program developed as part of meeting OSHA requirements or other safety and health standards. EPA proposes to require that each owner or operator document in the exposure control plan the following:

(A) Identification and rationale of exposure controls used or not used in the following sequence: elimination of TCE, substitution of TCE, engineering controls, and administrative controls to reduce exposures in the workplace to either at or below the ECEL or to the lowest level achievable for TCE in the workplace;

(B) The exposure controls selected based on feasibility, effectiveness, and other relevant considerations;

(C) If exposure controls were not selected, document the efforts identifying why these are not feasible, not effective, or otherwise not implemented;

(D) Actions taken to implement exposure controls selected, including proper installation, maintenance, training or other steps taken;

(E) Description of any regulated area and how it is demarcated, and identification of authorized persons; and description of when the owner or operator expects exposures may be likely to exceed the ECEL or lowest achievable exposure level;

(F) Identification of the lowest achievable exposure level and why further reductions are not possible;

(G) Regular inspections, evaluations, and updating of the exposure controls to ensure effectiveness and confirmation that all persons are implementing them as required;

(H) Occurrence and duration of any start-up, shutdown, or malfunction of the facility that causes air concentrations to be above the ECEL or lowest achievable exposure level and subsequent corrective actions taken during start-up, shutdown, or malfunctions to mitigate exposures to TCE; and

(I) Availability of the exposure control plan and associated records for potentially exposed persons.

ii. Workplace Information and Training

EPA is also proposing to require implementation of a training program in alignment with the OSHA Hazard Communication Standard (29 CFR 1910.1200) and the OSHA General Industry Standard for Methylene Chloride (29 CFR 1910.1052). To ensure that potentially exposed persons in the workplace are informed of the hazards associated with TCE exposure, EPA is proposing to require that owners or operators of workplaces subject to the WCPP institute a training and information program for potentially exposed persons and assure their participation in the training and information program.

As part of the training and information program, the owner or operator would be required to provide information and comprehensive training in an understandable manner (*i.e.,* plain language) and in multiple language as appropriate (*e.g.,* based on languages spoken by potentially exposed persons) to potentially exposed persons prior to or at the time of initial assignment to a job involving potential exposure to TCE. In alignment with the OSHA Hazard Communication Standard, owners and operators would be required to provide information and training to all potentially exposed persons that includes (A) the requirements of the TCE WCPP and how to access or obtain a copy of the requirements of the WCPP; (B) the quantity, location, manner of use, release, and storage of TCE and the specific operations in the workplace that could result in TCE exposure; (C) principles of safe use and handling of TCE in the workplace, including specific measures the owner or operator has implemented to reduce inhalation exposures or prevent dermal contact with TCE, such as work practices and PPE used; (D) the methods and observations that may be used to detect the presence or release of TCE in the workplace (such as monitoring conducted by the owner or operator, continuous monitoring devices, visual appearance or odor of TCE when being released, etc.); and (E) the health hazards associated with exposure to TCE.

In addition to providing training at the time of initial assignment to a job involving potential exposure to TCE, and in alignment with the OSHA General Industry Standard for Beryllium (20 CFR 1910.1024), owners and operators subject to the TCE WCPP would be required to re-train each potentially exposed person annually to ensure they understand the principles of safe use and handling of TCE in the workplace. Owners and operators would also need to update the training as necessary whenever there are changes in the workplace, such as new tasks or modifications of tasks, in particular, whenever there are changes in the workplace that increase exposure to TCE or where potentially exposed persons' exposure to TCE can reasonably be expected to exceed the action level. To support compliance, EPA is proposing that each owner or operator of a workplace subject to the WCPP would be required to provide to the EPA, upon request, all available materials related to workplace information and training.

iii. Workplace Participation

EPA encourages owners or operators to consult with persons that have potential for exposure on the development and implementation of exposure control plans and PPE/respirator programs. EPA is proposing to require owners or operators to provide potentially exposed persons or their designated representatives regular access to the exposure control plans, exposure monitoring records, and PPE program implementation and documentation. To ensure compliance in workplace participation, EPA is proposing that the owner or operator document the notice to and ability of any potentially exposed person that may reasonably be affected by TCE inhalation exposure or dermal contact with TCE to readily access the exposure control plans, facility exposure monitoring records, PPE program implementation, or any other information relevant to TCE inhalation or dermal exposure in the workplace. EPA is requesting comment on how owners and operators can engage with potentially exposed persons on the development and implementation of an exposure control plan and PPE program.

iv. Recordkeeping

To support and demonstrate compliance, EPA is proposing that each owner or operator of a workplace subject to WCPP retain compliance records for five years. EPA is proposing to require records to include:

(A) the exposure control plan;

(B) PPE program implementation and documentation, including as necessary, respiratory protection and dermal protection used and related PPE training; and

(C) information and training provided to each person prior to or at the time of initial assignment and any re-training.

In addition, EPA is proposing that owners and operators subject to the WCPP requirements maintain records to include:

(D) The exposure monitoring records;

(E) Notification of exposure monitoring results; and

(F) To the extent that the owner or operator relies on prior exposure monitoring data, records that demonstrates that it meets all of the proposed WCPP requirements.

The owners and operators, upon request by EPA, would be required to make all records that are maintained as

described in this unit available to EPA for examination and copying in accordance with EPA requirements. All records required to be maintained by this unit could be kept in the most administratively convenient form (electronic or paper).

v. Compliance Timeframes

EPA is proposing to require each owner or operator of a workplace subject to an ECEL conduct initial baseline monitoring according to the process outlined in this unit by 6 months after date of publication of the final rule in the **Federal Register**. EPA is proposing to require each owner or operator ensure that the airborne concentration of TCE does not exceed the ECEL or lowest achievable exposure level for all potentially exposed persons within 9 months after the date of publication of the final rule in the **Federal Register**, and if applicable, each owner or operator must provide respiratory protection sufficient to reduce inhalation exposures to below the ECEL to all potentially exposed persons in the regulated area within 3 months after receipt of the results of any exposure monitoring that indicates exposures exceeding the ECEL or, if using monitoring data conducted within five years prior to the effective date of the final rule that satisfies all other requirements of the proposed WCPP, within 9 months after the date of publication of the final rule in the **Federal Register**. EPA is also proposing to require owners and operators demarcate a regulated area within 3 months after receipt of any exposure monitoring that indicates exposures exceeding the ECEL. Regulated entities should then proceed accordingly to implement an exposure control plan within 12 months after date of publication of the final rule in the **Federal Register**. EPA requests comment relative to the ability of owners or operators to conduct initial monitoring within 6 months after date of publication of the final rule in the **Federal Register**, and anticipated timeframes for any procedural adjustments (*i.e.,* use of new technologies for personal breathing zone monitoring at extremely low-ppm levels of TCE) needed to comply with the requirements outlined in this unit, including establishment of a respiratory protection program and development of an exposure control plan.

EPA understands that the regulated community may have difficulty measuring at or below the ECEL consistently over an entire work shift. Therefore, EPA is requesting comment regarding the amount of time, if any, it would take the regulated community to develop a method to measure at or below the ECEL over an entire work shift. EPA is interested in what levels of detection are possible based on existing monitoring methods, justification for the timeframe of the specific steps needed to develop a more sensitive monitoring method, and any additional detailed information related to establishing a monitoring program to reliably measure TCE at or below the ECEL.

With regard to the compliance timeframe for those occupational conditions of use which are subject to dermal protection requirements, EPA is proposing to require each owner or operator of a workplace subject to dermal protection requirements to establish dermal protection outlined in this unit by 6 months after publication of the final rule in the **Federal Register**. EPA requests comment relative to the ability of owners or operators to implement dermal protection within 6 months of publication of the final rule in the **Federal Register**, and anticipated timeframes for any procedural adjustments needed to comply with the requirements outlined in this unit. EPA may finalize shorter or longer compliance timeframes based on consideration of public comments.

3. TSCA Section 6(g) Exemptions

Under TSCA section 6(g)(1), EPA may grant an exemption from a requirement of a TSCA section 6(a) rule for a specific condition of use of a chemical substance or mixture if the Agency makes one of three findings. TSCA section 6(g)(1)(A) permits such an exemption if the specific condition of use is a critical or essential use for which no technically and economically feasible safer alternative is available. Under TSCA section 6(g)(1)(B), EPA must find that compliance with the requirement would significantly disrupt the national economy, national security, or critical infrastructure to provide an exemption. Finally, TSCA section 6(g)(1)(C) allows for an exemption based on an EPA finding that the specific condition of use of the chemical substance or mixture, as compared to reasonably available alternatives, provides a substantial benefit to health, the environment, or public safety. Based on discussions and information provided by industry stakeholders and consultation with DOD and NASA, EPA has analyzed the need for several different exemptions and is proposing to grant six. This unit presents the results of that analysis.

Pursuant to TSCA section 6(g)(3), if an exemption is finalized, EPA may by rule later extend, modify, or eliminate the exemption, on the basis of reasonably available information and after adequate public justification, if EPA determines the exemption warrants a change. EPA will initiate this rulemaking process at the request of any regulated entity benefiting from such an exemption. The Agency is open to engagement throughout the duration of any TSCA section 6(g) exemption and emphasizes that, to ensure continuity in the event of an extension or modification, such a request should come at least two years prior to the expiration of an exemption.

a. Analysis of the Need for TSCA Section 6(g)(1) Exemptions for Uses of TCE That Are Critical or Essential

i. Analysis of the Need for a TSCA Section 6(G)(1)(B) Exemption for Industrial and Commercial Use of TCE as a Processing Aid for Battery Separator Manufacturing (Lead-Acid And Lithium Battery Separators)

As part of industry stakeholder engagement and interagency consultation with other Federal agencies following publication of the 2020 Risk Evaluation for TCE (Ref. 35 stakeholder meeting list), EPA was made aware that some U.S. battery separator manufacturers continue to rely on TCE to manufacture specialty separator materials of lead-acid and lithium batteries (Refs. 48, 49). In the 2020 Risk Evaluation for TCE, EPA evaluated the industrial and commercial use of TCE as a processing aid for battery separator manufacturing. EPA understands that the manufacture of battery separators takes place separately from overall battery manufacture, that both lead-acid and lithium batteries require separators for operation, and that the lead-acid and lithium battery separator manufacturing processes are highly engineered specialty products manufactured with precision to stringent technical specifications essential to power vehicles and systems in the U.S. supply chain for multiple critical infrastructure sectors within the national economy.

EPA understands that separators are fundamental components in batteries that provide the necessary separation between the internal anode and cathode components that make batteries work, and that a restriction on TCE use for the production of battery separators would critically impact the U.S. battery manufacturing supply chain and impede the expansion of domestic battery production capacity (Refs. 50, 51). Industry stakeholders as well as other Federal agencies have discussed with EPA the potential adverse implications of banning or severely restricting use of TCE for battery separator production, as it would

disrupt the supply chain and leave the U.S. reliant on foreign suppliers to the extent that they are available to support the national economy, national security, and critical infrastructure (Refs. 48, 49). EPA agrees these assertions have merit. Lead-acid and lithium batteries are essential to serve critical infrastructure such as transportation systems, security systems, as well as to energize the national defense base (*e.g.,* nuclear submarine batteries). Two companies requested that EPA provide exemptions under TSCA section 6(g) to allow for the continued use of TCE in the manufacture of battery separators, noting their significant concern about potential prohibitions under TSCA on the use of TCE. Both companies emphasized the need for the continued use of TCE in the manufacture of battery separators to strengthen critical supply chains by revitalizing domestic manufacturing and research and development in accordance with Executive Order 14017 (86 FR 11849, March 1, 2021). Additionally, the companies noted that a potential ban on TCE would be contrary to the Administration's national security priorities, which are to reduce supply chain risks by building a robust domestic renewable power sector, transitioning to a clean energy-based economy, growing a mature and competitive high-capacity battery industry, and leading global innovation and production in advanced technology products through a strong domestic manufacturing base.

One company requested a TSCA section 6(g) exemption for the use of TCE and described the specific use of TCE as an ''extraction solvent'' during the separator manufacturing process for both lead-acid and lithium battery separators (Ref. 48). The company makes lead-acid and lithium battery separators from naphthenic process oil during the extrusion process in order to form a thin sheet or film for each separator. During the extrusion process, a precise amount of process oil must be removed from the separator, which requires the use of a solvent (*i.e.,* TCE) to rapidly extract the process oil and leave behind the desired porosity to allow ion flow in each finished battery. The finished separators must contain a specific percentage of residual process oil that ranges between 15% to 20% for lead-acid battery separators (for oxidation resistance in the finished battery) and less than 1% for lithium separators. Once the solvent has removed the precise amount of oil from each separator, the solvent must be evaporated/removed from the separator, and post-evaporation, the separator must have the specific porosity and wettability to provide low electrical (ionic) resistance (*i.e.,* enabling ion transport) within a battery. For these established separator manufacturing processes, TCE is a high-performance process solvent that provides a unique combination of chemical properties (*e.g.,* non-flammability, rapid extrusion of process oil, compatibility with process equipment, etc.), which facilitate the controlled removal of process oil in both lead-acid and lithium separator production processes. The company also detailed that there is no other chemical alternative that is suitable or available to replace TCE in its lead-acid or lithium separator processes.

A second company requested a TSCA section 6(g) exemption for the use of TCE as a necessary solvent for the manufacture of lead-acid battery separators and indicated that prohibiting the use of TCE would harm the U.S. manufacturing, energy, transportation, and defense sectors (Ref. 49). The company describes its use of TCE as specific to the manufacture of polyethylene plate separators used by others in commercial wet cell batteries. Their lead-acid battery separators are made of silica, process oil, and PE resin, a unique polymer that is extruded into a sheet form using the process oil. After the sheet is formed, an oil-extraction process employs TCE to extract the process oil, which reduces the oil content within the sheet to 20–25%, and, once the solvent has removed the precise amount of oil from the lead-acid separator, the solvent is evaporated/removed from the separator to yield the required porosity to allow ion flow in the finished battery. Finally, the extracted oil and 99.7% of TCE are captured and reused in the extraction process. The company notes that its lead-acid battery separators are essential in gasoline and electric-powered commercial vehicles, emergency response and military vehicles, marine engines, nuclear power providers, as well as other business sectors. The company further reiterates the unique chemical properties that are essential to facilitate the controlled removal of process oil while allowing the company to recover and recycle previously-used TCE efficiently for reuse in the battery separator production process in a manner that they describe as minimizing worker exposure, while resulting in a product with the characteristics required by battery producers. The company has provided details to EPA on its sophisticated engineering process that follows the hierarchy of controls to minimize worker exposure. This includes a separate enclosed structure under negative pressure as a work area for TCE processing; limiting the time personnel are allowed to enter spaces where they could be potentially exposed to 15 minutes at a time; work area ventilation and filtration using carbon beds; and PPE including either a half-face or full-face air purifying respirator for any entry into the work area, as well as chemical-resistant gloves, chemical-resistant aprons, goggles, and face shields (Ref. 49, 53).

Both companies that requested a time-limited exemption for use of TCE for battery separator production in the U.S. have demonstrated to EPA the facility-specific research, development, and implementation of sophisticated control measures to minimize TCE exposures, while also searching for reasonably available alternative solvents and processes (Refs. 48, 49).

According to the requesters, there are several properties that make TCE uniquely suitable for use in the manufacture of battery separators. First, TCE is non-flammable. According to one requester, the only other solvent that is currently in use in this application is hexane, which is explosive and highly flammable, presenting a safety risk. Other key properties described by the requesters include TCE's rapid extraction of process oil, its compatibility with the metallurgy of the process equipment, the ease by which TCE is distilled from the process oil for recovery and reuse, and its vapor pressure that both allows for evaporation and permits condensation from the atmosphere using cooling coils. One requester evaluated more than a dozen potential alternatives, including hexane, other chlorinated solvents such as methylene chloride and perchloroethylene, 1-bromopropane, acetone, alcohols, siloxanes, and water. Some were eliminated as not being compatible with the process, such as water, which is not miscible with the process oil, so it cannot be used to extract the oil. Others were found to be much less effective than TCE at extracting process oils, while some were not as easy to recover and reuse. Even the more promising solvents, such as perchloroethylene, were not drop-in replacements and would, according to the requester, require expensive equipment modifications and a multi-year customer approval process. Based on requester submissions and EPA's general understanding of the battery separator manufacturing process, EPA believes that there are no feasible

alternatives to TCE available at present (Refs. 48, 49, 52).

One company requested a fixed exemption period of 25 years due to the critical nature of TCE use, current lack of any safer technologically or economically feasible alternative, and to avoid grave disruption to the U.S. economy, critical infrastructure, and defense base (Ref. 54). The company further explained that a restriction on TCE without sufficient time to identify, develop, and test a technically and economically feasible alternative (should such an alternative be identified and become available) would pose significant cost and safety concerns for the automobile and other critical infrastructure industries. The requester further explained that battery manufacturer customers and end users require compliance with strict performance testing, and, in addition, if a technically feasible alternative does become available, it will take multiple years to retrofit and obtain approvals required for the technical, economic and commercial feasibility of the separators. The company offered to provide EPA periodic reports every five years on its efforts to identify and assess feasible alternatives; in this way, EPA would receive ongoing alternatives analyses to ensure forward progress, while the company would obtain the regulatory certainty needed to maintain sustainable production for its customers (Ref. 48).

Similarly, the second company requested a 25-year exemption from restrictions on this use of TCE, with an additional request that EPA consider future extensions for additional time, in order to allow its use of TCE until a safer, feasible alternative is available (Ref. 49). The company justified the lengthy exemption request by explaining its ongoing search for alternatives since 2014, and its estimates that, while it will be another five years before a suitable alternative is identified, the period for trial use, customer vetting and approval and construction of a new manufacturing plant is expected to last at least 20 years. In addition, the second requester also offered to submit to EPA periodic reports every five years to detail their efforts to identify and assess feasible alternatives.

Based on the information provided to EPA, EPA proposes that compliance at this time with a prohibition for this specific condition of use would significantly disrupt national security and critical infrastructure. EPA agrees that the use of lead-acid batteries and lithium battery separators is crucial to each of these sectors at this time. These batteries are essential for critical infrastructure such as transportation and security systems, as well as for energizing the national defense base (*e.g.,* nuclear submarine batteries). Furthermore, EPA agrees that compliance with the prohibition would disrupt national security priorities of reducing supply chain risks by building a robust domestic renewable power sector and transitioning to a clean energy-based economy.

Despite the request for a 25-year exemption from two separate companies, EPA is proposing a 10-year time-limited TSCA section 6(g) exemption. EPA believes that a 10-year exemption from the prohibition on TCE as a processing aid, specific to lead-acid and lithium battery separator manufacturing, is reasonable because it would be sufficient to provide EPA with an updated analysis of any technically feasible alternative, the supply chain of the U.S. battery industry, as well as global innovation and production in high-technology products. Under TSCA section 6(g), EPA can consider revisiting or extending time-limited exemptions by rulemaking until a safer, feasible alternative becomes available, provided EPA receives an updated analysis of the specific use. EPA considered the emphasis in TSCA section 6(d) that compliance dates be as soon as practicable, and that TSCA section 6(g) requires that any exemptions be well-justified. EPA also took into consideration the regulatory scheme under the European Chemicals Agency for this use of TCE for battery separator manufacturing, and the periodic reporting cycle established in the European Union and United Kingdom. In the EU and UK, authorizations are chemical- and facility-specific and for a duration of either 7 or 12 years. Under the current EU and UK authorizations, in which a panel reviewed the scientific and economic implications of the specific TCE use, each battery separator manufacturing company was approved for a 7-year authorization period (with a 2023 expiration date); both companies have applied for a renewal for an additional 12 years after 2023 (Ref. 55). Noting that this industry has been able to provide updated applications for authorization to the EU and UK in a renewal cycle that has been shorter than 10 years, the two companies' interest in providing periodic updates to EPA, and the fast pace of battery technology development, EPA proposes that 10 years is sufficient for this time-limited exemption, and that this timeframe would also align with the EU and UK approaches. EPA requests comment on whether 10 years is an appropriate timeframe for the proposed TSCA section 6(g) exemption for industrial and commercial use of TCE as a processing aid for battery separator manufacturing (lead-acid and lithium battery separators).

ii. Analysis of the Need for a TSCA Section 6(g)(1)(B) Exemption for TCE Use for DoD Naval Vessels

During the analysis for this rulemaking of the use of TCE, EPA has identified that it is necessary to allow for the continued use of TCE for industrial uses for DoD naval vessel requirements for potting, bonding and sealing compounds, bonding and cleaning requirements for naval combat systems, radars, sensors, equipment, and fabrication and prototyping processes.

These naval vessel-related COUs cover the platform itself and/or specific systems, equipment, or processes. The use of TCE for industrial uses on DoD naval vessels is critical and essential, and a prohibition for this specific condition of use would significantly disrupt national security and critical infrastructure. An exemption for DoD uses for naval vessels would enable the continued use of TCE for the COUs described which relate to vessels and their systems, and which enable maintenance, fabrication and sustainment and thus the operation of naval vessels and equipment.

DoD has been unable to identify suitable alternatives for TCE for these uses. Based on information received from DoD, a 10-year timeframe for this exemption would prevent disruption of national security and allow critical infrastructure priorities to be met.

iii. Analysis of the Need for TSCA Section 6(g)(1)(A) Exemption of TCE for Laboratory Use That for Essential Laboratory Activities

During the analysis for this rulemaking of the uses of TCE, EPA agrees that it is necessary to allow the continued use of TCE for laboratory use for essential laboratory activities (this use is within the condition of use ''Industrial and commercial use of TCE in hoof polish; gun scrubber; pepper spray; and other miscellaneous industrial and commercial uses,'' described in Unit III.B.1.c.xx.). Under essential laboratory activities, EPA includes chemical analysis, chemical synthesis, extracting and purifying other chemicals, or dissolving other substances. Additionally, EPA includes as an essential laboratory activity research and development for new technologies related to monitoring and remediation for cleanup activities

related to TCE contamination and for new analytical methods for exposure monitoring (*e.g.,* for the ECEL).

Under TSCA section 6(g)(1)(A), EPA determined that TCE use as a laboratory chemical for essential laboratory activities is a critical and essential use with no technically and economically available substitutes. The use of TCE in laboratory use for essential laboratory activities is critical for ongoing Federal, state, and local government cleanup projects, in which it is necessary to use TCE as a laboratory chemical for the analysis of TCE-contaminated soil, air, and water samples. In these projects which are specific to TCE, the continued use of TCE in laboratory settings for chemical analysis when applied to cleanup and exposure monitoring is critical to efforts to improve health, the environment, and public safety and is without a technically available substitute. Additionally, industrial laboratory analysis is essential in monitoring for the presence of TCE for the adequate reduction of overall exposure to TCE in alignment with the hierarchy of controls. In order to accurately conduct exposure monitoring of TCE to implement the WCPP for the uses with longer timeframes, industrial and commercial use of TCE as a laboratory chemical to provide for the chemical analysis of samples is critical and essential and without a technical alternative. A 50-year timeframe for the continued use of TCE for uses in a laboratory for chemical analysis would allow a sufficient time for TCE remediation to occur at most identified clean-up sites, as well as sites not yet identified. EPA also proposes to include in this exemption the use by NASA of TCE in essential laboratory activities as a laboratory reagent, calibration standard, and for dissolving other substances (Ref. 56). Following interagency consultation with NASA, EPA understands NASA's critical use of TCE in laboratories to include sample preparation and equipment calibration related to the search for chlorinated hydrocarbons on Mars, calibration of gas mixture used in identification of contaminants in breathing air in human-rated space and aerospace systems, and preparation of quality assurance samples for groundwater analysis. EPA is also aware of an additional critical use of TCE in laboratories by NASA to dissolve substances, such as for wax removal from infrared sensors. The wax is applied to protect the sensors during the development of infrared detectors incorporated into specialty instruments. TCE is used to remove the wax, and, unlike other solvents, has not been found to damage other delicate components of the infrared sensors.

As an example of this use, EPA notes that the devices that require this kind of wax removal are built in the Detector Development Lab, which is an International Standards Organization 5 cleanroom dedicated to fabrication of detectors (including infra-red). The lab utilizes semiconductor like processes to create these devices in silicon wafers or similar substrates, through build up or removal of layers toward meeting NASA missions. Detectors and devices are built in the lab that are not typically found in industry yet are needed to meet NASA requirements. The devices built tend to be unique, one-of-a-kind devices created using equally unique and highly specialized processes. One of these processes uses TCE. Part of device fabrication requires building up or removing material from both sides of the wafer. To do so, while protecting one side, a sacrificial substrate is commonly adhered to the silicon substrate using a wax material as glue. In many cases, when the process is complete, the wax is dissolved away to remove the sacrificial substrate. Common waxes that achieve this process are readily dissolved in a polar solvent such as acetone. The build-up or removal of material is done in a manner to create very specific patterns with each layer. These patterns are transferred to the substrate using a polymer material called photoresist. Once the pattern transfer is complete the photoresist is removed using acetone or other means.

In the case of creating certain types of infra-red detectors, there is a need to embed a photoresist pattern within the wax layer when gluing a sacrificial substrate to the silicon wafer. The requirement is that the patterned resist remain intact after dissolving the wax. Using solvents such as acetone would simultaneously dissolve the resist pattern or in the case of some solvents deform or weaken the photoresist beyond rendering it unusable. TCE is the only product identified that can perform this process. Specifically, TCE is able to dissolve the wax layer and leave the patterned resist layer uncompromised. The use of TCE is solely for dissolving material and is always used in an exhausted hood in the laboratory. Each hood is inspected yearly by an on-site Industrial Hygiene Office to ensure proper airflow and operation. The hood has a local alarm for airflow that is tested daily for operation. The clean room has vertical laminar air flow, pushing air into the exhausted hoods as air is pulled by the exhaust fans. The room is maintained at a positive pressure of 0.08 inches on water column. For added exposure reduction, the laboratory is equipped with a separate emergency exhaust fan which, if activated, creates a negative pressure in the laboratory. All potentially exposed persons are provided a full set of PPE that includes apron with arm guards, face shield, safety glasses, standard issue nitrile gloves and chemical gloves rated for chlorinated solvents.

The process consists of the following steps: First, the wafer is soaked in 200–2000 mL of TCE (volume dependent on wafer size). When the wax is fully dissolved, the wafer is transferred to a second (fresh) TCE container of 200–2000mL and soaked for several minutes. Then, the effluent is rinsed with de-ionized water and the waste TCE is captured in waste containers for disposal by an on-site Environmental Group. This process is conducted over the span of approximately one week and is required an average of 3 times per year. When the process is complete all chemicals are disposed of or stored in screw capped bottles within an exhausted enclosure. Based on the information available to EPA, EPA is including the use of TCE in laboratories by NASA to dissolve substances as part of the proposed exemption for use of TCE in laboratories for essential laboratory activities. In addition, based on the information provided by NASA and other Federal agencies, EPA has considered and is including in this proposal an exemption for additional research and development activities and test and evaluation method activities, and similar laboratory activities, conducted by Federal agencies and their contractors, provided the use is essential to the agency's mission. As described more fully in Unit V.A.3.a.vi., for example, NASA's mission requires that it operate at the cutting edge of science, in environments that are hostile to life, especially human life. While NASA is skilled at addressing problems presented by these environments, EPA is concerned that the proposed limits on this laboratory use exemption in general would negatively affect NASA's ability to respond to issues that arise in spaceflight, particularly human spaceflight. Similarly, EPA believes that the DoD's unique mission requires additional flexibilities for research and development in order to maintain military readiness at all times.

It should be noted that the use of TCE in laboratory settings for testing asphalt would not be included in this TSCA section 6(g) exemption because it is not critical nor essential, and because alternative testing methods exist,

including the Nuclear Asphalt Content Gauge and the Ignition Method (Ref. 57). EPA requests comment on whether 50 years is a reasonable timeframe for the TSCA section 6(g) exemption for the industrial and commercial use of TCE in laboratory use essential for chemical analysis. Specifically, EPA requests comment on the anticipated duration of TCE cleanup projects, and whether there will be projects that continue and require the use of TCE as a laboratory chemical for the analysis of contaminated soil, air, and water samples past 50 years. Additionally, EPA requests comment on if the exemption for laboratory use of TCE should include research and development purposes for objectives broader than cleanup activities or exposure monitoring, such research into TCE alternatives, whether these broader objectives should be limited to Federal agencies and their contractors or expanded to include others, and whether a shorter time period, such as 10 years, should be imposed on these broader research and development activities.

iv. Analysis of the Need for a TSCA Section 6(g)(1)(A) Exemption for Disposal of TCE to Industrial Pre-Treatment, Industrial Treatment, or Publicly Owned Treatment Works for the Purposes of Cleanup Projects of TCE-Contaminated Groundwater and Other Wastewater

EPA has conducted an analysis of the application of this rulemaking and found that the disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works for the purposes of cleanup projects of TCE-contaminated groundwater and other wastewater should be permitted to continue for some period of time to avoid adverse impacts on these important remediation projects.

TCE is a contaminant of concern in a significant number of cleanup sites that are managed under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund sites, as well as under the Resource Conservation and Recovery Act (RCRA) and state programs authorized under RCRA. The remediation of these sites, including the removal and treatment of TCE-contaminated groundwater, is critical to EPA's mission to protect human health and the environment. The disposal of wastewater that contains TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works is an important method used in these cleanup efforts. In EPA's analysis of this rulemaking, EPA determined that at many contaminated sites, TCE-contaminated wastewater is pumped out of the ground and either sent to offsite industrial treatment or publicly owned treatment works. EPA acknowledges that the cleanup of these sites is vital work in which the disposal of TCE is a critical or essential use for which no technically and economically feasible safer alternative is available that must continue under CERCLA, RCRA, authorized state programs, and/or orders or permits issued under those authorities. Taking into consideration hazards and exposure, a prohibition on disposal without this exemption could result in prolonged exposure to TCE-contaminated groundwater for affected communities. EPA is concerned that eliminating a common disposal method for TCE-contaminated groundwater would be a significant burden on these cleanups and would likely slow the pace of remediation at the numerous sites where TCE-contaminated groundwater is a problem. EPA also understands that there are other sites where TCE-contaminated groundwater is being addressed under the authority of other federal environmental laws or state and local government authorities, including at sites that are currently implementing remedies selected through relevant statutory and regulatory processes, and the impact of a prohibition on an important disposal method is expected to be similar. EPA therefore is proposing a 50-year exemption from the prohibition on disposal of TCE by industrial pre-treatment, industrial treatment, or publicly owned treatment works for cleanup projects undertaken under the authority of CERCLA, RCRA, or other federal, state, or local government environmental laws, regulations, or requirements.

A 50-year timeframe for the continued disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works for the purposes of federal, state, and local government cleanup projects would allow a sufficient time for TCE remediation to occur at most sites. Additionally, the 50-year timeframe aligns with the proposed 50-year time-limited TSCA section 6(g)(1)(A) exemption for industrial and commercial use of TCE as a laboratory chemical in essential laboratory activities, which is also intended to support cleanup operations through allowing for the analysis of samples. EPA requests comment on whether 50 years is a reasonable timeframe for a TSCA section 6(g)(1)(A) exemption for the cleanup of TCE-contaminated water and groundwater sites. Specifically, EPA requests comment on the anticipated duration of TCE cleanup projects, and whether there will be projects that may continue and require the disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works beyond 50 years.

v. Analysis of the Need for a TSCA Section 6(g)(1)(B) Exemption for Industrial and Commercial Use of TCE as a Solvent in Closed Loop Vapor Degreasing Necessary for Human-Rated Rocket Engine Cleaning by NASA and Its Contractors

EPA has conducted an analysis of the application of this rulemaking to the industrial and commercial use of TCE as a solvent in closed-loop vapor degreasing necessary for human-rated rocket engine cleaning by NASA and its contractors and proposes to find that a TSCA section 6(g) exemption is warranted. Under TSCA section 6(g)(1)(B), EPA proposes to determine that a prohibition at this time on the manufacture, processing, and distribution in commerce of TCE as a solvent for closed-loop vapor degreasing for human-rated rocket engine cleaning by NASA and its contractors would significantly disrupt national security and critical infrastructure.

The United States Space Priorities Framework notes that space systems (*e.g.,* flight components of satellites and space craft) are part of the nation's critical infrastructure and that the United States has significant national security interests in space (Ref. 58). NASA operates on the leading edge of science seeking innovative solutions to future problems in environments that offer little to no margin for error. Identification and qualification of compatible materials in the context of the less forgiving environments in which NASA operates is an iterative, collaborative process between original equipment manufacturers and NASA, especially in the case of human space flight operations (Ref. 59). NASA's mission architecture requirements often are developed many years in advance of an actual launch occurring. As part of mission planning, space systems are designed, full scale mock-ups are built, and mission critical hardware is constructed using materials qualified for spaceflight. According to NASA, for Artemis Program applications, in particular, losing access to a qualified high-performance substance like TCE in a short period of time has the potential to introduce an unacceptable level of

risk to crew, vehicle, and mission viability (Ref. 43).

As described by NASA, their use of TCE in closed-loop vapor degreasing involves cleaning small diameter parts, such as rocket engine nozzle coolant tubes, and removing the fluids used for manufacturing. Substitutes for TCE and alternative processes do not meet the technical specifications required to clean certain complex aerospace parts, namely small diameter parts. Specifically, these small diameter parts cannot be cleaned with other solvents due to the likelihood of entrapment issues (*i.e.,* a solvent carried out of a degreaser that adheres to or is entrapped in the part being removed) (Ref. 60). As discussed in Unit V.B.3.a.i., similar concerns have been expressed by a manufacturer of commercial jetliners and defense, space, and security systems, although the manufacturer states that potential alternatives have been identified for nearly all applications. Given that the small diameter parts identified by NASA are for human-rated space flight, there is a rigorous safety standard that must be met, and according to NASA, TCE is the only solvent currently qualified for degreasing these specific parts. The engines and devices in which these parts are used include Space Shuttle engines or hardware being reused; others are designed to leverage proven Space Shuttle technology and require use of certain fluids, such as TCE, that have been qualified for human space flight.

EPA notes that this proposed exemption of use of TCE as a solvent in closed loop vapor degreasing necessary for human-rated rocket engine cleaning by NASA and its contractors differs from the exemption for TCE in vapor degreasing for essential aerospace parts and components, described in the primary alternative regulatory action. As a principal matter, this proposed exemption is limited only to NASA and its contractors due to the critical infrastructure and national security needs of human-rated spaceflight rocket engines. In contrast, the alternative is much broader and covers all aerospace entities, including commercial aviation. This proposed exemption also differs from the alternative regulatory action in that the exemption is limited to use of TCE only in closed-loop vapor degreasing, while the alternative regulatory action would provide an exemption under TSCA section 6(g) for 7 years before prohibition for all vapor degreasing with TCE (*e.g.,* open top, in-line conveyorized, in-line web cleaner, and other types of vapor degreasing in addition to closed loop). Vapor degreasing as an industry has some of the higher exposures of TCE to workers and ONUs and this industry would have to make significant changes in order to comply to the extent possible with a WCPP until prohibition. However, of the types of vapor degreasing processes, closed-loop vapor degreasing has the lowest exposures to TCE for workers and ONUs, and as such, facilities with a closed-loop process are best situated to comply with an interim WCPP and to the extent possible, meet the ECEL until prohibition. Further, EPA believes that the facilities involved in this particular application of vapor degreasing for human-rated rocket engine cleaning by NASA or their contractors already have sophisticated industrial hygiene plans in place. EPA notes that a prohibition on vapor degreasing with TCE for all uses was proposed in 2017 (Ref. 67). While that proposal was withdrawn pending the completion of a risk evaluation for TCE under amended TSCA, which evaluated all conditions of use including vapor degreasing, EPA expects that since the 2017 proposal, certain stakeholders have made significant progress in identifying and adopting substitutes for vapor degreasing with TCE in anticipation of potential restrictions on TCE under amended TSCA. For instance, EPA is aware that many users have transitioned to a substitute for TCE in vapor degreasing where possible or are planning for technologically feasible adjustments (Refs. 32, 43. 60). EPA requests comment on whether 7 years is an appropriate timeframe for the proposed TSCA section 6(g) exemption for industrial and commercial use of TCE in closed loop vapor degreasing necessary for human-rated rocket engine cleaning by NASA and its contractors.

vi. Analysis of the Need for TSCA Section 6(g)(1)(A) Exemption for Certain NASA Uses in an Emergency for Which No Technically or Economically Feasible Safer Alternative is Available

EPA considered a TSCA section 6(g) exemption for emergency use of TCE in the furtherance of NASA's mission. For certain specific conditions of use, EPA proposes that use of TCE by NASA and its contractors in an emergency be exempt from the requirements of this rule because it is a critical or essential use provided that (1) there is an emergency; and (2) NASA selected TCE because there are no technically or economically feasible safer alternatives available during the emergency.

NASA operates on the leading edge of science seeking innovative solutions to future problems where even small volumes of an otherwise prohibited chemical substance could be vital to crew safety and mission success. During interagency review, NASA expressed concerns that there will likely be circumstances where a specific, EPA-prohibited condition of use may be identified by NASA during an emergency as being needed in order to avoid or reduce situations of harm or immediate danger to human health, or the environment, or avoid imperiling NASA space missions. In such cases, it is possible that no technically and economically feasible safer alternative would be available that meets the stringent technical performance requirements necessary to remedy harm or avert danger to human health, the environment, or avoid imperiling NASA space missions.

An emergency is a serious and sudden situation requiring immediate action to remedy harm or avert danger to human health, the environment, or to avoid imperiling NASA space missions. In NASA's case, there may be instances where the emergency use of TCE for specific conditions of use is critical or essential to remedying harm or averting danger to human health, the environment, or avoiding imperiling NASA space missions. Because of the immediate and unpredictable nature of emergencies described in this unit and of the less forgiving environments NASA operates in that offer little to no margin for error, it is likely that, at the time of finalization of this proposal, alternatives to emergency TCE use may not be available in a timely manner to avoid or reduce harm or immediate danger (Ref. 59). In this way, these emergencies for particular conditions of use meet the criteria for an exemption under TSCA section 6(g)(1)(A), because the emergency use of TCE for listed conditions of use is critical or essential and no technically and economically feasible safer alternative will be available in a timely manner, taking into consideration hazard and exposure.

In support of the TSCA section 6(g)(1)(A) emergency use exemption, NASA submitted detailed criteria which they must use to screen, qualify, and implement materials to be used in spacecraft equipment, as well as historical case studies that outline the loss of life and loss of assets in the discharge of previous missions. In one of several examples detailed, the Apollo I command module fire that claimed the lives of three American astronauts demonstrated the need for careful testing and continuity of materials (Ref. 59). Moreover, due to NASA's rigorous safety testing requirements under various environmental conditions, technically and economically feasible

safer alternatives may not be readily available during emergencies and may require certain conditions of use of TCE to alleviate the emergency.

In another example, NASA identified a scenario concerning a mission to the International Space Station (ISS) whereby, during a launch evolution, the countdown was paused immediately prior to launch (T–2 minutes). NASA engineers identified a clogged filter and supply line as the primary issue, which required immediate attention (*i.e.,* line flushing and filter cleaning). In this type of emergency scenario, an already approved chemical substance rated for space system applications is necessary to immediately remedy the situation. Although TCE was not used in this particular incident, if it were needed in the future to address such an emergency, then the proposed exemption would allow for its lawful use—the countdown would resume and the launch would occur. Conversely, without an exemption under the specific condition of use (*e.g.,* industrial and commercial use in cold cleaning), NASA's use of TCE would be otherwise prohibited, which would put NASA in an untenable position of having to choose to either violate the law or place the mission (and potentially the health and safety of its employees involved in the mission) at risk.

The identification and qualification of compatible materials in the context of aviation is iterative and involves expansive collaboration between original equipment manufacturers, federal agencies, and qualifying institutions. This is equally, if not more so, the case in the context of human space flight operations undertaken by NASA (Ref. 59). NASA's mission architecture requirements often are developed many years in advance of an actual launch occurring. As part of mission planning, space systems are designed, full scale mock-ups are built, and mission critical hardware is constructed using materials qualified for spaceflight. Once NASA's mission architecture requirements are developed, NASA may need to retain emergency access to TCE because its alternatives may not have yet gone through NASA's rigorous certification process before their use. Allowing NASA to retain emergency use of TCE would reduce the chances that this rule will hinder future space missions for which mission architecture infrastructure is being developed or is already built. While NASA considers alternatives to the chemical substances it currently uses in its space system designs, NASA has not yet identified technically and economically feasible alternatives to proven chemistries in many current applications. While EPA acknowledges that the use of TCE in emergency situations may be necessary in the near term, it is also EPA's understanding that NASA will continue its work to identify and qualify alternatives to TCE. Thus, EPA is proposing an exemption duration of 10 years.

b. Proposed TSCA Section 6(g) Exemptions

i. Proposed 10-Year Exemption for Industrial and Commercial Use of TCE as a Processing Aid for Battery Separator Manufacturing (Lead-Acid and Lithium Battery Separators)

For the reasons discussed in this unit, EPA is proposing a 10-year exemption from the prohibition on the industrial and commercial use of TCE as a processing aid, specific to battery separator manufacturing. The proposed conditions for the exemption are: (1) The use of TCE would be limited to use as a processing aid for battery separator manufacturing to supply the essential battery components to continue to support the national economy, national security, and critical infrastructure; (2) This specific industrial and commercial use of TCE as a processing aid would be required to be conducted at industrial facilities already using TCE to manufacture the lithium ion or lead acid separators; and (3) Owners or operators of facilities where TCE is used as a processing aid for battery separator manufacturing and entities that manufacture (including import) TCE as a processing aid would be required to comply with the WCPP requirements described in Unit V.A.2. until the expiration of the exemption and the prohibition compliance date.

ii. Proposed 10-Year Exemption for TCE for Industrial Uses for DoD Naval Vessel Requirements

For reasons discussed in this unit, EPA is proposing a 10-year exemption from the prohibition on industrial and commercial use of TCE for the industrial and commercial use of TCE as potting compounds for naval electronic systems and equipment; sealing compounds for high and ultra high vacuum systems; bonding compounds for materials testing and maintenance of underwater systems and bonding of nonmetallic materials; and cleaning requirements (which includes degreasing using wipes, sprays, solvents, and vapor degreasing) for: materials and components required for military ordinance testing; temporary resin repairs in vessel spaces where welding is not authorized; ensuring polyurethane adhesion for electronic systems and equipment repair and installation of elastomeric materials; various naval combat systems, radars, sensors, equipment; fabrication and prototyping processes to remove coolant and other residue from machine parts; machined part fabrications for naval systems; installation of topside rubber tile material aboard vessels; and vapor degreasing required for substrate surface preparation prior to electroplating processes. The proposed conditions for the exemption are: (1) The use of TCE would be limited to use only for DoD naval vessels and their systems, and in the maintenance, fabrication, and sustainment for and of such vessels and systems; and (2) Owners or operators of facilities where TCE is used for DoD naval vessels and entities that manufacture (including import) or process TCE for use in DoD naval vessels would be required to comply with the WCPP requirements described in Unit V.A.2. until the expiration of the exemption and the prohibition compliance date.

iii. Proposed 50-Year Exemption for TCE Laboratory Use for Essential Laboratory Activities

For the reasons discussed in this unit, EPA is proposing a 50-year exemption from the prohibition on industrial and commercial use of TCE, for other miscellaneous industrial and commercial use of TCE in laboratory use for essential laboratory activities, excluding the testing of asphalt, as previously discussed. The proposed conditions for the exemption are: (1) The use of TCE would be limited to use in an industrial or commercial laboratory for essential laboratory activities, including chemical analysis, chemical synthesis, extracting and purifying other chemicals, dissolving other substances, and research and development for the advancement of cleanup activities and analytical methods for monitoring related to TCE contamination or exposure monitoring, with the exclusion of laboratory testing for asphalt; (2) Federal agencies and their contractors would be permitted to conduct research and development activities and test and evaluation method activities, and similar laboratory activities, provided the use is essential to the agency's mission; and (3) Owners or operators of facilities where TCE is used in laboratory settings and entities that manufacture (including import) or process TCE for use as a laboratory chemical would be required to comply with the WCPP requirements described in Unit V.A.2. until the expiration of the

exemption and the prohibition compliance date.

iv. Proposed 50-Year Exemption for Disposal of TCE to Industrial Pre-Treatment, Industrial Treatment, or Publicly Owned Treatment Works for the Purposes of Cleanup Projects of TCE-Contaminated Groundwater and Other Wastewater

For the reasons discussed in this Unit, EPA is proposing a 50-year exemption from the prohibition on disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works for the purposes of cleanup projects of TCE-contaminated groundwater and other wastewater. The proposed conditions for the exemption are: (1) The disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works would only be permitted for the purposes of cleanup projects of TCE-contaminated water and groundwater at sites undergoing remediation under CERCLA, RCRA, or other Federal, state, and local government laws, regulations or requirements; and (2) Owners and operators of the locations where workers are handling TCE wastewater, and owners and operators of facilities where TCE is disposed to industrial pre-treatment, industrial treatment, or publicly owned treatment works, would be required to comply with the WCPP requirements described in Unit V.A.2. and the recordkeeping requirements described in Unit V.A.4. until the expiration of the exemption and the prohibition compliance date.

v. Proposed 7-Year Exemption for Industrial and Commercial Use of TCE as a Solvent in Closed-Loop Vapor Degreasing Necessary for Human-Rated Rocket Engine Cleaning by NASA and Its Contractors

For the reasons discussed in this unit, EPA is proposing a 7-year exemption from the prohibition on the industrial and commercial use of TCE as a solvent in closed-loop vapor degreasing necessary for human-rated rocket engine cleaning by NASA and its contractors, and the manufacture (including import), processing, and distribution in commerce of TCE for this use. The proposed conditions for the exemption are: (1) The use of TCE would be limited to closed-loop vapor degreasing necessary for human-rated rocket engine cleaning by NASA and its contractors; and (2) Owners or operators of facilities where TCE is used in closed-loop vapor degreasing necessary for human-rated rocket engine cleaning by NASA and its contractors, and entities that manufacture (including import) or process TCE for such use, would be required to comply with the WCPP requirements described in Unit V.A.2. until the expiration of the exemption and the prohibition compliance date.

vi. Proposed Exemption for Uses of TCE for Emergency Uses in the Context of Human Space Flight for Certain Uses

For the reasons discussed in this Unit, EPA is proposing a 10-year exemption for emergency use of TCE in furtherance of NASA's mission for the following specific conditions of use:

(1) Industrial and commercial use as solvent for open-top or closed-loop batch vapor degreasing;

(2) Industrial and commercial use as a solvent for cold cleaning;

(3) Industrial and commercial use as a solvent for aerosol spray degreaser/cleaner and mold release;

(4) Industrial and commercial use as a lubricant and grease in tap and die fluid;

(5) Industrial and commercial use as a lubricant and grease in penetrating lubricant;

(6) Industrial and commercial use as an adhesive and sealant in solvent-based adhesives and sealants;

(7) Industrial and commercial as a functional fluid in heat exchange fluid;

(8) Industrial and commercial use in corrosion inhibitors and anti-scaling agents; and

(9) Industrial and commercial use of TCE as a processing aid.

EPA is also proposing to include additional requirements as part of the exemption, pursuant to TSCA section 6(g)(4), including required notification and controls for exposure, to the extent feasible: (1) NASA and its contractors must provide notice to the EPA Administrator of each instance of emergency use within 15 days; and (2) NASA and its contractors would have to comply with the ECEL.

EPA is proposing to require that NASA notify EPA within 15 days of the emergency use. The notification would include a description of the specific use of TCE in the context of one of the conditions of use for which this exemption is being proposed, an explanation of why the use described qualifies as an emergency, and an explanation with regard to the lack of availability of technically and economically feasible alternatives.

EPA expects NASA and its contractors have the ability to implement a WCPP as described in Unit V.A.2. for the identified uses in the context of an emergency, to some extent even if not to the full extent of WCPP implementation. Therefore, EPA is proposing to require that during emergency use, NASA must comply with the ECEL to the extent technically feasible in light of the particular emergency.

Under the proposed exemption, NASA and its contractors would still be subject to the proposed general recordkeeping requirements discussed in Unit V.A.

EPA requests comment on this TSCA section 6(g) exemption for continued emergency use of TCE in the furtherance of NASA's mission as described in this Unit, and whether any additional conditions of use should be included, in particular for any uses qualified for space flight for which no technically or economically feasible safer alternative is available. Additionally, EPA requests comment on what would constitute sufficient justification of an emergency.

4. Other Requirements

a. Recordkeeping

In addition to the recordkeeping requirements for the WCPP outlined in this unit, for conditions of use that would not otherwise be prohibited one year after the effective date of this proposed regulation, EPA is also proposing that manufacturers, processors, distributors, and commercial users maintain ordinary business records, such as invoices and bills-of-lading, that demonstrate compliance with the prohibitions, restrictions, and other provisions of this proposed regulation; and to maintain such records for a period of 5 years from the date the record is generated. EPA is proposing that this compliance date would begin at the effective date of the rule (60 days following publication of the final rule in the **Federal Register**). Recordkeeping requirements would ensure that owners or operators can demonstrate compliance with the regulations if necessary. EPA may require more, less, or different documentation in the final rule based on consideration of public comments.

b. Downstream Notification

For conditions of use that are not otherwise prohibited under this proposed regulation, EPA is proposing that manufacturers (including importers), processors, and distributors, excluding retailers, of TCE and TCE-containing products provide downstream notification of the prohibitions through the Safety Data Sheets (SDS) required by OSHA under 29 CFR 191.1200(g) by adding to sections 1(c) and 15 of the SDS the following language:

After [DATE 6 MONTHS AFTER DATE OF PUBLICATION OF THE

FINAL RULE IN THE **FEDERAL REGISTER**], this chemical/product is and can only be domestically manufactured, imported, processed, or distributed in commerce for the following purposes until the following prohibitions take effect: (1) Processing as an intermediate (a) for the manufacture of HFC–134a until [DATE 8.5 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] and (b) for all other processing as a reactant/intermediate until [DATE 2 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**]; (2) Industrial and commercial use as a solvent for open-top batch vapor degreasing until [DATE 1 YEAR AFTER DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**]; (3) Industrial and commercial use as a solvent for closed-loop batch vapor degreasing until [DATE 1 YEAR AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], except for industrial and commercial use as a solvent for closed-loop batch vapor degreasing necessary for human-rated rocket engine cleaning by NASA and its contractors until [DATE 7 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], and except for industrial and commercial use as a solvent for closed-loop batch vapor degreasing for rayon fabric scouring for end use in rocket booster nozzle production by Federal agencies and their contractors until [DATE 10 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**]; (4) Industrial and commercial use in processing aid a) for battery separator manufacturing until [DATE 10 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] and b) in process solvent used in polymer fiber spinning, fluoroelastomer manufacture and Alcantara manufacture; in extraction solvent used in caprolactam manufacture; and in precipitant used in beta-cyclodextrin manufacture until [DATE 2 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**]; (5) Industrial and commercial uses for DoD naval vessels and their systems, and in the maintenance, fabrication, and sustainment for and of such vessels and systems until [DATE 10 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**]; and (6) Industrial and commercial use for laboratory use for essential laboratory activities until [DATE 50 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**].

The intention of downstream notification is to spread awareness throughout the supply chain of the restrictions on use of TCE under TSCA as well as provide information to commercial end users about allowable uses of TCE until the prohibition compliance dates.

To provide adequate time to update the SDS and ensure that all products in the supply chain include the revised SDS, EPA is proposing a two-month period for manufacturers and a six-month period for processors and distributers to implement the proposed SDS changes following publication of the final rule.

EPA requests comments on the appropriateness of identified compliance timeframes for recordkeeping and downstream notification requirements described in this unit.

### *B. Primary Alternative Regulatory Action*

As indicated by TSCA section 6(c)(2)(A)(iv)(II) through (III), EPA must consider and publish a statement based on reasonably available information with respect to the reasonably ascertainable economic consequences of the rule, including consideration of the costs and benefits and the cost effectiveness of the proposed regulatory action and one or more primary alternative regulatory actions considered by the Agency. This unit includes a description of the primary alternative regulatory action considered by the Agency. An overview of the proposed regulatory action and primary alternative regulatory actions for each condition of use is in Unit V.C.

The primary alternative regulatory action described in this notice of proposed rulemaking (NPRM) and considered by EPA combines prohibitions and requirements for a WCPP. While in some ways it is similar to the proposed regulatory action, the primary alternative regulatory action described in this NPRM differs from the proposed regulatory action by providing longer timeframes for prohibitions, and by describing an ECEL based on a different health endpoint (*i.e.,* immunotoxicity), as part of the WCPP that would be required for the conditions of use of TCE that would be permitted to continue for longer than one year after publication of the final rule until the prohibition compliance dates. As described in Unit IV.B., this ECEL is based on the endpoint used for EPA's unreasonable risk determination for TCE under TSCA, (*i.e.,* immunotoxicity (Ref. 2), rather than the most sensitive health endpoint (developmental toxicity), which is the basis for the ECEL for the WCPP under the proposed regulatory action (the rationale for these differences is described in Unit VI.A.1.a.). EPA requests comment on this primary alternative regulatory action and whether any elements of this primary alternative regulatory action described in this unit should be considered as EPA develops the final regulatory action. For example, EPA could finalize a rule that includes the longer timeframes for prohibitions that are included in this primary alternative regulatory action and the ECEL based on the fetal cardiac defects endpoint (0.0011 ppm) that is included in the proposed regulatory action. EPA also requests comment on the practicability of the timeframes outlined in this unit compared to the timeframes identified for the proposed regulatory action in Unit V.A.

#### 1. Prohibitions

The primary alternative regulatory action considered by EPA would prohibit the manufacture (including import) and processing of TCE for all uses; prohibit the distribution in commerce and industrial and commercial use of TCE, as well as prohibitions on the disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works. The primary alternative regulatory action includes longer compliance timeframes for all prohibitions.

Under the primary alternative action, the prohibitions would follow a staggered schedule and would generally take effect three months later than in the proposed regulatory action. Under a compliance timeframe that would be three months longer than the proposed regulatory action, the prohibitions for the manufacturing (including import) and processing would come into effect in 180 days (6 months) for manufacturers and 270 days (9 months) for processors, except for the manufacturing and processing associated with certain processing and industrial and commercial uses described later in this unit, due to supply chain considerations. Associated with this prohibition, EPA would prohibit the manufacturing (including import) and processing for all uses, including for all consumer uses, under the primary alternative regulatory action.

The prohibition compliance dates for most industrial and commercial users would be one year after the publication of the final rule under the primary alternative regulatory action. However, under the primary alternative regulatory action, there would be longer timeframes for the prohibition of some industrial and commercial uses and for the associated manufacturing (including import) and processing. For all manufacturing (including import), processing, and industrial and commercial use of TCE that would continue more than one year after the publication of the final rule, the WCPP would be in effect until the respective prohibition compliance dates or, if applicable, expiration of the TSCA section 6(g) exemption. The WCPP under the primary alternative would include an ECEL of 0.004 ppm, as described in Units IV.B. and V.B.2. Furthermore, to aid with the implementation of the prohibitions under the primary alternative regulatory action, the prohibitions on distribution in commerce of TCE would take effect concurrent with the compliance date for the prohibition on the manufacture and processing TCE for a particular condition of use.

For the two conditions of use that encompass industrial and commercial batch vapor degreasing (*i.e.,* open-top and closed-loop), prohibitions under the primary alternative regulatory action described in this unit would take effect in 24 months for manufacturers, in 27 months for processors, and in 30 months for the industrial and commercial users of TCE used as a solvent for open-top and closed-loop batch vapor degreasing after the publication date of the final rule (with the exception of industrial and commercial use of TCE as a solvent for closed-loop batch vapor degreasing for rayon fabric scouring for end use in rocket booster nozzle production by Federal agencies and their contractors, which is described in Unit V.B.3.).

For certain processing and industrial and commercial conditions of use, the prohibitions under the primary alternative regulatory action described in this unit would take effect in two and a half years after the publication date of the final rule for manufacturers and in three years after the publication date of the final rule for processors for two conditions of use: (1) Processing as a reactant/intermediate, and (2) Industrial and commercial use as a processing aid in: process solvent used in battery manufacture; process solvent used in polymer fiber spinning, fluoroelastomer manufacture and Alcantara manufacture; extraction solvent used in caprolactam manufacture; and precipitant used in beta-cyclodextrin manufacture. Additionally, a TSCA section 6(g) exemption would be part of the primary alternative regulatory action for the industrial and commercial use of TCE as a processing aid (specifically for battery separator manufacture) and industrial and commercial use of TCE as a solvent for closed-loop batch vapor degreasing for rayon fabric scouring for end use in rocket booster nozzle production by Federal agencies and their contractors (see Unit V.B.3.).

Furthermore, compliance dates for prohibition would vary for processing TCE as an intermediate (specifically for HFC–134a manufacture), which would be subject to a longer phaseout, and for the prohibition of processing TCE as a reactant/intermediate. Under the primary alternative regulatory action, the manufacturing (including import) and processing of TCE as an intermediate for the manufacture of HFC–134a would be prohibited. Under the primary alternative regulatory action, there would be a nine-and-a-half-year phaseout (with an extra year to start compliance compared to the eight-and-a-half-year phaseout for the proposed regulatory action) following the requirements discussed in this unit. Under the primary alternative regulatory action, the prohibition would start one year later than under the proposed regulatory action, and thus the compliance timeframe would be one year longer than under the proposed regulatory action described in Unit V.A.1.b. Under the primary alternative regulatory action, a phaseout on processing of TCE as an intermediate for the manufacture of HFC–134a would begin at the final rule's effective date and end nine years and six months after the publication of the final rule. Within 18 months after the publication of the final rule, any facility using TCE as a feedstock to manufacture HFC–134a in the United States would establish a baseline within 12 months after the publication of the final rule of the annual quantity of TCE processed by the facility as a feedstock to manufacture HFC–134a. While this is similar to the proposed regulatory action, the timeframes allowed for establishment of the baseline would be longer under the primary alternative regulatory action. The manufacturer would use the average of any 12 consecutive months in the preceding 36 months to calculate the baseline and would have records that demonstrate how the baseline annual volume was calculated. Following the establishment of a baseline volume, under the alternative regulatory action, following a similar four-step phaseout process described in Unit V.A., the following compliance dates would take effect after the publication of the final rule: (1) In three years and six months each manufacturer of HFC–134a who uses TCE as an intermediate would not be permitted to process TCE as an intermediate at an annual volume greater than 75 percent of the baseline so established; (2) In five years and six months each manufacturer of HFC–134a who uses TCE as an intermediate would not be permitted to process TCE as an intermediate at an annual volume greater than 50 percent of the baseline so established; (3) In seven years and six months each manufacturer of HFC–134a who uses TCE as an intermediate would not be permitted to process TCE as an intermediate at an annual volume greater than 25 percent of the baseline so established; and (4) In nine years and six months each manufacturer of HFC–134a would be prohibited from using TCE as an intermediate. Additionally, manufacturing (including import) for this condition of use and distribution in commerce for this condition of use would follow a corresponding longer phaseout timeframe to account for the availability of TCE through the supply chain during the period of the phaseout of processing TCE as an intermediate for the manufacture of HFC–134a. Under the primary alternative regulatory action, regulated entities would keep records of the annual quantity of TCE purchased and processed from the year 2024 until the termination of all processing of TCE as an intermediate.

EPA requests comment on the practicability of the timeframes outlined in this unit compared to the timeframes identified for the proposed regulatory action in Unit V.A.1.c., including consideration of the need for manufacturing (including import), and distribution in commerce to continue during the period of the phaseout.

Furthermore, with regard to the prohibition of the disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works, under the primary alternative regulatory action, the prohibition would start three months later than under the proposed regulatory action, and thus the compliance timeframe would be two years and three months longer than under the proposed regulatory action described in Unit V.A.4. (description of disposal for the purposes of this rulemaking is provided in Unit III.B.2.d.). Under the primary alternative regulatory action, the prohibition described in this unit would take effect in three years for domestic manufacturers, processors, and

industrial and commercial users disposing of TCE to wastewater, including disposing of TCE-containing wastewater to industrial pre-treatment, industrial treatment, or publicly owned treatment works. EPA recognizes there may be challenges in identifying and implementing an alternative disposal process separate from disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works. EPA requests comment on whether the three-year alternative timeline would be practicable or whether additional time is needed, for example, for a regulated entity to implement a change to their wastewater collection, treatment, or disposal processes or infrastructure, and what those alternative disposal methods may be.

2. Workplace Chemical Protection Program for Certain Conditions of Use

As in the proposed regulatory action described in Unit V.A.1., EPA's primary alternative regulatory action would include a WCPP as a requirement, which would encompass an ECEL as well as dermal requirements to reduce inhalation and dermal exposures to TCE. However, the WCPP under the primary alternative regulatory action would include an ECEL based on a different health endpoint, immunotoxicity, as further discussed in this unit. The WCPP would be in place until the prohibition compliance date for those conditions of use of TCE that would continue for longer than one year after publication of the final rule, which would be: manufacturing (including import); processing: as a reactant/intermediate; incorporation into formulation, mixture or reaction product; repackaging; recycling; industrial and commercial use: as a solvent for open-top batch vapor degreasing; industrial and commercial use as a solvent for closed-loop batch vapor degreasing; and industrial and commercial use as a processing aid in process solvent used in battery manufacture; process solvent used in polymer fiber spinning, fluoroelastomer manufacture and Alcantara manufacture; extraction solvent used in caprolactam manufacture; and precipitant used in beta-cyclodextrin manufacture.

As discussed in Unit V.A.2., and for the reasons described in Unit V., EPA does not believe that long-term implementation of the WCPP would be a feasible means of addressing unreasonable risk indefinitely and that prohibition of the affected COUs would ultimately be necessary to eliminate the unreasonable risk. Under the primary alternative regulatory action, the WCPP for several conditions of use of TCE would reduce to the extent possible the unreasonable risk during the time period before a prohibition would become effective.

For the primary alternative regulatory action, the WCPP would encompass an ECEL based on immunotoxicity, following the associated implementation requirements discussed in Unit V.A.2., in addition to longer timeframes described in this unit. EPA's primary alternative regulatory action includes an ECEL of 0.0040 ppm (0.021 mg/m3) as an eight-hour TWA, which is based on the chronic non-cancer occupational HEC for autoimmunity (Ref. 14). As discussed in Unit VI.A., among the adverse health effects, the drivers for EPA's revised unreasonable risk determination for TCE under TSCA were identified as cancer, immunotoxicity, acute immunosuppression and chronic autoimmunity from inhalation and dermal exposures (Ref. 2). Therefore, reducing the remaining exposures to or below the ECEL of 0.0040 ppm would address the unreasonable risk of injury to health from TCE that is driven by inhalation exposures in an occupational setting (Refs. 1, 14). If ambient exposures are kept at or below the eight-hour ECEL of 0.0040 ppm, EPA expects that workers and ONUs would be protected against not only the chronic non-cancer effects for autoimmunity described in Unit III.B.2., but also effects resulting from acute non-cancer exposure (immunosuppression) and cancer. Associated with the ECEL of 0.0040 ppm, under the alternative regulatory action, EPA would establish an ECEL action level at half of the eight-hour ECEL, or 0.002 ppm as an eight-hour time-weighted average.

EPA believes that longer timeframes may facilitate compliance; therefore, the primary alternative regulatory action would provide longer timeframes for implementation of a WCPP than the proposed regulatory action. With a compliance timeframe that would be six months later than in the proposed regulatory action, the compliance timeframe for the WCPP under the primary alternative regulatory action would be extended as follows: regulated entities would establish initial exposure monitoring according to the process outlined in Unit V.A.2.ii. within 12 months (in contrast to six months in the proposed regulatory action described in Unit V.A.2.ii.) and proceed accordingly, based on the outcome of the initial monitoring. EPA requests comment on the ability of regulated entities to conduct initial monitoring within 12 months, anticipated timeframes for any procedural adjustments needed to comply with the requirements, and the extent to which this option could result in additional exposure, compared to the proposed regulatory option as described in Unit V.A. Overall, EPA requests comment on the practicability of the timeframes outlined in this unit, when compared to the timeframes identified for the proposed regulatory action in Unit V.A. EPA requests comment on whether any elements of the primary alternative regulatory action described in this unit should be considered as EPA develops the final regulatory action, *e.g.,* whether EPA should consider the timeframes for implementation of a WCPP presented in this primary alternative regulatory action and the ECEL value presented in the proposed regulatory action.

EPA does not have sufficient information as to whether the conditions of use that would continue for longer than one year under the primary alternative regulatory action listed in this unit could meet requirements of a WCPP for TCE, including an ECEL of 0.0040 ppm for TCE. Therefore, EPA requests comment on the existing practices (*e.g.,* engineering controls, administrative controls, PPE) involving TCE use in these conditions of use, as to whether activities may take place in closed systems and the degree to which users of TCE in these sectors could successfully implement an ECEL of 0.0040 ppm, dermal protection, and ancillary requirements, described in Unit V.A.2., until the prohibitions would become effective, including for the manufacturing, processing, and distribution in commerce that account for the supply chain.

3. TSCA Section 6(g) Exemptions

Under TSCA section 6(g)(1), EPA may grant an exemption from a requirement of a TSCA section 6(a) rule for uses that are critical or essential. Based on discussions with and information provided by industry stakeholders and consultation with other Federal agencies, EPA has analyzed the need for two different exemptions, described in the proposed regulatory action discussed in Units I.A.3.a. and b., and would grant both with a longer time limit if the primary alternative regulatory action described in this NPRM is adopted in the final rule. Furthermore, under the primary alternative regulatory action, EPA has analyzed the need for additional exemptions for essential uses of open-top and closed-loop batch vapor degreasing for aerospace use (including

for rayon fabric scouring for rocket booster nozzle production) as well as narrow tubing used in medical devices, and EPA would provide the additional exemptions if the primary alternative regulatory action described in this NPRM is adopted in the final rule. (EPA notes that the use of TCE for vapor degreasing narrow tubing used in medical devices is not excluded by TSCA section (3)(2)(B)(vi) because TCE is not intended to become part of the medical device that incorporates the narrow tubing). This unit presents the results of the analysis for the requested exemption for industrial and commercial use of TCE in vapor degreasing, as well as the time limits indicated under the primary alternative regulatory action.

a. Primary Alternative Analysis of the Need for TSCA Section 6(g)(1) Exemptions for Uses of TCE That Are Critical or Essential

i. Analysis of the Need for a TSCA Section 6(g)(1)(B) Exemption for Industrial and Commercial Use of TCE in Vapor Degreasing for Essential Aerospace Parts and Components

EPA has conducted an analysis of the application of this rulemaking to the industrial and commercial use of TCE in vapor degreasing and found that a TSCA section 6(g) exemption may be warranted for certain aerospace parts and components if the primary alternative regulatory action considered by EPA is adopted, in its entirety or in relevant part, in the final rule.

EPA received a request for a TSCA section 6(g) exemption from prohibition for the use of TCE in vapor degreasing of aerospace parts from a manufacturer of commercial jetliners and defense, space, and security systems (Refs. 60 and 61). As the requester describes, they manufacture and procure these parts and have identified that TCE vapor degreasing is necessary due to technical challenges with other substitute chemicals or alternative methods.

The requester has spent many years developing, qualifying, and implementing alternative materials and processes to replace TCE vapor degreasing with aqueous cleaning where technically viable. According to the requester, while the transition to aqueous cleaning has been successful for many detail parts (*e.g.,* stringers, spars, seat tracks, brackets, etc.), substitutes and alternative processes do not meet the technical specifications required to clean certain complex aerospace parts, specifically, gaseous oxygen tubing systems, non-oxygen tubing, as well as honeycomb core and rotorcraft mechanical systems. The requester notes the ongoing research and development activities over the years for the TCE vapor degreasing uses without viable alternatives, and highlights that a potential replacement technology has been identified for vapor degreasing oxygen and non-oxygen tubing systems. However, for the honeycomb core and rotorcraft mechanical systems parts, the requestor explains the continued challenge to identify a replacement solvent due to entrapment issues (*i.e.,* a solvent carried out of a degreaser that adheres to or is entrapped in the part being removed) and processing concerns.

The requester notes that an adequate transition period for this technically challenging aerospace use requires substantial investment and time to develop viable alternatives. The requester is currently in the process of identifying a replacement solvent that can adequately clean, cause no harm to parts, and is not an equally toxic material to TCE. Based on the submitted request, conversion from vapor degreasing to aqueous cleaning is a capital-intensive investment that the requester expects would require several years to plan, permit, construct, and install. Additionally, the requester notes that the aerospace industry needs to ensure that aerospace parts meet DOD and other Federal Aviation Administration (FAA) specifications to ensure safety of flight. For example, in order to replace the chemical with an alternative, the requester notes that they must identify, test, and select an alternative that meets technical requirements derived from FAA mandated standards for a typical part used in a commercial aircraft, such as specifications for specific gravity (ASTM D 792), Water Absorption (ASTM D 750), and other test requirements, which may be a lengthy process (Ref. 62). According to the information submitted, certification with FAA could take at least nine months for individual parts of components or up to several years for major subsystems or complete aircraft (Ref. 62). The requester also notes that while they do not know the extent that their supply chain has transitioned away from use of TCE in vapor degreasing, TCE has been used in vapor degreasing to meet required levels of cleanliness of certain supplied parts by long-standing design specifications that are incorporated into contracts of a complex supply chain. The requester also told EPA the suppliers are not required to inform the requester of the process they use to clean parts that the supplier provides to the requester, and the requester therefore may not know which solvent a supplier has selected for vapor degreasing or what factors were considered when selecting cleaning systems. According to the requester, material declarations and auditing processes to validate usage may be burdensome, considering that a large portion of the requester's supply chain includes small suppliers. Due to the concerns raised with transitioning to aqueous cleaning or another new cleaning method, the requester has requested that EPA exempt use of TCE in vapor degreasing of aerospace parts for 10 years.

As discussed in this unit, substitute chemicals for vapor degreasing of aerospace parts may not be available at this time for meeting the cleanliness standards of certain parts as required by DOD and FAA specifications or other specifications included in existing contracts within the supply chain such that significant disruption to national security and critical infrastructure would occur without a longer timeframe for transition to an alternative. More time is needed for companies to make the capital-intensive transition from TCE vapor degreasing to aqueous cleaning for those parts that can be cleaned using the aqueous method. In addition, the requester states that they are continuing to work towards identifying a replacement solvent that is able to adequately clean complex machining parts and actuation systems parts without harming them and that is not a regrettable substitution. Therefore, EPA has preliminarily determined that if the use of TCE for vapor degreasing were not available in the near term for aerospace parts, or if industry could not meet the requirements of the prohibition considered as the proposed regulatory action, compliance with such requirement could significantly disrupt national security and critical infrastructure. In addition, due to availability concerns, EPA has preliminarily determined that a ban on the manufacture, processing, and distribution in commerce of TCE for vapor degreasing of aerospace parts could also significantly disrupt national security and critical infrastructure. A prohibition on the use of TCE for vapor degreasing of aerospace parts could negatively affect DOD's capability and readiness, which includes the ability to adequately maintain aircraft. Such a prohibition could also negatively affect the maintenance of civilian aircraft and potentially have impacts on the safety of civilian flight.

Similarly, EPA is aware of a highly specific use of vapor degreasing for

aerospace components as part of production of booster rocket nozzles for national security or critical infrastructure uses (Ref. 43). In the production of booster rocket nozzles, TCE is used in vapor degreasing as a solvent in rayon fabric scouring, an intensive cleaning process to remove contaminants. Cleaning is a critical step of this process; if contaminants are not sufficiently removed in the scouring stage, the fabric will be degraded during the chemical reaction that occurs during carbonization which could result in failure of the nozzle during a launch and catastrophic effects for the rockets.

A Federal agency involved in this use, specifically NASA, has attempted at length to identify an alternative to TCE in vapor degreasing; while NASA had preliminarily identified an alternative solvent, the manufacturer of the substitute chemical announced they would be voluntarily ceasing production (Ref. 63), making this alternative solvent no longer viable. NASA has restarted the identification and qualification of a non-TCE cleaning method. While aqueous cleaning has been explored as an alternative method of rayon fabric scouring, it is not a viable alternative as the rayon fiber is hydrophilic and water can cause damage to the fiber itself, impacting its ablation performance (Ref. 43). Currently, substitutes and alternative processes do not meet the technical specifications required to clean the rayon fabric in order to safely produce and launch rockets that are important for national security or critical infrastructure. NASA has provided to EPA an estimated timeline for the identification and replacement of TCE in the vapor degreasing of this component. The replacement of TCE involves intense testing as it is part of spaceflight, notably a new process would have to undergo various rounds of testing culminating in a full-scale static motor test using a booster nozzle manufactured with an alternative cleaning solvent. For NASA specifically, the first opportunity to conduct a full-scale static motor test with a booster nozzle produced using a non-TCE alternative would be 2027; before that is planned to occur, NASA has launches planned with eight booster rockets, which cannot proceed unless all components are safely produced. Therefore, EPA has preliminarily determined that if TCE was not available for this sub-use of closed-loop batch vapor degreasing for this aerospace component, there would be a significant, disruptive impact on national security and critical infrastructure. In addition, due to availability concerns, EPA has preliminarily determined that a ban on the manufacture, processing, and distribution in commerce of TCE for vapor degreasing of aerospace parts could also significantly disrupt national security and critical infrastructure.

ii. Analysis of the Need for a TSCA Section 6(g)(1)(A) Exemption for Industrial and Commercial Use of TCE in Closed-Loop and Open-Top Batch Vapor Degreasing for Narrow Tubing Used in Medical Devices

EPA also finds that a TSCA section 6(g)(1)(A) exemption may be warranted for vapor degreasing of narrow metal tubing used in medical devices if the primary alternative regulatory action considered by EPA is adopted in the final rule. According to a manufacturer of metal tubing for medical devices (Ref. 64), TCE is the only solvent that they have found that effectively removes all lubricants from their tubing products, allowing them to meet the stringent cleanliness standards for medical devices.

Information provided to EPA from the tubing manufacturer indicates that their tubing products consist of over 20 different alloys processed with more than 25 different lubricants, for use primarily in the medical industry. The tubing is incorporated into devices used in the body for diagnostic and surgical procedures as well as permanent implants for orthopedic and cardiovascular applications. The tubing produced by the manufacturer ranges in diameter from 0.005″ to 0.625″, and both the inner and outer diameters of the tubing must be degreased at various points in the manufacturing process (Ref. 64).

According to this manufacturer, the use of specialty lubricants in the drawing and annealing processes create unique degreasing demands for narrow tube manufacturers and TCE has historically been the industry standard for effective removal of these lubricants. Cleanliness is paramount, as even the slightest degreasing failure may cause corrosion, which could result in a critical failure of an implantable medical device. Alternative solvents such as methylene chloride or 1-bromopropane are not feasible alternatives for a variety of reasons, including that they do not always achieve the required cleanliness standards, could result in a facility exceeding emission caps under the Clean Air Act, and are also in the process of being regulated by EPA under TSCA. Other alternative chemicals have been explored by the manufacturer, such as parachlorobenzotrifluoride, which is not a hazardous air pollutant under the Clean Air Act. While promising, this solvent could not remove some of the manufacturer's lubricants and specialty coatings, thus not meeting the customer's cleanliness standard. This alternative is also flammable, which would require additional equipment design and infrastructure to use safely.

The information provided by this manufacturer of tubing for use in medical devices regarding TCE vapor degreasing is consistent with the information provided by the aerospace industry regarding challenges with finding a replacement for TCE in vapor degreasing of tubing. It is also consistent with information provided to EPA during the public comment period for EPA's 2017 proposal on TCE in vapor degreasing (82 FR 7432, January 19, 2017). A commenter on that proposal indicated that aqueous cleaners did not effectively remove most of the materials in their lubrication system, so effective lubricants and coating systems would need to be developed that are compatible with aqueous cleaners (Ref. 65). Experiments with other lubricants were not successful, the commenter found that lubricants that could be effectively aqueous degreased were less effective at lubricating, requiring more drawing steps as well as more cleaning steps. Further, according to this commenter, aqueous cleaning requires large, heated water tanks and hot air drying chambers, increasing energy use and industrial effluent volumes.

In addition, EPA did not impose additional Clean Air Act emission reductions on aerospace manufacturing and maintenance facilities or on facilities manufacturing narrow tubing in 2007, recognizing the unique nature of the vapor degreasing done by these industries. In the 2007 final rule, EPA found that the level of control called for by the 1994 National Emission Standard for Halogenated Solvent Cleaning for aerospace manufacturing and maintenance and narrow tube manufacturing facilities reduced hazardous air pollutant emissions to levels that presented an acceptable level of risk, protected public health with an ample margin of safety, and prevented any adverse environmental effects (Ref. 66). As noted in the 2007 final rule, the finding regarding an ''ample margin of safety'' was based on a consideration of the additional costs of further control as represented by compliance with emissions limits adapted for these industry sectors, considering availability of technology, costs and time to comply with further controls.

EPA further notes that the term ''narrow tube'' as used in the 2007 final rule was tubing with a portion of the outside diameter being a quarter of an inch or less, which is different from the diameters provided by the narrow tube manufacturer (Ref. 64).

EPA acknowledges the importance of properly cleaned narrow tubing used in medical devices. The failure of a medical device used in a medical or surgical procedure, or implanted in the body, can have immediate and significant negative impacts on human health. Further, a complete prohibition on the use of TCE for vapor degreasing in the near term could result in shortages of narrow tubing for use in such medical devices, which would also have significant negative impacts on human health. Therefore, EPA requests comment on the extent to which the use of TCE for vapor degreasing of narrow tubing is a critical use for which no technically and economically feasible safer alternative is available. In addition, due to availability concerns, a ban on the manufacture, processing, and distribution in commerce of TCE for vapor degreasing of narrow tubing used in medical devices could significantly disrupt a critical use for which no technically and economically feasible safer alternative is available.

iii. Analysis of the Need for a TSCA Section 6(g)(1)(A) Exemption for Industrial and Commercial Use of TCE as a Processing Aid for Specialty Polymeric Microporous Sheet Materials

EPA has conducted an analysis of the application of this rulemaking to the industrial and commercial use of TCE as a processing aid and preliminarily found that a TSCA section 6(g)(1)(A) exemption may be warranted for certain industrial and commercial purposes if the primary alternative regulatory action considered by EPA is adopted, in its entirety or in relevant part, in the final rule. As part of industry stakeholder engagement, EPA was made aware that at least one U.S. materials manufacturer relies on TCE to manufacture a specialty microporous sheet material. This company has requested an exemption under TSCA section 6(g) for the continued use of TCE for this purpose (Ref. 67).

As the requestor describes, specialty polymeric microporous sheet materials are fundamental components in the production of critical or essential products. EPA preliminarily agrees that certain applications of these specialty polymeric microporous sheet materials are critical and essential uses for which no technically and economically feasible safer alternative is available. This exemption on processing TCE would be limited to processing for applications of the specialty polymeric microporous sheet materials that are critical and essential, specifically; driver's licenses and identification cards of U.S. states and territories; passports (including U.S. passports and e-passports); labels for chemical drums, complex filtration elements and cartridges (such as for oil/water and bilge water separations); and for use in membranes in energy recovery ventilators. Any application of the specialty polymeric microporous sheet materials for uses not listed above would not be covered under this exemption.

EPA believes that these uses would preliminarily also qualify for an exemption under TSCA section 6(g)(1)(B). These critical and essential products are also important for the national economy, national security, and critical infrastructure and EPA preliminarily agrees that compliance with the prohibition within the timeframes proposed would be disruptive. The proper identification of individuals is important for maintaining national security and critical infrastructure. Systems such as travel, healthcare, and law are all reliant on identification. Further, the proper labeling of chemicals is important for protecting critical infrastructure. Similarly, complex filtration elements and cartridges (such as for oil/water and bilge water separations) and membranes in energy recovery ventilation are essential for the operations of critical infrastructure.

Each of these products includes the use of TCE in their development. The requester described the specific use of TCE as a ''process solvent'' during the manufacturing of a ''unique polymeric microporous sheet material'' (Ref. 67). The company makes the microporous sheet material using process oil (white mineral oil) during the extrusion process in order to form a thin plastic sheet containing 55–60% process oil by weight. The process oil is then removed from the plastic sheet, which requires the use of a solvent (*i.e.,* TCE) to rapidly extract the process oil and leave behind the desired microporosity for the material. The requestor describes how specific microporosity is important for performance of the material. Once the solvent has removed the oil from the sheet, the solvent must be evaporated to remove it from the sheet; post-evaporation, the separator must leave behind the desired microporosity crucial to the performance of the material. Finally, the extracted oil and much of the TCE is captured and reused in the extraction process. TCE that is not captured and reused is released from a discharge stack; the requestor describes that the air released contains no more than 10 ppm of TCE.

The requestor describes this manufacturing process as well-established and reliant on TCE as a high-performance process solvent that provides a unique combination of chemical properties (*e.g.,* non-flammability, rapid extrusion of process oil, compatibility with process equipment, etc.). The requestor describes how this unique combination of properties facilitate the controlled removal of process oil in the production of the specialty polymeric microporous sheet material, resulting in the specific microporosity important for the performance of the material.

The requester has provided some details to EPA on its efforts to reduce worker exposure to TCE. The exposure mitigation program includes a separate area under negative pressure for TCE processing and use of PPE as necessary to comply with the OSHA PEL for TCE (Refs. 67, 10). While EPA's proposed ECEL is much lower than the OSHA PEL, EPA expects the requester to make appropriate changes to its worker exposure mitigation program to comply with the WCPP and attempt to meet the ECEL to the extent possible for the duration of this exemption.

According to the requester, there are several properties that make TCE uniquely suitable for use in the manufacture of the specialty microporous sheet material. The key properties described by the requester include TCE's rapid extraction of process oil, the ease by which TCE is distilled from the process oil for recovery and reuse, and its vapor pressure, which both allows for evaporation and permits condensation from the atmosphere. TCE is also non-flammable. The requester evaluated more than a dozen potential alternatives that could be compatible with their process for manufacturing specialty polymeric microporous sheet materials, including hexane, trans-1,2-dichloroethylene, perchloroethylene, and 1-bromopropane. Many of these substitutes were found to be less effective than TCE at extracting process oils, while some were not as easily recovered and reused. Even the more promising solvents, such as perchloroethylene, were not drop-in replacements and would, according to the requester, require expensive equipment modifications and a multi-year approval process. Many of the potential substitute chemicals would need to be blended with an HFC that is

being phased out, or the chemical itself is being phased out due to concern over PFAS or due to high Global Warming Potential. In addition to these challenges, the requestor describes how any blend would be a challenging substitute because the different chemicals in the blend evaporate at different rates and could become flammable during this process. The requester emphasized that it is using modeling to seek out potential alternatives, but that further study is required and that there is no other chemical alternative that is suitable or available to replace TCE in this process. Based on the requester's submission and EPA's general understanding of the manufacturing process for the specialty microporous sheet material, EPA believes that there are no feasible alternatives to TCE available at present.

While the requester did not describe a time limit for the exemption, EPA has identified a 15-year time-limited TSCA section 6(g) exemption under the alternative regulatory action. EPA believes that a 15-year exemption from the prohibition on the industrial and commercial use of TCE as a processing aid, specific to the manufacturing of specialty microporous sheet materials, would be reasonable because it would be sufficient to provide EPA with an updated analysis of any technically feasible alternative, the supply chain of the U.S. materials industry, as well as global innovation and production in high-technology products. Under TSCA section 6(g), EPA can consider revisiting or extending time-limited exemptions by rulemaking until a safer, feasible alternative becomes available. EPA requests comment on whether 15 years is an appropriate timeframe for the proposed TSCA section 6(g) exemption for industrial and commercial use of TCE as a processing aid for specialty polymeric microporous sheet materials.

b. Primary Alternative Exemptions for Uses of TCE That Are Critical or Essential

i. Primary Alternative 15-Year Exemption for Industrial and Commercial Use as a Processing Aid for Battery Separator Manufacturing (Lead-Acid and Lithium Battery Separators)

As part of the primary alternative regulatory action, based on the analysis in Unit V.A.3.a.i., EPA would grant a 15-year exemption from the prohibition on TCE for the industrial and commercial use as a processing aid for battery separator manufacturing. The primary alternative regulatory action differs from the proposed regulatory action in that it extends the compliance date for the exemption by five years, allowing a longer timeframe for stakeholders to continue the use until its prohibition, in recognition of the challenge to transition to an alternative chemical or process, further discussed in Unit V.B. The conditions for the exemption under the primary alternative regulatory action would be: (1) The use of TCE would be limited to use as a processing aid for battery separator manufacturing to supply the essential battery components to continue to support the national economy, national security, and critical infrastructure; (2) this specific industrial and commercial use of TCE as a processing aid must be conducted at industrial facilities already using TCE to supply the lithium ion or lead acid battery components; and (3) Industry stakeholders who use TCE as a processing aid for battery separator manufacturing and entities that manufacture (including import), process, and distribute in commerce TCE to be available as a processing aid must comply with the WCPP requirements described in Unit V.B.2., including meeting the ECEL to the extent possible until the prohibition compliance date.

ii. Primary Alternative 30-Year Exemption for Industrial and Commercial Use of TCE in Laboratory Use for Essential Laboratory Activities

As part of the primary alternative regulatory action, based on the analysis discussed in Unit V.A.3.a.iii., there would be a 30-year exemption from the prohibition on TCE in other miscellaneous industrial and commercial use of TCE in laboratory use for essential laboratory activities. The primary alternative regulatory action differs from the proposed regulatory action in that it shortens the compliance date by 20 years. The conditions for the primary alternative proposed exemption are: (1) The use of TCE is limited to uses in an industrial or commercial laboratory for essential laboratory activities, including chemical analysis, chemical synthesis, extracting and purifying other chemicals, dissolving other substances, with the exclusion of laboratory testing for asphalt; and (2) Stakeholders who use TCE in laboratory settings and stakeholders who manufacture (including import), process, and distribute in commerce TCE to be available as a laboratory chemical must comply with the WCPP requirements described in Unit V.B.2., including meeting the ECEL to the extent possible until the prohibition compliance date.

iii. Primary Alternative Seven-Year Exemption for Industrial and Commercial Use of TCE in Batch Vapor Degreasing for Essential Aerospace Parts and Components and Narrow Tubing Used in Medical Devices

For the reasons discussed in this unit, EPA would grant a seven-year exemption from the prohibition as part of the primary alternative regulatory action for the industrial and commercial use of TCE in batch vapor degreasing for essential aerospace parts and components and narrow tubing used in medical devices. While one requester suggested that an appropriate length of time for an exemption would be 10 years, and another did not specify, EPA notes that a prohibition on vapor degreasing with TCE for all uses was proposed in 2017 (Ref. 68). While that proposal was withdrawn pending the completion of a risk evaluation for TCE under amended TSCA, which included the evaluation of the vapor degreasing conditions of use, EPA expects that certain stakeholders have made significant progress on substitutes since then in anticipation of similar restrictions on TCE under amended TSCA. For instance, EPA is aware that many users have transitioned to a substitute for TCE where possible or are planning for technologically feasible adjustments (Refs. 32, 43).

The conditions for the exemption would be: (1) TCE could only be used for batch vapor degreasing of aerospace parts or components (including rayon fabric) where other alternatives present technical feasibility or cleaning performance challenges to meet specifications from other Federal agencies or other long-standing design specifications that are included in existing contracts, or for batch vapor degreasing of narrow tubing used in medical devices; and (2) Industry stakeholders who use TCE for batch vapor degreasing of aerospace parts or components or narrow tubing used in medical devices and entities that manufacture (including import), process, and distribute in commerce TCE to be available for TCE vapor degreasing would comply with the WCPP requirements described in Unit V.B.2. to the extent possible until the prohibition compliance date. EPA requests comments on all aspects of the exemption request and the exemption in the primary alternative regulatory action from the prohibition on use of TCE in batch vapor degreasing, including whether compliance with the WCPP should also be required during the period of the exemption. Additionally, EPA is soliciting comment on whether

it should specify the type of batch vapor degreasing operation, such as open-top or closed loop batch vapor degreasing, that would be exempt from prohibition as part of the primary alternative regulatory action for the industrial and commercial use of TCE in batch vapor degreasing for essential aerospace parts and components and narrow tubing for medical devices. EPA also requests comment whether it should consider different exemption timeframes for different types of vapor degreasing operations.

iv. Primary Alternative 15-Year TSCA Section 6(G)(1)(A) Exemption for Industrial and Commercial Use of TCE as a Processing Aid for Specialty Polymeric Microporous Sheet Materials

As part of the primary alternative regulatory action, based on the analysis in Unit V.A.3.c., EPA would grant a 15-year exemption from the prohibition on TCE for the industrial and commercial use as a processing aid for specialty polymeric microporous sheet material manufacturing. Under the primary alternative regulatory action, in accordance with TSCA section 6(g)(4), the conditions for the exemption that EPA believes are necessary to protect health and the environment would be: (1) The use of TCE would be limited to use as a processing aid for the manufacturing of specialty polymeric microporous sheet materials; and (2) Stakeholders who use TCE as a processing aid for the manufacturing of specialty polymeric microporous sheet materials and entities that manufacture (including import), process, and distribute in commerce TCE to be available as a processing aid must comply with the WCPP requirements described in Unit V.B.2., including meeting the ECEL to the extent possible until the prohibition compliance date. EPA requests comments on all aspects of the exemption in the primary alternative regulatory action from the prohibition on industrial and commercial use of TCE as a processing aid, specific to the manufacturing of specialty microporous sheet materials, including whether compliance with the WCPP should also be required during the period of the exemption. EPA also requests comment on whether 15 years would be an appropriate timeframe for a TSCA section 6(g)(1)(A) exemption for this use.

*C. Overview of Conditions of Use and Proposed Regulatory Action and Primary Alternative Regulatory Action*

Table 2 is a side-by-side depiction of the proposed regulatory action with the primary alternative action for each condition of use identified as driving the unreasonable risk (Ref. 2). The purpose of this table is to succinctly convey to the public the major differences between the proposed regulatory action and the primary alternative regulatory action; as such the actions in each column are truncated and do not necessarily reflect all the details of the proposed and alternative regulatory action, including differences in timeframes. EPA notes that ''prohibit + WCPP'' listed in the table indicates that a condition of use would be prohibited, but in the time before the prohibition goes into effect, there would be a WCPP. For the proposed action, the WCPP would include an ECEL of 0.0011 ppm based on the fetal cardiac defects endpoint so that the developing fetus is best protected (see Unit V.A.), especially for the sensitive PESS group of older pregnant workers and ONUs (the group identified as most susceptible to fetal cardiac defects), while under the primary alternative regulatory action, the WCPP would include an ECEL of 0.0040 ppm based on the immunotoxicity endpoint (see Unit V.B.). The rationale for these differences is detailed in Unit VI.A.1.

The proposed and alternative regulatory actions are described more fully in Units V.A. and B.

TABLE 2—OVERVIEW OF PROPOSED REGULATORY ACTION AND ALTERNATIVE REGULATORY ACTION BY CONDITIONS OF USE

| Condition of use | Action | |
|---|---|---|
| | Proposed regulatory action [1] | Primary alternative action |
| Manufacturing: domestic manufacture | Prohibit + WCPP includes an ECEL of 0.0011 ppm for inhalation exposures to TCE as an eight-hour TWA based on developmental toxicity. | Prohibit + WCPP includes an ECEL of 0.0040 ppm for inhalation exposures to TCE as an eight-hour TWA based on immunotoxicity. |
| Manufacturing: import | Prohibit + WCPP includes an ECEL of 0.0011 ppm for inhalation exposures to TCE as an eight-hour TWA based on developmental toxicity. | Prohibit + WCPP includes an ECEL of 0.0040 ppm for inhalation exposures to TCE as an eight-hour TWA based on immunotoxicity. |
| Processing: processing as a reactant/intermediate. | Prohibit; includes a phaseout of TCE for processing as an intermediate for the manufacture of HFC–134a + WCPP includes an ECEL of 0.0011 ppm for inhalation exposures to TCE as an eight-hour TWA based on developmental toxicity. | Prohibit; includes a phaseout of TCE for processing as an intermediate for the manufacture of HFC–134a + WCPP includes an ECEL of 0.0040 ppm for inhalation exposures to TCE as an eight-hour TWA based on immunotoxicity. |
| Processing: incorporation into a formulation, mixture, or reaction product. | Prohibit + WCPP includes an ECEL of 0.0011 ppm for inhalation exposures to TCE as an eight-hour TWA based on developmental toxicity. | Prohibit + WCPP includes an ECEL of 0.0040 ppm for inhalation exposures to TCE as an eight-hour TWA based on immunotoxicity. |
| Processing: incorporation into articles | Prohibit | Prohibit. |
| Processing: repackaging | Prohibit + WCPP includes an ECEL of 0.0011 ppm for inhalation exposures to TCE as an eight-hour TWA based on developmental toxicity. | Prohibit + WCPP includes an ECEL of 0.0040 ppm for inhalation exposures to TCE as an eight-hour TWA based on immunotoxicity. |
| Processing: recycling | Prohibit + WCPP includes an ECEL of 0.0011 ppm for inhalation exposures to TCE as an eight-hour TWA based on developmental toxicity. | Prohibit + WCPP includes an ECEL of 0.0040 ppm for inhalation exposures to TCE as an eight-hour TWA based on immunotoxicity. |

TABLE 2—OVERVIEW OF PROPOSED REGULATORY ACTION AND ALTERNATIVE REGULATORY ACTION BY CONDITIONS OF USE—Continued

| Condition of use | Action | |
|---|---|---|
| | Proposed regulatory action [1] | Primary alternative action |
| Industrial and commercial use as a solvent for open-top batch vapor degreasing. | Prohibit | Prohibit; includes a TSCA section 6(g) exemption for the industrial and commercial use as solvent for open-top batch vapor degreasing for essential aerospace use + WCPP includes an ECEL of 0.0040 ppm for inhalation exposures to TCE as an eight-hour TWA based on immunotoxicity. |
| Industrial and commercial use as a solvent for closed-loop batch vapor degreasing. | Prohibit; includes a phaseout of TCE for industrial and commercial use as a solvent for closed loop batch vapor degreasing for rayon fabric scouring for end use rocket booster nozzle production by Federal Agencies and their contractors and a TSCA section 6(g) exemption for industrial and commercial use as a solvent for closed loop batch vapor degreasing necessary for human-rated rocket engine cleaning by NASA and its contractors+ WCPP for one sub-use includes an ECEL of 0.0011 ppm for inhalation exposures to TCE as an eight-hour TWA based on developmental toxicity. | Prohibit; includes a TSCA section 6(g) exemption for the industrial and commercial use as solvent for closed-loop batch vapor degreasing for essential aerospace use and medical tubing + WCPP includes an ECEL of 0.0040 ppm for inhalation exposures to TCE as an eight-hour TWA based on immunotoxicity. |
| Industrial and commercial use as a solvent for in-line conveyorized vapor degreasing. | Prohibit | Prohibit. |
| Industrial and commercial use as a solvent for in-line web cleaner vapor degreasing. | Prohibit | Prohibit. |
| Industrial and commercial use as a solvent for cold cleaning. | Prohibit | Prohibit. |
| Industrial and commercial use as a solvent for aerosol spray degreaser/cleaner and mold release. | Prohibit | Prohibit. |
| Industrial and commercial use as a lubricant and grease in tap and die fluid. | Prohibit | Prohibit. |
| Industrial and commercial use as a lubricant and grease in penetrating lubricant. | Prohibit | Prohibit. |
| Industrial and commercial use as an adhesive and sealant in solvent-based adhesives and sealants; tire repair cement/sealer; mirror edge sealant. | Prohibit | Prohibit. |
| Industrial and commercial use as a functional fluid in heat exchange fluid. | Prohibit | Prohibit. |
| Industrial and commercial use in paints and coatings as a diluent in solvent-based paints and coatings. | Prohibit | Prohibit. |
| Industrial and commercial use in cleaning and furniture care products in carpet cleaner and wipe cleaning. | Prohibit | Prohibit. |
| Industrial and commercial use in laundry and dishwashing products in spot remover. | Prohibit | Prohibit. |
| Industrial and commercial use in arts, crafts, and hobby materials in fixatives and finishing spray coatings. | Prohibit | Prohibit. |
| Industrial and commercial use in corrosion inhibitors and anti-scaling agents. | Prohibit | Prohibit. |
| Industrial and commercial use as a processing aid for battery separator manufacturing and for the manufacturing of specialty polymeric microporous sheet materials; process solvent used in polymer fabric spinning, fluoroelastomer manufacture and Alcantara manufacture; extraction solvent used in caprolactam manufacture; precipitant used in beta-cyclodextrin manufacture. | Prohibit; includes a TSCA section 6(g) exemption for the industrial and commercial use as a processing aid for battery separator manufacturing + WCPP includes an ECEL of 0.0011 ppm for inhalation exposures to TCE as an eight-hour TWA based on developmental toxicity. | Prohibit; includes TSCA section 6(g) exemptions for the industrial and commercial use as a processing aid for battery separator manufacturing and for the manufacturing of specialty polymeric microporous sheet materials + WCPP includes an ECEL of 0.0040 ppm for inhalation exposures to TCE as an eight-hour TWA based on immunotoxicity. |
| Industrial and commercial use as ink, toner and colorant products in toner aid. | Prohibit | Prohibit. |
| Industrial and commercial use in automotive care products in brake parts cleaner. | Prohibit | Prohibit. |

TABLE 2—OVERVIEW OF PROPOSED REGULATORY ACTION AND ALTERNATIVE REGULATORY ACTION BY CONDITIONS OF USE—Continued

| Condition of use | Action | |
|---|---|---|
| | Proposed regulatory action [1] | Primary alternative action |
| Industrial and commercial use in apparel and footwear care products in shoe polish. | Prohibit | Prohibit. |
| Industrial and commercial use in hoof polish; gun scrubber; pepper spray; other miscellaneous industrial and commercial uses. | Prohibit; includes a TSCA section 6(g) exemption for the industrial and commercial use as a laboratory chemical for essential laboratory activities and some research and development activities + WCPP includes an ECEL of 0.0011 ppm for inhalation exposures to TCE as an eight-hour TWA based on developmental toxicity. | Prohibit; includes a TSCA section 6(g) exemption for the industrial and commercial use as a laboratory chemical for essential laboratory activities + WCPP includes an ECEL of 0.0040 ppm for inhalation exposures to TCE as an eight-hour TWA based on immunotoxicity. |
| Consumer use as a solvent in brake and parts cleaners. | Prohibit [2] | Prohibit.[2] |
| Consumer use as a solvent in aerosol electronic degreaser/cleaner. | Prohibit [2] | Prohibit.[2] |
| Consumer use as a solvent in liquid electronic degreaser/cleaner. | Prohibit [2] | Prohibit.[2] |
| Consumer use as a solvent in aerosol spray degreaser/cleaner. | Prohibit [2] | Prohibit.[2] |
| Consumer use as a solvent in liquid degreaser/cleaner. | Prohibit [2] | Prohibit.[2] |
| Consumer use as a solvent in aerosol gun scrubber. | Prohibit [2] | Prohibit.[2] |
| Consumer use as a solvent in liquid gun scrubber. | Prohibit [2] | Prohibit.[2] |
| Consumer use as a solvent in mold release | Prohibit [2] | Prohibit.[2] |
| Consumer use as a solvent in aerosol tire cleaner. | Prohibit [2] | Prohibit.[2] |
| Consumer use as a solvent in liquid tire cleaner | Prohibit [2] | Prohibit.[2] |
| Consumer use as a lubricant and grease in tap and die fluid. | Prohibit [2] | Prohibit.[2] |
| Consumer use as a lubricant and grease in penetrating lubricant. | Prohibit [2] | Prohibit.[2] |
| Consumer use as an adhesive and sealant in solvent-based adhesives and sealants. | Prohibit [2] | Prohibit.[2] |
| Consumer use as an adhesive and sealant in mirror edge sealant. | Prohibit [2] | Prohibit.[2] |
| Consumer use as an adhesive and sealant in tire repair cement/sealer. | Prohibit [2] | Prohibit.[2] |
| Consumer use as a cleaning and furniture care product in carpet cleaner. | Prohibit [2] | Prohibit.[2] |
| Consumer use as a cleaning and furniture care product in aerosol spot remover. | Prohibit [2] | Prohibit.[2] |
| Consumer use as a cleaning and furniture care product in liquid spot remover. | Prohibit [2] | Prohibit.[2] |
| Consumer use in arts, crafts, and hobby materials in fixative and finishing spray coatings. | Prohibit [2] | Prohibit.[2] |
| Consumer use in apparel and footwear products in shoe polish. | Prohibit [2] | Prohibit.[2] |
| Consumer use in fabric spray | Prohibit [2] | Prohibit.[2] |
| Consumer use in film cleaner | Prohibit [2] | Prohibit.[2] |
| Consumer use in hoof polish | Prohibit [2] | Prohibit.[2] |
| Consumer use in toner aid | Prohibit [2] | Prohibit.[2] |
| Disposal to industrial pre-treatment, industrial treatment, or publicly owned treatment works. | Prohibit the disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works; with a TSCA section 6(g) exemption for the disposal of TCE from cleanup projects. | Prohibit. |

[1] Does not include exemptions under TSCA section 6(g); for certain industrial and commercial uses of TCE for DoD naval vessels and their systems, and in the maintenance, fabrication, and sustainment for and of such vessels and systems + WCPP, which includes an ECEL of 0.0011 ppm for inhalation exposures to TCE as an eight-hour TWA based on developmental toxicity; or for the emergency industrial and commercial use of TCE in furtherance of the NASA mission for specific conditions that are critical or essential and for which no technically and economically feasible safer alternative is available + WCPP, which includes an ECEL of 0.0011 ppm for inhalation exposures to TCE as an eight-hour TWA based on developmental toxicity.

[2] Prohibit manufacture, processing, and distribution in commerce for the consumer use.

## VI. Rationale for the Proposed Regulatory Action and Primary Alternative Regulatory Action

This unit describes how the considerations described in Unit III.B.3. were applied when selecting among the TSCA section 6(a) requirements to arrive at the proposed and primary alternative regulatory actions described in Unit V.

### *A. Consideration of Risk Management Requirements Available Under TSCA Section 6(a)*

1. Proposed Regulatory Action

a. Prohibition

EPA considered a prohibition as a regulatory option and is proposing it for all manufacturing (including import), processing, distribution in commerce, use, and certain types of disposal of TCE (Unit V.A.). EPA proposes that prohibition is necessary to address the unreasonable risk for all occupational conditions of use after taking into consideration other combinations of controls such as a non-prescriptive WCPP or prescriptive controls (*i.e.,* engineering controls, administrative controls, and PPE). As described in Unit V.A., EPA's bases for the need for this regulatory approach are similar to those for the Agency's determination of unreasonable risk, and include severity of the hazard, exposed populations, magnitude of risk, and uncertainties (Ref. 2). Throughout this proposed rule, EPA has described the severity of the hazard of TCE (including immunotoxicity, developmental, and cancer risks), based on the 2020 Risk Evaluation for TCE, as well as the populations exposed to the 52 conditions of use that drive the unreasonable risk, which include numerous workers, ONUs, consumers, and bystanders, including PESS such as workers of reproductive age (in particular, older pregnant women).

The significance of the magnitude of exposures for TCE is highlighted when considering the margins of exposure (MOEs, or the health point of departure for an endpoint divided by the exposure concentration) in the risk evaluation that estimate non-cancer risk for acute and chronic exposure. Estimated MOEs are compared to a benchmark, described in more detail in the risk evaluation, as part of the unreasonable risk determination (Refs. 1, 2). An MOE lower than the benchmark supports a determination of unreasonable risk of injury to health, based on noncancer effects. As an example, for commercial use of TCE in open top vapor degreasing, the chronic MOE for fetal cardiac defects is 0.0006, which is several orders of magnitude lower than then benchmark of 10. Even with engineering controls, the only way to reduce exposures more than 1,000-fold would be PPE with an APF of 10,000 (Ref. 1). This level of APF would require workers to constantly wear a full-face self-contained breathing apparatus (SCBA) in pressure demand mode or other positive pressure mode, which is considered unsustainable for the long-term and the least preferred approach to worker protection in the hierarchy of controls. There are many documented limitations to successful implementation of respirators with an APF of 10,000, including difficulties in fit and use rendering them ineffective in actual application, preventing the assurance of consistent and reliable protection, regardless of the assigned capabilities of the respirator (Refs. 69, 70) (63 FR 1152, January 8, 1998). EPA requests comments on subsections of conditions of use, which by nature of their infrequent occurrence, could meet the ECEL without having their employees wear high APF levels of PPE on a daily basis. Given that the magnitude of risk from TCE is so high, and that the extremely high level of PPE would be an ineffective long-term way of addressing that risk along with information provided by stakeholders, including during consultations (Refs. 70, 31), EPA has significant uncertainty that any measures short of prohibition would be sufficient to address the unreasonable risk. Therefore, EPA proposes that prohibition is the preferred option to ultimately address unreasonable risk. EPA believes that the extremely low ppm level of the ECEL, while fully addressing unreasonable risk, will be infeasible for industry to reliably meet due to the need for a combination of engineering, administrative controls, and full-face, self-contained, air-supplied respirators. As such, the only way to protect human health consistently, reliably, and continually from unreasonable risk would be to prohibit TCE.

Ultimately, a prohibition would result in elimination of unreasonable risk from TCE, rather than allowing TCE use to continue in perpetuity, which would necessitate burdensome requirements to achieve exposure reductions to implement a technically challenging long-term program to meet a very low exposure limit. Recognizing that longer compliance timeframes and TSCA section 6(g) time-limited exemptions would nevertheless be necessary for certain critical uses to continue for a period of time as, described previously in Units V.A.1.d., V.A.1.e., and V.A.1.f., it is necessary to protect workers, including PESS, such as older pregnant workers and ONUs (the group identified as most susceptible to fetal cardiac defects). Therefore, as described in Unit IV., EPA is proposing the WCPP ECEL of 0.0011 ppm, based on the fetal cardiac defects endpoint, so that the developing fetus is best protected. EPA's primary alternative regulatory option bases the WCPP ECEL for TCE on the immunotoxicity endpoint. Because it would not be as protective for the subset of PESS that include older pregnant workers and ONUs as specific under TSCA section 6(b), the ECEL based on immunotoxicity was not put forth as the proposed ECEL. In other words, under the immunotoxicity ECEL of 0.0040 ppm, workers and ONUs would be protected from immunosuppression resulting from an acute (eight-hour) exposure, and from an excess risk of cancer resulting from lifetime exposure, as well as other adverse health effects such as reproductive toxicity, liver toxicity, kidney toxicity, and neurotoxicity. When the ECEL of 0.0011 ppm based on fetal cardiac defects is used, EPA expects that a fetus would be protected from the effects of maternal exposure by workers and ONUs, in addition to the protections noted previously. Given this gap in protectiveness, the immunotoxicity ECEL of 0.0040 ppm is being considered as the alternative regulatory option rather than the proposed approach. As noted in Unit V.A.2., EPA has significant uncertainty about the extent to which some members of the regulated community could measure or reliably meet either the ECEL of 0.0011 ppm (in the proposed WCPP) or the ECEL of 0.0040 ppm (in the primary alternative regulatory action), which contributes to EPA's proposal that prohibition is the best long-term risk management option for TCE.

EPA understands that additional time may be necessary for certain processing and industrial and commercial conditions of use to achieve a full prohibition, including the need for upstream manufacturing, processing, and distribution in commerce for those uses to continue to ensure availability for the supply chain. In particular, EPA recognizes that processing TCE as a reactant/intermediate often takes place in unique closed-systems, and facilities processing TCE may need additional time to transition to adjust the physical plant design to accommodate an alternative manufacturing process or chemical substance and avoid significantly disrupting the supply

chain. For example, EPA understands that the manufacturing (including import) and processing of TCE as an intermediate for the manufacture of HFC–134a is expected to phase down (absent a TSCA prohibition) over time as users move to more climate-friendly alternatives under the requirements of the AIM Act. In this instance, EPA is proposing requirements as part of a WCPP to reduce the worker exposures to TCE until the prohibition compliance date. In addition, EPA recognizes that industrial and commercial use of TCE as a solvent for closed-loop batch vapor degreasing for rayon fabric scouring for end use in rocket booster nozzle production by Federal agencies and their contractors is a highly specific use with a uniquely long qualification process for alternatives. In the production of booster rocket nozzles, TCE is used in vapor degreasing as a solvent in rayon fabric sourcing, an intensive cleaning process to remove contaminants. This rayon fabric is then carbonized as part of an ablative process in the nozzle production and used to line the inside of the nozzles on booster rockets (Ref. 43). Cleaning is a critical step of this process; if contaminants are not sufficiently removed in the scouring stage, the fabric will be degraded during the chemical reaction that occurs during carbonization, which could result in failure of the nozzle during a launch and catastrophic effects for the rockets.

For this use, NASA has presented information to EPA on the necessity of additional time to transition to an alternative, given that 8 rocket launches are planned using booster sets with a component produced with TCE (Ref. 43). These launches could not occur if prohibition occurred on a shorter timeframe. In particular, given the end use of the components in human-rated spaceflight, EPA recognizes that NASA must conduct an array of tests to qualify an alternative solvent to TCE, including a variety of booster rocket function tests culminating in a full-scale static motor test. Even if an alternative were identified and qualified through a successful testing cycle, additional time would be needed for updates to workflows and production of new booster nozzles (Ref. 43). As such, EPA has provided additional time for the industrial and commercial use as a solvent for closed-loop batch vapor degreasing for rayon fabric scouring for end use in rocket booster nozzle production by Federal agencies and their contractors. EPA recognizes that other Federal agencies may also rely on rayon fabric scouring for their rocket booster nozzle production and so proposes that the phaseout for this subset of the industrial and commercial use of TCE as a solvent in closed-loop batch vapor degreasing apply to Federal agencies generally and their contractors. As a condition for the phaseout, EPA has specified that a final pre-launch test of rocket booster nozzles without using TCE must be conducted within 5 years, with a full prohibition in 10 years on the use of TCE in scouring rayon fabric for end use in nozzles in rocket boosters. For this phaseout period, EPA is proposing requirements as part of a WCPP to reduce the worker exposures to TCE until the prohibition compliance date, and Unit V.A.2. explains that the establishment of a WCPP is intended to allow more flexibility to regulated entities than requiring specific prescriptive controls. Similarly, EPA is proposing the WCPP to reduce to the extent possible the unreasonable risk until the prohibition compliance date for certain conditions of use that would be permitted to continue for longer than a year after publication of the final rule, as discussed in Unit V.A.

Additionally, prohibition is the preferred option for occupational conditions of use where reasonably available information suggests minimal ongoing use or when feasible safer alternatives are reasonably available. As described in this unit, EPA is highly uncertain as to whether users could comply with the requirements of a TCE WCPP, and EPA is also concerned with the severity of the risks of TCE. EPA notes the prevalence of alternative processes and products (Unit VI.B.). In some cases, reasonably available information indicating a use is no longer ongoing (Refs. 71, 3), has led EPA to propose more immediate prohibitions for most industrial and commercial uses of TCE, including the upstream manufacturing, processing, and distribution in commerce for those uses. EPA requests public comment on the rationale for proposing prohibitions as the preferred risk management approach. In addition, EPA requests comment regarding the number of businesses and other entities that could potentially close as well as associated costs with a prohibition of TCE for the industrial and commercial conditions of use identified in Unit V.A.1.

TSCA section 6(a)(2) provides EPA with the authority to prohibit or otherwise restrict the manufacture (including import), processing, or distribution in commerce of a substance or mixture ''for a particular use'' to ensure that a chemical substance no longer presents unreasonable risk. For this rulemaking, EPA proposes that ''for a particular use'' include consumer use, which encompasses all known, intended, and reasonably foreseen consumer uses for TCE (Ref. 1). Given the severity and ubiquitous nature of the risks identified in the 2020 Risk Evaluation for TCE for processing of TCE into formulation as well as for all but one consumer use (pepper spray) and, noting that those conditions of use encompass all known, intended, and reasonably foreseen consumer use, EPA proposes that prohibiting manufacture (including importing), processing, and distribution in commerce of TCE for consumer use is reasonable and necessary to address the unreasonable risk from TCE driven by manufacturing (including importing) and processing TCE into formulation (the upstream conditions of use for products intended for consumer use), and that this proposed approach will also address the unreasonable risk to consumers and bystanders. Furthermore, amongst the broad prohibition of TCE, EPA considered and acknowledges the likely future unavailability of TCE for the consumer use of pepper spray, and EPA expects the prohibition on industrial and commercial use of TCE in pepper spray, as well as the upstream prohibition on manufacturing, processing, and distribution of TCE for commercial or consumer uses, would result in no TCE-containing pepper spray being produced for consumer use (Ref. 71).

Details of the proposed prohibitions are described in more detail in Unit V.A.

b. Workplace Chemical Protection Program (WCPP)

*i. Overall.* Prohibition is the preferred option for all occupational COUs, because significant uncertainty exists relative to any sector's ability to comply with a notably low exposure limit for TCE, particularly given the magnitude of exposure for many conditions of use (see Unit V.A.1.). A more immediate prohibition is the preferred option for occupational conditions of use where greater uncertainty exists relative to a sector's ability to comply with provisions of a WCPP, in particular a very low ECEL, as well as additional requirements that would support implementation of these restrictions (described in Unit V.A.2.). The 8-hour TWA ECEL of 0.0011 ppm for TCE that EPA is proposing, based on the developmental toxicity endpoint, is significantly lower than the OSHA PEL of 100 ppm, and there is a high degree of uncertainty as to whether users under the conditions of use in any sector would be able to comply with such a level and, thus, whether the

unreasonable risk would be addressed. However, to address, to the extent possible, the unreasonable risk during the time period before a prohibition would become effective, EPA is proposing a WCPP until the prohibition compliance date. The WCPP would include a combination of restrictions to reduce the unreasonable risk from TCE driven by inhalation and dermal exposures in the workplace until the prohibition compliance date and is proposed only for certain conditions of use. EPA requests public comment related to the ability of regulated entities to meet the ECEL of 0.0011 ppm, and whether EPA should prescribe mandatory restrictions and PPE levels.

*ii. Existing Chemical Exposure Limit.* One requirement considered by EPA to include in a TCE WCPP to reduce the unreasonable risk driven by inhalation exposures to TCE for occupational conditions of use was establishing an ECEL and related implementation measures, such as exposure monitoring, until the prohibition compliance date. As described in Unit V.A., the TCE WCPP would be non-prescriptive, in the sense that regulated entities would not be required to use specific controls prescribed by EPA to achieve the exposure concentration limit. Rather, it would be a performance-based exposure limit that would enable owners or operators to determine how to most effectively put measures in place to reduce the exposure to TCE based on conditions at their workplace, consistent with the hierarchy of controls.

A central component of the TCE WCPP is the exposure limit. Exposures remaining at or below the ECEL would address any unreasonable risk of injury to health driven by inhalation exposures for occupational conditions of use. In the case of TCE, EPA has calculated the ECEL to be 0.0011 parts per million (ppm) (0.0059 $mg/m^3$) for inhalation exposures as an 8-hour TWA in workplace settings, based on the most sensitive acute non-cancer occupational HEC for fetal cardiac defects (Ref. 13). The differences between the ECEL and the OSHA PEL are discussed in more detail in Unit II.C.1.b. EPA chose the acute non-cancer developmental toxicity endpoint for TCE as the basis for the exposure limit for the proposed regulatory action as it is the most sensitive endpoint and, therefore, would be protective of both acute and chronic non-cancer as well as cancer inhalation endpoints over the course of a working day and lifetime, including for potentially exposed or susceptible subpopulations (additional explanation is in Unit VI.A.). However, as discussed in Unit V.A.2., EPA expects that detection of and adherence to extremely low-ppm levels of TCE may present challenges to the regulated community (Ref. 45), and so EPA is proposing the WCPP until the prohibition compliance date. EPA emphasizes the time limited nature of this WCPP, due to the likely need for reliance on air-supplied respirators of APF 1,000 or 10,000 that would be needed to address the unreasonable risk, even when engineering and administrative controls are put into place. More details are provided later in this unit.

*iii. Dermal protection.* As part of the WCPP, EPA is proposing to require use and provision of chemically resistant gloves by potentially exposed persons in combination with specific activity training (*e.g.,* appropriate procedures for glove removal, replacement, and disposal) for tasks where dermal exposure can be expected to occur. However, EPA understands these tasks are expected to occur for conditions of use, such as processing TCE as a reactant, where closed system processes are already in place to minimize exposure to TCE. EPA is not proposing to require owners or operators to document consideration of the hierarchy of controls for dermal exposures to TCE because EPA intends to prohibit all uses of TCE, EPA is proposing relatively rapid compliance dates for the prohibitions for most uses of TCE, and dermal PPE programs are somewhat more straightforward to implement than respiratory PPE programs. In proposing dermal requirements, EPA took into consideration the volatile nature of TCE because the dermal absorption of TCE depends on the type and duration of exposure. For the conditions of use that would be subject to the WCPP, EPA also considered the unique, closed system processes of each use which aid to reduce dermal exposure.

*iv. WCPP considerations.* EPA is proposing a WCPP for several conditions of use of TCE to reduce the unreasonable risk to the extent possible during the time period before a prohibition becomes effective, described in Unit V.A.2.

In deciding whether an ECEL and related required measures would appropriately reduce the unreasonable risk driven by occupational inhalation exposures, EPA considered factors related to work activities that may make it difficult to comply with an ECEL, particularly at the low air concentration level EPA has identified. Once EPA identified the appropriate risk-based inhalation limit to reduce identified unreasonable risk, EPA carefully considered the appropriateness of such an exposure control program for each occupational condition of use of TCE, in the context of the unreasonable risk. Examples include conditions of use with work activities that may take place in the field, making it challenging to establish a regulated area and conduct monitoring; work activities that may take place in open systems that require manual contact with the chemical substance; work activities that may take place in small, enclosed spaces, creating challenges for implementing engineering controls or using respiratory PPE; work activities that require a high range of motion or for some other reason create challenges for the implementation of respiratory PPE; and the type of PPE that would be needed under the TCE WCPP to meet the ECEL in the absence of, or in addition to, other feasible exposure controls, based on analysis in the 2020 Risk Evaluation for TCE describing expected exposures with and without use of PPE.

EPA also considered the feasibility of exposure reduction sufficient to reduce the unreasonable risk, including in facilities currently complying with the OSHA PEL for TCE or implementing other recommended OELs such as the ACGIH TLV. While EPA acknowledges the regulated community's expected familiarity with OSHA PELs generally, as well as facilities' past and ongoing actions to implement the TCE PEL, the value of EPA's exposure limit is almost five orders of magnitude lower than the OSHA PEL. (The differences between the ECEL and the OSHA PEL are discussed in more detail in Unit II.C.4.) This creates a significant degree of uncertainty as to whether facilities engaging in most conditions of use could implement engineering or administrative controls to reduce exposures in a manner aligned with the hierarchy of controls to meet the ECEL (and associated action level) and whether they could do so without relying primarily on the use of PPE (which is the least preferred option in the hierarchy of controls) to supplement exposure reduction efforts.

EPA understands that this uncertainty extends to the feasibility of respirators as a long-term risk management practice as well, since the complexity and burden of wearing respirators increases with increasing APF. Although respirators, specifically SCBAs (APF 10,000), could reduce exposures to levels that protect against non-cancer and cancer risks, not all workers may be able to wear respirators. Individuals with impaired lung function due to asthma, emphysema, or chronic obstructive pulmonary disease, for

example, may be physically unable to wear a respirator. OSHA requires that a determination regarding the ability to use a respirator be made by a physician or other licensed health-care professional, and annual fit testing is required for tight-fitting, full-face piece respirators to provide the required protection. Individuals with facial hair, such as beards or sideburns that interfere with a proper face-to-respirator seal, cannot wear tight fitting respirators. In addition, respirators may also present communication problems, vision problems, worker fatigue, and reduced work efficiency (63 FR 1152, January 8, 1998). According to OSHA, ''improperly selected respirators may afford no protection at all (for example, use of a dust mask against airborne vapors), may be so uncomfortable as to be intolerable to the wearer, or may hinder vision, communication, hearing, or movement and thus pose a risk to the wearer's safety or health.'' (63 FR 1189 through 1190). Furthermore, depending on the air concentrations and proximity to the regulated area, other employees in the area may also need to wear respiratory PPE. EPA understands, based on reasonably available information, that occupational exposures tend to fluctuate depending on the task being performed and the frequency of the task, which could create challenges for reliably effective implementation of respiratory PPE (Refs. 70, 72, 35).

EPA reviewed reasonably available information, including monitoring data, and information related to considerations described previously in this unit. EPA expects attempts to implement the WCPP to include increased monitoring and that industry would likely need to exclusively rely on PPE when aiming to reach the ECEL, including the use of high APF respirators, such as fit-tested, air-supplied respirators of APF 1,000 or APF 10,000. Given the high APF of respirators that are likely needed to reach the ECEL, EPA recognizes that this equipment and its programmatic maintenance could be highly burdensome. EPA believes this could create implementation challenges and is not a long-term, sustainable use of the WCPP. The WCPP would be in place for a relatively short period of time (less than 10 years for the vast majority of production value) until the eventual prohibition, because of the likely need for such extensive PPE. The ultimate goal for TCE is prohibition given the difficulty of maintaining a WCPP long term.

One of the conditions of use for which EPA is proposing a WCPP until the prohibition goes into effect is processing TCE as a reactant/intermediate. The majority of the annual production volume of TCE processed as an intermediate under this condition of use goes almost entirely toward the manufacture of one HFC, HFC–134a (Refs. 3, 70, 73). Monitoring information submitted by facilities processing TCE as an intermediate to manufacture HFC–134a suggests that TCE is largely confined to the process reactors, which require infrequent loading and unloading activities taking place approximately 20 times per year and resulting in low-ppm TCE exposure levels (Ref. 70). The information submitted also highlights that TCE is consumed and transformed during the reaction process (Ref. 70). Additionally, HFC–134a is one of the regulated substances that are subject to a phasedown under the AIM Act, and as discussed in Unit I.D., EPA understands that HFC–134a has a lower GWP compared to other refrigerants, which will likely continue to be used to facilitate the transition from certain other HFCs pursuant to the phasedown under the AIM Act. Providing a longer phaseout under TSCA for processing TCE as an intermediate for the manufacture of HFC–134a, while subject to a WCPP, is consistent with the agency's efforts to address climate-damaging HFCs, such as HFC–134a, under the AIM Act. EPA is seeking comment on the actions that manufacturers who process TCE for the production of HFC–134a would take as a result of this proposed phaseout and whether this would motivate a decision to cease manufacture earlier than they would otherwise under the AIM Act phase-down. For the remaining volume of TCE processed as a reactant/intermediate for chemical synthesis other than manufacturing HFC–134a, additional time may be necessary to reconfigure or otherwise adjust the physical plant to accommodate an alternative manufacturing process, so a WCPP is also associated with the prohibition of other processing as a reactant/intermediate uses; however, the phaseout does not apply to the other uses for which EPA is proposing a more immediate prohibition discussed in Unit V.A.

Additionally, EPA considered other industrial and commercial uses as candidates for a WCPP. Similar to the processing of TCE as a reactant/intermediate, unique, closed-system processes exist for the industrial and commercial use as: processing aid in process solvent used in battery manufacture; a process solvent used in polymer fiber spinning, fluoroelastomer manufacture and Alcantara manufacture; an extraction solvent used in caprolactam manufacture; and a precipitant used in beta-cyclodextrin manufacture. Where TCE is used as a processing aid, TCE is consumed or captured and reused in the process. Monitoring data suggests low-ppm TCE exposure levels but may involve daily worker tasks. EPA understands that some of the industrial and commercial uses of TCE as a processing aid occur outside of the U.S., or may no longer be ongoing in the U.S. However, EPA received and reviewed substantive information from the battery separator manufacturing industry, specifically for lead-acid and lithium-ion battery separator manufacturing processes, along with a request for a TSCA section 6(g) exemption under this TSCA rulemaking. EPA agrees that battery separator manufacturing is critical to the national economy and national security; therefore, EPA is proposing to grant a 10-year exemption from the prohibition for the industrial and commercial use of TCE as a processing aid for battery separator manufacturing. For this exemption EPA is proposing to impose the WCPP requirements as a condition for the TSCA section 6(g) exemption. All other industrial and commercial processing aid uses (*e.g.,* process solvent used in polymer fabric spinning, fluoroelastomer manufacture, etc.) must comply with the more stringent prohibition detailed in Unit V.A.

Furthermore, EPA considered industrial and commercial uses of TCE as an essential laboratory chemical as necessary to continue following the WCPP requirements, during the period of the TSCA section 6(g) time-limited exemption described in Unit V.A. Industrial and commercial use as a laboratory chemical is necessary to provide for the analysis of monitoring samples required to implement the ECEL requirements under the WCPP as part of this proposed regulation, as well as for essential chemical analysis, including for ongoing cleanup projects that fall under the Superfund program or other EPA jurisdictions, described in Unit V.A.3. Furthermore, EPA expects laboratory settings to be more conducive to the implementation of engineering controls such as fume hoods to ventilate vapors and reduce overall exposure to TCE in alignment with the hierarchy of controls.

Lastly, for TCE to be available for the downstream uses described in this unit, it must be manufactured (including imported), processed, and distributed in commerce. Therefore, as discussed in Unit V.A., EPA is proposing the WCPP

for manufacturing (including importing) and processing for certain industrial and commercial uses, to allow a continuous supply chain for the specified conditions of use expected to continue 1 year after the final rule is published until the prohibition compliance dates.

2. Primary Alternative Regulatory Action

EPA acknowledges that, for some conditions of use that it is proposing to prohibit, there may be some activities or facilities that need longer compliance timeframes in order to appropriately transition. Therefore, the primary alternative regulatory action accounts for additional time under a prohibition to provide the flexibility for facilities to comply, for example, to account for issues in the supply chain, such as the availability of alternatives to reformulate products. In selecting among the TSCA section 6(a) requirements for the primary alternative regulatory action for use of TCE-containing products, EPA considered risk-related factors, including but not limited to, the population exposed and the severity of the hazard of TCE and, separately, of other alternative solvents, which are undergoing risk evaluation and risk management under TSCA section 6, such as PCE (as part of a separate rulemaking under RIN 2070–AK84). For example, there may be instances where PCE and TCE may be desired because they are non-flammable solvents used as cleaning agents for energized electrical equipment (*e.g.,* circuit boards). In these instances, additional time may be needed to identify an alternative chemical or process to avoid flammability concerns.

EPA also considered a TSCA section 6(g) time-limited exemption for additional conditions of use that are critical or essential, or where a prohibition could have significant impacts on the national economy, national security, and infrastructure As described in Unit V.B.3.a.ii., EPA requests comments on a TSCA section 6(g) exemption, and based on the information received may find that an exemption may be warranted under the primary alternative regulatory action for the industrial and commercial use of TCE in batch vapor degreasing for critical aerospace or medical device applications, if the workplaces engaged in that condition of use cannot meet the requirements of the proposed regulatory action.

Similar to the proposed regulatory action, the primary alternative regulatory action would include a WCPP for several conditions of use of TCE to reduce to the extent possible the unreasonable risk during the time period before a prohibition becomes effective, including as a condition to the TSCA section 6(g) exemption, per TSCA section 6(g)(4). For the implementation of the TCE WCPP, EPA considered providing additional time under the primary alternative regulatory action for the WCPP requirements given the difference in order of magnitude for the exposure limit under TSCA compared to levels required by OSHA or other recommended guidelines. These provisions would include, for instance, identifying appropriate monitoring methods to comply with an TSCA exposure limit that is five orders of magnitude lower than the OSHA PEL (*i.e.,* 0.0040 ppm *vs.* 100 ppm, respectively), as well as providing for respiratory protection corresponding to a higher assigned protection factor than required by OSHA, further described in Unit II.C.

Further, the WCPP under the primary alternative regulatory action would include an ECEL of 0.0040 ppm to address inhalation exposures to TCE in occupational settings that is based on the immunotoxicity endpoint. EPA believes that this ECEL would be less protective than the ECEL of 0.0011 ppm based on the developmental toxicity endpoint, that EPA would require under the proposed regulatory action. (A summary of EPA's risk evaluation activities under TSCA is provided in Unit II.D., and the health effects of TCE, including the difference in the two human health endpoints as the basis for the two different ECELs, are discussed in Unit VI.A.) EPA considered the extremely low-ppm values of both ECELs and acknowledges the uncertainties regarding the ability of traditional industrial hygiene methods to meet the limit of detection associated with either ECEL action level, and the feasibility of combining existing engineering and administrative controls to reduce the exposure of TCE to extremely low-ppm levels before relying on PPE. Therefore, EPA does not consider long-term implementation of the WCPP a feasible means of addressing unreasonable risk indefinitely; as such, prohibition of the affected conditions of use is ultimately necessary to address the unreasonable risk under both the proposed and primary alternative regulatory actions.

The primary alternative regulatory action is described in more detail in Unit V.B.

3. Risk Management Requirements Considered But Not Proposed

EPA considered but is not proposing to regulate the weight fraction of TCE in products for industrial and commercial or consumer use because TCE is the main constituent (*e.g.,* cleaning component) of the majority of TCE-containing product formulations and EPA understands that decreasing the concentration of TCE decreases the efficacy of the product (Refs. 74, 75).

EPA also examined the extent to which a self-certification and limited-access program restricting TCE use to trained and licensed users could ensure that only certain workers employed by a facility would be able to purchase and subsequently use TCE. Under a limited access program such as a point-of-sale self-certification, entities would submit a self-certification to the distributor at the point of purchasing the products. The self-certification could consist of a statement indicating that the facility is implementing the required workplace safety measures to control exposures to TCE. However, a point-of-sale self-certification is not a viable option for this proposed rulemaking. Given the eventual full prohibition of TCE and the significant investments users may have to make toward establishing a WCPP, EPA does not believe it would be practicable to add an additional burden of implementing a limited access program. Therefore, EPA is not proposing a self-certification and limited access program as part of this rulemaking. EPA requests comment on the effectiveness of a limited access program, such as a point-of-sale self-certification or other administrative controls, to address the unreasonable risk of TCE, in particular for facilities with occupational exposures to TCE that may not be able to meet the WCPP requirements of this proposed rulemaking.

Another option that EPA considered was requiring prescribed engineering controls, administrative controls, or personal protective equipment to reduce exposures to TCE in occupational settings. Prescriptive requirements would be supported by information in the 2020 Risk Evaluation for TCE. However, as described in Unit III.A.1. and 2., EPA received input during required consultations and additional stakeholder engagement that regulatory options that align with the hierarchy of controls (*i.e.,* elimination and substitution of hazards in the workplace) should be preferred over prescriptive controls (which alternatively could be accomplished through the implementation of a WCPP with a risk-based exposure limit) (Refs. 12, 31). Inadequacy of engineering, administrative, and personal protective equipment control measures to lower exposure below the exposure limit

would mean that elimination or substitution would be the only viable methods of addressing unreasonable risk. Additionally, the WCPP approach EPA is considering under the proposed action is a more flexible approach as prescriptive controls present significant uncertainties related to their feasibility, given the site-specific operations and variable configurations, and need for consistency of proper use.

EPA determined that such controls (*i.e.,* engineering or administrative controls, or PPE) may not be able to eliminate unreasonable risk for some conditions of use when used in isolation. In the 2020 Risk Evaluation for TCE, many conditions of use still drive unreasonable risk even with the application of air-supplied APF 50 respirators (Ref. 1). Reasonably available data indicated additional uncertainty regarding the feasibility of exposure reductions through engineering controls alone, considering the unique closed-system processes already in place (Refs. 70, 48). For occupational conditions of use, prohibitions (rather than prescribed controls) would be more appropriate to ensure the elimination of unreasonable risk of TCE. Nevertheless, EPA determined that a WCPP, including requirements for an ECEL (which would be accompanied by monitoring requirements) in tandem with the implementation of engineering controls, administrative controls, and/or PPE, as appropriate, would be necessary for reducing exposures to TCE prior to the proposed prohibition compliance dates.

4. Additional Considerations

After considering the different regulatory options under TSCA section 6(a), alternatives (described in Unit V.B.), compliance dates, and other requirements under TSCA section 6(c), EPA developed the proposed regulatory action described in Unit V.A. to address the unreasonable risk from TCE so that it is no longer unreasonable. To ensure successful implementation of this proposed regulatory action, EPA considered other requirements to support compliance with the proposed regulations, such as requiring monitoring and recordkeeping to demonstrate compliance with a WCPP and downstream notification regarding the prohibition on manufacturing (including import), processing, and distribution in commerce of TCE, and products containing TCE, for industrial and commercial use as well as consumer uses. These proposed requirements are described in Unit V.A.

As required under TSCA section 6(d), any rule under TSCA section 6(a) must specify mandatory compliance dates, which shall be as soon as practicable with a reasonable transition period, but no later than 5 years after the date of promulgation of the rule (except in the case of a use exempted under TSCA section 6(g) or for full implementation of ban or phaseout requirements). These compliance dates are detailed in Units V.A. and V.B. EPA may finalize significantly shorter or longer compliance timeframes based on consideration of public comments.

*B. Consideration of Alternatives in Deciding Whether To Prohibit or Substantially Restrict TCE*

Under TSCA section 6(c)(2)(C), in deciding whether to prohibit or restrict in a manner that substantially prevents a specific condition of use of a chemical substance or mixture, and in setting an appropriate transition period for such action, EPA must consider, to the extent practicable, whether technically and economically feasible alternatives that benefit human health or the environment, compared to the use so proposed to be prohibited or restricted, will be reasonably available as a substitute when the proposed prohibition or other restriction takes effect. To that end, in addition to an Economic Analysis (Ref. 3), EPA conducted an Alternatives Assessment, using reasonably available information (Ref. 71).

For this assessment, EPA identified and analyzed alternatives to TCE in products relevant to industrial, commercial, and consumer conditions of use proposed to be prohibited or restricted. Based on reasonably available information, including information submitted by industry, EPA understands viable alternatives to TCE may not be available for several conditions of use, for example, processing TCE as an intermediate for the manufacture of HFC–134a, and considered that information to the extent practicable in the development of the regulatory options as described in Unit III.B.3. For some conditions of use, EPA was unable to identify products currently available for sale that contain TCE. EPA is soliciting comments on whether there are products in use or available for sale relevant to these conditions of use that contain TCE at this time, so that EPA can ascertain whether there are alternatives that benefit human health or the environment as compared to such use of TCE. These conditions of use are detailed in the Alternatives Assessment (Ref. 71).

For conditions of use for which products currently containing TCE were identified, EPA identified several hundred commercially available alternative products that do not contain TCE, and listed in the Alternatives Assessment, to the extent practicable, their unique chemical components, or ingredients. For each of these chemical components or ingredients, EPA identified whether it functionally replaced TCE for the product use and screened product ingredients for human health and environmental hazard, as well as identified flammability and global warming potential where information was reasonably available (Ref. 71). EPA then assigned a rating to the human health and environmental hazards, using a methodology described in the Alternatives Assessment document. In general, EPA identified products containing ingredients with a lower hazard screening rating than TCE for certain endpoints, while some ingredients presented higher hazard screening ratings than TCE (Ref. 71). These alternative hazard screening ratings are described in detail in the Alternatives Assessment grouped under common product use categories (Ref. 71).

Discussion of alternatives to TCE was discussed during the SBAR Panel process outreach meetings. EPA's consideration of alternatives was informed by the information provided by SERs, which included known problems and risks with several available alternatives, such as flammability, toxicity, and water limitations due to drought. Specifically, SERs discussed how some chlorinated solvents are currently undergoing TSCA risk evaluations, while other alternatives may be labeled as severe fire hazards by the National Fire Protection Association. SERs also mentioned that in the automotive and aerospace industries, alternative solvent degreasers may have their own hazard profile, which can include flammability, lower boiling temperatures, and toxicity (Ref. 32). SERs expressed concern for future regulation of chemicals undergoing risk evaluation, and also described the challenges of alternative processes, such as aqueous methods. Specifically, SERs described how in certain regions it is difficult to justify installation of these systems due to limited space or water availability. One SER provided an account about one of their customers, who had an aqueous cleaning system installed and was unable to source the required amount of water to run it. EPA notes the concerns expressed by SERs regarding availability of feasible alternatives that could be subject to market forces that may impact availability of alternatives (*e.g.,* certain fluorinated chemicals) or potentially be

subject to future EPA regulations. EPA notes that SERs described how available alternatives for lubricants in spray applications are mostly fluorinated organic compounds; although non-fluorinated options may exist, the SERs expressed concern for future potential regulatory activity. A trade organization SER highlighted that some fluorinated alternatives to TCE are under increased regulatory scrutiny, especially at state levels, because they may be subject to state PFAS laws based on their chemical structure and properties (Ref. 32). These discussions with SERs informed the Panel recommendations.

EPA has considered input from SERs and other stakeholders regarding alternatives to TCE, as well as the information used for the Alternatives Assessment. In deciding whether to propose prohibition or other significant restrictions on a condition of use of TCE and in proposing an appropriate transition period for any such action, EPA has therefore, pursuant to TSCA section 6(c)(2)(C), considered, to the extent practicable, whether technically and economically feasible alternatives that benefit human health or the environment, compared to the use proposed to be prohibited or restricted, would be reasonably available as a substitute when a proposed prohibition or other significant restriction would become effective. EPA is additionally requesting comment on the Alternatives Assessment as a whole.

## VII. TSCA Section 6(c)(2) Considerations: Magnitude of Human Exposure, Environmental Effects of TCE, Benefits of TCE for Various Uses, and Reasonably Ascertainable Economic Consequences

As described in Unit IV., TSCA section 6(a) rules must be promulgated ''in accordance with subsection (c)(2).'' TSCA section 6(c)(2)(A) requires EPA, in proposing and promulgating TSCA section 6(a) rules, to ''consider and publish a statement based on reasonably available information'' with respect to listed criteria, including the effects and magnitude of exposure to human health and the environment, the benefits of the chemical substance for various uses, and the reasonably ascertainable economic consequences of the rule. Under TSCA section 6(c)(2)(B), EPA must ''factor in, to the extent practicable,'' the considerations under TSCA section 6(c)(2)(A) when selecting among prohibitions and other restrictions in TSCA section 6(a) rules. EPA's consideration of the health effects of TCE is in Unit IV.; EPA's consideration of the remaining considerations under TSCA section 6(c)(2) are in this unit.

### *A. Magnitude of Human Exposure to TCE*

TSCA section 6(c)(2)(B) directs EPA to factor in, to the extent practicable, the magnitude of human exposure to TCE under TSCA section 6(c)(2)(A). EPA's analysis of the magnitude of human exposure to TCE are in the 2020 Risk Evaluation for TCE (Ref. 1). A summary is presented here.

Regarding the magnitude of human exposure, one factor EPA considers for the conditions of use that drive unreasonable risk is the size of the exposed population which, for TCE, EPA estimates is 43,675 workers, 8,920 ONUs, and 20,600 consumers (Ref. 3).

For the conditions of use that drive the unreasonable risk for TCE, PESS include workers and occupational non-users (ONUs), including men and women of reproductive age, adolescents, and biologically susceptible subpopulations; and consumer users (age 11 and older) and bystanders (of any age group, including infants, toddlers, children, and elderly), including biologically susceptible subpopulations.

In addition to workers, ONUs, consumers, and bystanders to consumer use directly exposed to TCE, EPA recognizes there is exposure to the general population from air and water pathways for TCE. As mentioned in Unit II.D., EPA has separately conducted a screening approach to assess whether there may be potential risks to the general population from these exposure pathways. The screening approach was developed in order to allow EPA to determine—with confidence—situations which present no unreasonable risk to fenceline communities or where further investigation would be needed to develop a more-refined estimate of risk. The fenceline technical support memos for the ambient air pathway and the water pathway provide the Agency with a quantitative assessment of exposure. For TCE, the results from applying this screening approach did not allow EPA to rule out unreasonable risk to fenceline communities. This unit summarizes the results of that fenceline analysis. Although EPA is not making a determination of unreasonable risk based on the fenceline screening analysis, the proposed regulatory action described in Unit V.—which would ultimately prohibit all conditions of use of TCE is expected to eliminate the risks identified in the screening approach.

As described in Unit II.D., EPA's analysis methodology was presented to the SACC peer review panel in March 2022, and EPA considered SACC feedback (including the SACC recommendation to EPA to consider multiple years of release data to estimate exposures and associated risks) when applying the fenceline analysis to TCE. EPA also plans to consider SACC feedback and make decisions regarding how to build upon the screening approach so that EPA can more accurately assess and quantify general population exposures in upcoming risk evaluations, such as for the 1,4-dioxane supplement, the forthcoming 20 High Priority Substances, and manufacturer-requested risk evaluations. For TCE, EPA is including a multi-year assessment of the ambient air pathway in light of peer review comments on the initial methodology.

EPA interpreted risk estimates in relation to the benchmark values corresponding to each hazard value. In the case of acute and chronic exposures to drinking water, as well as incidental oral and incidental dermal exposures in ambient waters, potential for noncancer risk was identified by those risk estimates below the benchmark MOE for acute and chronic non-cancer immunotoxicity and developmental endpoints. While cancer risks were not assessed for incidental oral or dermal exposure pathways, cancer risks were assessed for inhalation exposures. For cancer, potential for risk was identified by those risk estimates above the benchmark. For the air pathway, EPA's analysis identified risk estimates that did not exceed the benchmarks for at least two non-cancer endpoints (developmental and immunotoxicity), and risk estimates above the benchmark for cancer. Estimates of cancer risk to fenceline communities were calculated and compared to $1 \times 10^{-6}$ as a benchmark value for cancer risk in fenceline communities. Cancer benchmarks used by EPA and other regulatory agencies in interpreting the significance of cancer risks range from 1 in 1,000,000 to 1 in 10,000 (*i.e.,* $1 \times 10^{-6}$ to $1 \times 10^{-4}$) depending on the subpopulation exposed (see, *e.g.,* EPA's interpretation set forth in the **Federal Register** of September 14, 1989 (54 FR 38044) which discusses the use of benchmarks for purposes of assessing exposures to individuals living in the vicinity of air emissions sources under section 112 of the Clean Air Act (CAA); see also EPA's interpretation of the upper bound of acceptable risk and the preferred benchmark described in the Letter of Concern regarding EPA Complaint Nos. 01R–22–R6, 02R–22–R6, and 04R–22–R6 (Ref. 76, see page 3

footnotes 5 and 6, and page 6)). While EPA is unable to formally determine, based on the screening level fenceline analysis, whether risks to the general population drive the unreasonable risk, as a matter of risk management policy EPA considers the range of 1 in 1,000,000 to 1 in 10,000 (*i.e.,* $1 \times 10^{-6}$ to $1 \times 10^{-4}$) as the appropriate values for interpreting the significance of increased cancer risk for the general population, including fenceline communities. It is preferable to have the air or water concentrations of TCE result in an increased cancer risk closer to the 1 in 1,000,000 ($1 \times 10^{-6}$) value, with the 1 in 10,000 ($1 \times 10^{-4}$) value generally representing the upper bound of acceptability for estimated excess cancer risk. Benchmark values help inform decisions regarding the significance of risk, and the Agency considers a number of other factors when determining whether risks are significant, such as the endpoint under consideration, the reversibility of effect, and exposure-related considerations (*e.g.,* duration, magnitude, or frequency of exposure, or population exposed).

In this unit, EPA presents the results of its ambient air and water pathways fenceline analysis and the uncertainties associated with the analysis. Overall, EPA's fenceline analysis for the air and water pathways for TCE did not allow EPA to rule out unreasonable risk to fenceline communities with confidence. Additionally, based on the fenceline analysis for the ambient air and water pathways for TCE, including the strengths, limitations, and uncertainties associated with the information used to inform the analysis, EPA is unable to determine with this analysis whether those risks drive the unreasonable risk of injury to health presented by TCE. EPA also describes how the proposal to prohibit the manufacturing (include importing), processing, and distribution in commerce of TCE for all uses of TCE (including all consumer use) is expected to eliminate the potential risks identified in the screening analysis to any general population or fenceline communities close to facilities engaging in TCE use. This unit also describes how EPA believes the proposed WCPP requirements may reduce exposures to the general population for facilities identified in the fenceline analysis with expected exposures to fenceline communities that are associated with conditions of use for which EPA is proposing longer compliance timeframes (including under a TSCA section 6(g) time-limited exemption). EPA therefore does not intend to revisit the air or water pathways for TCE as part of a supplemental risk evaluation.

1. Ambient Air Pathway Analysis

The ambient air fenceline analysis was divided into three components: (1) A single-year ambient air analysis, (2) A multi-year ambient air analysis, and (3) A land use analysis. EPA conducted an ambient air analysis for a single year and multiple years to assess where estimates exceeded the one in a million risk estimates for non-cancer and cancer risk for real and generic, or modeled, facilities at multiple distances. After doing an initial screen (the single year ambient air screening analysis) that did not rule out unreasonable risk, EPA conducted additional analyses (the multi-year ambient air analysis) from which it derived risk estimates that, with a small number of exceptions, are within the cancer benchmarks used by EPA and other regulatory agencies of 1 in 10,000 to 1 in 1,000,000. The single year ambient air screening analysis and the multi-year ambient air analysis allow EPA to mathematically calculate a cancer risk in fenceline communities. The Agency then conducted a land use analysis as part of both the single-year and multi-year analyses to determine if EPA could reasonably expect an exposure to fenceline communities to occur within the modeled distances for facilities where there was an indication of risk. This review consisted of a visual analysis using aerial imagery and interpreting land/use zoning practices around each facility to identify where residential, industrial/commercial businesses, or other public spaces are present within those radial distances indicating risk (as opposed to uninhabited areas), as well as whether the radial distances lie outside the boundaries of the facility.

There are some uncertainties associated with the fenceline analysis for the air pathway for TCE. The TRI dataset used for the single- and the multi-year fenceline analysis and land use analysis does not include actual release point locations, which can affect the estimated concentrations at varying distances modeled. To identify the release location for each facility, EPA used a local-coordinate system based on latitude/longitude coordinates reported in TRI. The latitude/longitude coordinates may represent the mailing address location of the office building associated with a very large facility or some other area of the facility rather than the actual release location (*e.g.,* a specific process stack). This discrepancy between the coordinates reported in TRI and the actual release point could result in an exposure concentration that does not represent the actual distance where fenceline communities may be exposed. The fenceline analysis also evaluated the most ''conservative exposure scenario'' that consists of a facility that operates year-round (365 days per year, 24 hours per day, 7 days per week) in a South Coastal meteorologic region and a rural topography setting (Ref. 77). Therefore, the modeled exposures to people who live in fenceline communities may be overestimated if there are fewer exposure days per year or hours per day.

Additionally, the ambient air fenceline analysis (as well as the water pathway analysis, described in Unit VII.A.2.) organizes facilities and associated risks by OES and generally crosswalks each OES with the associated condition of use of TCE (Ref. 77). For some OES, EPA identified the associated conditions of use to the category level in the November 2020 Risk Evaluation for TCE, but, for the air pathway, was unable to identify the conditions of use to the subcategory level due to limited information on activities and use of TCE reported under TRI. Therefore, some OES indicating increased risk from ambient air exposures to TCE in the air fenceline analysis may be associated with one or more conditions of use of TCE.

EPA's analysis included inhalation hazard values for cancer and non-cancer risk (acute and chronic immunological and developmental endpoints). Because risk estimates did not exceed the benchmarks for any risks of non-cancer effects, the results presented focus on cancer risks. EPA's single year fenceline analysis for the ambient air pathway, based on methods presented to the SACC, evaluated TCE releases reported to TRI over the 2019 reporting year. This single-year fenceline analysis identified risk estimates exceeding one in a million for cancer risk for 99 of the 133 facilities (including generic, or modeled, facilities) at multiple distances, representing 13 OES. While the analysis identified facilities with some indication of releases and potential exposure with associated increased cancer risk that exceeds one in a million at a distance of 100 meters or more from the releasing facility, the analysis did not identify any facilities exceeding 1 in 10,000; the highest risk estimate is in the 1 in 100,000 range. Separately, following SACC feedback, EPA applied a slightly modified pre-screening methodology to evaluate 6 years of TCE release data (2015 through 2020 TRI data as well as the 6-year average of that data) rather than a single year of data for facilities with reported releases in TRI. Although the multi-year analysis

identified several additional facilities with risk estimates above one in a million for cancer farther out when compared to the single year analysis or that were not captured in the single-year analysis, the results of the overall risk profiles (*i.e.,* OES and corresponding conditions of use with risk estimates above one in a million for cancer at the distances evaluated) indicated a higher risk profile than the single year analysis: the multi-year analysis identified 217 facilities and found risk estimates above one in a million for cancer in 133 of those facilities at a distance of 100 meters from the releasing facility. Based on the multi-year analysis, 58 of these 133 facilities either had risks above one in a million for cancer at distances farther out than 100 meters when compared to the single year analysis or are facilities that were not captured in the single-year analysis (*e.g.,* did not report in 2019 TRI). The analysis did not identify any facilities exceeding 1 in 10,000 at a distance greater than 100 meters; the highest risk estimate is in the 1 in 100,000 range (Ref. 77).

EPA conducted a land use analysis to determine if EPA can reasonably expect an exposure to fenceline communities to occur within the modeled distances for facilities where there was an indication of risk in the single year or multi-year fenceline analysis. This review consisted of a visual analysis using aerial imagery and interpreting land/use zoning practices around the facility to identify where residential, industrial/commercial businesses, or other public spaces are present within those radial distances indicating risk (as opposed to uninhabited areas), as well as whether the radial distances lie outside the boundaries of the facility. The land use analysis of the 85 facilities with risk indicating risk in the single-year fenceline analysis identified 69 facilities with expected exposure to fenceline communities. The land use analysis of the 58 facilities indicating risk in the multi-year fenceline analysis (*i.e.,* facilities where risk estimates were above one in a million for cancer at distances farther out when compared to the single-year analysis or facilities that were not captured in the single year analysis) identified a total of 55 facilities with expected exposure to fenceline communities. Those facilities represent 10 OES and include: degreasing (batch open-top degreasing; batch closed-loop degreasing; conveyorized vapor degreasing; web vapor degreasing; cold cleaning); formulation of aerosol and non-aerosol products; industrial processing aid; manufacturing; metalworking fluids; other industrial uses; process solvent recycling and worker handling of wastes; processing as a reactant; recycling and disposal; and repackaging (Ref. 77).

Under the proposed regulatory action described in Unit V.A., each of the conditions of use that indicate risk relative to the one in a million cancer risk estimate would ultimately be prohibited, many of them within one year. As a result, exposures to any fenceline communities from these facilities would be eliminated under the prohibitions in this proposed rulemaking. The risks to fenceline communities from exposure further strengthens the impetus for EPA's prohibition of TCE.

EPA recognizes that there are some facilities for which risks are indicated that may exceed the one in a million risk estimate and with expected exposure to fenceline communities that may be associated with the following conditions of use that EPA is proposing to prohibit under longer compliance timeframes: degreasing (batch open-top degreasing; batch closed-loop degreasing; conveyorized vapor degreasing; web vapor degreasing; cold cleaning); industrial processing aid; manufacturing; and processing as a reactant. For processing as a reactant, EPA notes that while the analysis identified facilities with some indication of releases and potential exposure with associated increased cancer risk that exceeds one in a million at a distance of 100 meters from the releasing facility, the analysis did not identify any facilities exceeding 1 in 10,000; the highest risk estimate is in the 1 in 100,000 range. For this and other conditions of use that may be associated with facilities that indicate risks with expected exposure to fenceline communities, the proposed rule would require strict workplace exposure controls via implementation of a WCPP as described in Unit V.A.2., until the prohibition compliance date. Under the proposed WCPP requirements, facilities would need to monitor indoor TCE air concentrations, which would allow facilities to better understand and manage the total releases of TCE. Furthermore, under the WCPP requirements, facilities would need to evaluate controls to determine how to reduce releases and exposures to potentially exposed persons in the workplace. EPA anticipates that this analysis would help facilities to determine the most effective ways to reduce exposures (including possible engineering controls or elimination/substitution of TCE) and whether those methods for exposure reduction impact releases, and therefore may reduce the overall risk to fenceline communities from facilities permitted to use TCE under a longer compliance timeframe until the prohibition compliance date. As further detailed in Unit V.A.2.b.iii., EPA is also requesting comment on whether industry anticipates increased releases of TCE to outdoor air associated with the implementation of the WCPP. In order to avoid unintended increases in exposures to people from TCE emissions to ambient air, EPA requests comment on whether owners and operators should be required to attest in their exposure control plan that engineering controls selected do not increase emissions of TCE to ambient air outside of the workplace and document in their exposure control plan whether additional equipment was installed to capture emissions of TCE to ambient air. EPA requests comment on how such a requirement could impact the availability, feasibility, or cost of engineering controls as a means to reduce workplace exposures to or below the proposed ECEL. EPA is also soliciting comment on the frequency and nature of air monitoring EPA should consider including as requirements in the final rule.

In the instances where efforts to reduce exposures in the workplace to levels below the ECEL could lead to adoption of engineering controls that ventilate more TCE outside, EPA believes this potential exposure would be limited as a result of the existing NESHAP for TCE for these conditions of use under the CAA. Applicable NESHAP include: 40 CFR part 63, subpart F, Synthetic Organic Chemical Manufacturing Industry; 40 CFR part 63, subpart DD, Off-Site Waste and Recovery Operations; 40 CFR part 63, subpart VVV, Publicly Owned Treatment Works; 40 CFR part 63, subpart VVVVVV, Chemical Manufacturing Area Sources; 40 CFR part 63, subpart GG, Aerospace Manufacturing and Rework Facilities; 40 CFR part 63, subpart T, Halogenated Solvent Cleaning, which impose emission standards and work practice requirements reflecting maximum achievable control technology and generally available control technology. The CAA required residual risk reviews for standards reflecting maximum achievable control technology, and technology reviews are required every 8 years for all NESHAP.

2. Water Pathway Analysis

The methods used to assess the water pathways (*i.e.,* drinking water or incidental dermal or oral exposure in ambient waters) for TCE are consistent

with the methods described in the 2022 Fenceline report that underwent peer review (Ref. 78). Briefly, EPA assessed exposure via drinking water, incidental oral ingestion, and incidental dermal contact based on modeled stream and water body concentrations, using information described and documented in the November 2020 TCE Risk Evaluation (Ref. 1). This included the amount of chemical released to wastewater, the release days per year (with a high end of 250 to 365 days per year, and a low end of 20 days per year), the percent removal from wastewater treatment, and site-specific stream flow or dilution factors.

There are some uncertainties associated with the fenceline analysis for the water pathway for TCE. For the ambient water pathway, exposures were evaluated based on modeled stream and water body concentrations using E–FAST 2014, which is subject to a number of uncertainties. For example, stream flow data available in the E–FAST 2014 at the time of this analysis were 15 to 30 years old and therefore may not represent current conditions at a particular location. Additionally, E–FAST 2014 estimates waterbody surface water concentrations at the point of release without considering certain post-release environmental fate of degradation processes, which may lead to higher predicted surface water concentrations. Similarly, estimated drinking water exposures are based on assumptions that an individual is exposed to potential waterbody concentrations at the point of release without any potential for transport, dilution, or treatment and therefore represent higher-end estimates of possible drinking water exposures (Ref. 79). An additional uncertainty relates to the crosswalk of a given facility to a particular OES and then condition of use; as described in Unit VII.A.2., due to limited information on activities and use of TCE in the data sources available, there is uncertainty if the facilities associated with a specific OES were correctly cross-walked to the appropriate condition of use, or whether some OESs indicating increased risk from water exposures to TCE should be associated with more than one condition of use.

EPA's screening level analysis for the water pathway for TCE, based on methods presented to the SACC, found potential risks from several OES from exposure to drinking water, incidental dermal or incidental oral exposure in ambient waters. The estimated exposure values for the screening level assessed water pathway resulted in estimated acute noncancer, chronic noncancer, or cancer risk for relative to their respective benchmark values for various evaluated OESs (Ref. 79).

The drinking water analysis modeled a total of 101 releases across all OES for the 20-day release scenario, and modeled a total of 103 releases for the maximum days of release scenario. For the drinking water exposure, risks relative to the benchmark for the acute non-cancer developmental endpoint for both the 20-day and maximum days of release scenarios for at least one facility in each of the following OES: Manufacturing; Processing as a Reactant; Degreasing; Repackaging; Process Solvent Recycling; Adhesives, Sealants, Paints and Coatings; Industrial Processing Aid, and Other Industrial Uses. For drinking water exposures, at least one facility indicated an increased cancer risk at or above 1 in 1,000,0000 (but less than 1 in 100,000) for both the 20-day and maximum days of release scenarios for the Degreasing and Repackaging OES. EPA did not identify source water drinking water intakes for public drinking water systems within 10 miles downstream of facilities with known locations discharging to identifiable waterbodies. No risks relative to acute or chronic exposures for the immune endpoint or for chronic exposures for the developmental endpoint benchmarks were identified for any OES for drinking water exposures; for the immune endpoint, estimated margins of exposure were at least 4-fold higher than benchmarks.

For the incidental oral exposure in ambient water, a total of 113 releases were modeled across all OES for the 20-day release scenario, and a total of 115 releases were modeled across all OES for the maximum days of release scenario. Risks relative to the benchmark were identified for at least one facility for the acute non-cancer developmental endpoint under the 20-day scenarios for Processing as a Reactant; Degreasing; Repackaging; Process Solvent Recycling; Adhesives, Sealants, Paints, and Coatings; and Other Industrial Uses OESs were identified for the 20-days of release scenario. For the maximum days of release scenario, risks relative to the benchmark for the acute developmental endpoint were identified for: Processing as a Reactant and Degreasing. For the immune endpoint, no risks were identified relative to the acute exposures benchmark. For chronic scenarios, risk was identified relative to the benchmarks for both the immune and developmental endpoints for the 20-day and maximum days of release scenarios. Specifically, at least one facility in the Degreasing OES was identified as showing risk relative to both endpoints for the maximum risk scenarios for both types of releases (20-day and maximum), and at least one facility in the Processing as a Reactant OES was identified as showing risk relative to the developmental endpoint for both the 20-day and maximum release scenarios.

Similarly, for the incidental dermal exposure in ambient waters pathway, a total of 113 releases were modeled across all OES for the 20-day release scenario, and a total of 115 releases were modeled across all OES for the maximum days of release scenario. For both incidental oral and incidental dermal exposures, EPA did not assess cancer risk because repeated exposures are not expected to continue across a lifetime. For acute scenarios, risk was identified for at least one facility relative to both the immune and developmental endpoints for the 20-day and maximum release scenarios. For 20-day release scenarios, the immune endpoint had identified risk relative to the benchmark for at least one facility in the Degreasing OES, while the developmental endpoint had identified risk relative to the benchmark for the at least one facility in the following OES: Processing as a Reactant; Degreasing; Repackaging; Process Solvent Recycling; Adhesives, Sealants, Paints, and Coatings; Industrial Processing Aid; and Other Industrial Uses. For the maximum days of release scenarios, risk relative to the developmental endpoint was identified for at least one facility in the Processing as a Reactant and the Degreasing OES. For chronic scenarios, risk was identified relative to both the immune and developmental endpoint benchmarks for at least one facility for both the 20-day and maximum days of release scenarios. For 20-day release scenarios, the Processing as a Reactant and Degreasing OES had risks identified relative to the immune and developmental endpoint benchmarks; for the maximum days release scenarios, the Processing as a Reactant and Degreasing OES had risks identified relative to the immune and developmental endpoint benchmarks.

Overall, for the analysis of the water pathway, EPA identified potential risks that exceed the benchmark for non-cancer endpoints from several facilities, representing benchmark exceedances between 1 and 10 OES, depending on whether the drinking water, incidental oral, or incidental dermal exposures are considered. In each case for the screening level analysis, risks were identified only for the maximum risk scenarios (or facilities with the highest reported results), and for a relatively

small number of facilities. In instances where a facility may be engaging in a condition of use with a longer phase-out, EPA notes that in no instances did EPA identify drinking water intakes within 10 miles of a discharging facility, and emphasizes that the scenarios analyzed include significant uncertainties and assumptions within the high-end risk estimates due to reliance on the highest-reported results from several facilities (Ref. 79). Regarding cancer risks, while the analysis identified facilities with some indication of releases and potential drinking water exposure with associated increased cancer risk that exceeds more than 1 in 1,000,000, the analysis did not identify any facilities exceeding more than 1 in 10,000; the highest potential risk estimate is in the 1 in 100,000 range (Ref. 79).

Under the proposed regulatory action described in Unit V.A., all conditions of use would ultimately be prohibited and so any potential risk indicated by this screening analysis would be eliminated. In particular, under the proposed regulatory action the disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works would be prohibited. The risks to fenceline communities from exposure through water further strengthen the impetus for EPA's prohibition of TCE. EPA therefore does not intend to revisit the water pathway for TCE as part of a supplemental risk evaluation.

### *B. Environmental Effects of TCE and the Magnitude of Exposure of the Environment to TCE*

EPA's analysis of the environmental effects of TCE and the magnitude of exposure of the environment to TCE are in the 2020 Risk Evaluation for TCE (Ref. 1). The unreasonable risk determination for TCE is based solely on risks to human health (Ref. 2); based on the TSCA 2020 Risk Evaluation for TCE, EPA determined that exposures to the environment did not drive the unreasonable risk. A summary is presented here.

For all conditions of use, amphibian, fish, and aquatic invertebrate acute and chronic exposures to TCE do not drive the unreasonable risk. To characterize the exposure to TCE by aquatic organisms, EPA assessed environmental exposures derived from predicted and measured concentrations of TCE in surface water in the U.S. Specifically, the aquatic exposures associated with the industrial and commercial conditions of use were predicted through modeling, and the aquatic exposure assessment also includes an analysis of collected measured surface water concentrations from monitoring data. EPA considered the biological relevance of the species to determine the concentrations of concern for the location of surface water concentration data to produce risk quotients, as well as frequency and duration of the exposure. EPA determined that the evaluation does not support an unreasonable risk determination to aquatic organisms.

The toxicity of TCE to sediment-dwelling invertebrates is similar to the toxicity to aquatic invertebrates. TCE is expected to remain in aqueous phases and not adsorb to sediment due to its water solubility and low partitioning to organic matter. TCE has relatively low partitioning to organic matter and biodegrades slowly, so TCE concentrations in sediment pore water are expected to be similar to the concentrations in the overlying water or lower in the deeper part of sediment where anaerobic condition prevails. Thus, the TCE detected in sediments is likely from the pore water. Therefore, for sediment-dwelling organisms, the risk estimates, based on the highest ambient surface water concentration, do not support an unreasonable risk determination to sediment-dwelling organisms from acute or chronic exposures.

For terrestrial organisms, TCE exposure is expected to be low since physical-chemical properties do not support an exposure pathway through water and soil pathways to these organisms. Therefore, for terrestrial organisms, the risk estimates, based on the EPA 2003 Guidance for Ecological Soil Screening Levels, do not support an unreasonable risk determination from acute or chronic exposures.

### *C. Benefits of TCE for Various Uses*

TCE has a wide range of uses, including as an intermediate during the manufacture of refrigerants, specifically HFC–134a, and is also used as a solvent, frequently in cleaning and degreasing (including spot cleaning, vapor degreasing, cold cleaning, and aerosol degreasing). A variety of consumer and commercial products use TCE as adhesives and sealants, in paints and coatings, and in other miscellaneous products. TCE is subject to Federal and State regulations and reporting requirements.

The largest uses of TCE, by production volume, are for processing as a reactant/intermediate as well as aerosol and vapor degreasing uses. Based on the 2020 Risk Evaluation for TCE, over 84% of the production volume of TCE is processed as a reactant/intermediate, the majority of the volume is for TCE processed as an intermediate in the production of HFC–134a, a refrigerant widely used in a broad range of applications. The second largest use of TCE is in industrial and commercial uses for aerosol and vapor degreasing. TCE is a relatively inexpensive solvent useful for cleaning contaminated metal parts and other fabricated materials (Ref. 3).

TCE has many other uses, which, based on the 2020 Risk Evaluation for TCE, collectively constitute about 1% of the production volume (Ref. 1). In battery separator manufacturing, TCE is used as an extraction solvent to produce the desired porosity in lead-acid and lithium battery separators, which are essential to power vehicles and systems in the U.S. supply chain.

### *D. Reasonably Ascertainable Economic Consequences of the Proposed Rule*

#### 1. Likely Effect of the Rule on the National Economy, Small Business, Technological Innovation, the Environment, and Public Health

The reasonably ascertainable economic consequences of this proposed rule include several components, all of which are described in the Economic Analysis for this proposed rule (Ref. 3). With respect to the anticipated effects of this proposed rule on the national economy, EPA considered the number of businesses and workers that would be affected and the costs and benefits to those businesses and workers and did not find that there would be an impact on the national economy (Ref. 3). The economic impact of a regulation on the national economy becomes measurable only if the economic impact of the regulation reaches 0.25% to 0.5% of Gross Domestic Product (GDP) (Ref. 80). Given the current (real) GDP [of $60.4 trillion (2022)], this is equivalent to a cost of $151 billion to $302 billion. Therefore, because EPA has estimated that the monetized cost of the proposed rule would range from $33.1 million annualized over 20 years at a 3% discount rate and $40.6 million annualized over 20 years at a 7% discount rate, EPA has concluded that this action is highly unlikely to have any measurable effect on the national economy (Ref. 3). EPA does not have data to quantify employment impacts of the proposed rule, and large employment impacts are not expected. Instead, workers currently using TCE are expected to continue employment while shifting away from TCE use and towards alternatives. However, EPA acknowledges that transitional employment impacts may be

experienced by some workers at facilities that opt to close or shift operations abroad instead of complying with requirements at the facilities currently using TCE. EPA considered the employment impacts of this proposed rule, and found that the direction of change in employment is uncertain, but EPA expects the short-term and longer-term employment effects to be small.

Of the small businesses potentially impacted by this proposed rule, 99.1% are expected to have impacts of less than 1% to their firm revenues, 0.5% are expected to have impacts between 1 and 3% to their firm revenues, and 0.4% are expected to have impacts greater than 3% to their firm revenues. The largest segment of businesses that would be affected by this regulation are commercial users of liquid and aerosol degreasers. Costs of alternatives were found to be both higher and lower than products containing TCE. For most product types, alternatives with similar efficacy are available with costs that both lower and higher than TCE products. However, there may be some applications where TCE is more effective, reducing labor time and wait time, and or where extensive safety testing might be required. EPA was unable to quantify these costs.

With respect to this proposed rule's effect on technological innovation, EPA expects this action to spur more innovation than it will hinder. A prohibition or significant restriction on the manufacture, processing, and distribution in commerce of TCE for uses covered in this proposed rule may increase demand for safer chemical substitutes. This proposed rule is not likely to have significant effects on the environment because TCE does not present an unreasonable risk to the environment, though this proposed rule does present the potential for small reductions in air emissions and soil contamination associated with improper disposal of products containing TCE. The effects of this proposed rule on public health are estimated to be positive, due to the reduced risk of cancer and other non-cancer endpoints from exposure to TCE.

2. Costs and Benefits of the Proposed Regulatory Action and of the One or More Primary Alternative Regulatory Actions Considered by the Administrator

The costs and benefits that can be monetized for this proposed rule are described at length in in the Economic Analysis (Ref. 3). The monetized costs for this proposed rule are estimated to range from $33.1 million annualized over 20 years at a 3% discount rate and $40.6 million annualized over 20 years at a 7% discount rate. The monetized benefits are estimated to range from $18.1 to $21.5 million annualized over 20 years at a 3% discount rate and $8.2 to $10.3 million annualized over 20 years at a 7% discount rate.

EPA considered the estimated costs to regulated entities as well as the cost to administer and enforce alternative regulatory actions. The primary alternative regulatory action is described in detail in Unit V.B. The estimated annualized costs of the alternative regulatory action are $34.4 million at a 3% discount rate and $41.2 million at a 7% discount rate over 20 years (Ref. 3). The monetized benefits of this alternative regulatory action are estimated to range from $18.1 to $21.5 million annualized over 20 years at a 3% discount rate and $8.2 to $10.3 million annualized over 20 years at a 7% discount rate over 20 years (Ref. 3).

This proposal is expected to achieve health benefits for the American public, some of which can be monetized and others that, while tangible and significant, cannot be monetized. EPA believes that the balance of costs and benefits of this proposal cannot be fairly described without considering the additional, non-monetized benefits of mitigating the non-cancer adverse effects. These effects may include neurotoxicity, kidney toxicity, liver toxicity, immunological and hematological effects, reproductive effects, and developmental effects. The multitude of adverse effects from TCE exposure can profoundly impact an individual's quality of life, as discussed in Unit II.A. (overview), Unit III.B.2. (description of the unreasonable risk), Unit V.A. (discussion of the health effects), and the 2020 Risk Evaluation for TCE. Chronic adverse effects of TCE exposure include both cancer and the non-cancer effects listed in this paragraph. Acute effects of TCE exposure could be experienced for a shorter portion of life but are nevertheless significant in nature. The incremental improvements in health outcomes achieved by given reductions in exposure cannot be quantified for non-cancer health effects associated with TCE exposure, and therefore cannot be converted into monetized benefits. The qualitative discussion throughout this rulemaking and in the Economic Analysis highlights the importance of these non-cancer effects. These effects include willingness-to-pay to avoid illness, which includes cost of illness and other personal costs such as pain and suffering. Considering only monetized benefits underestimates the impacts of TCE adverse outcomes and therefore underestimates the benefits of this proposed rule.

3. Cost Effectiveness of the Proposed Regulatory Action and of the 1 or More Primary Alternative Regulatory Actions Considered by the Administrator

Cost effectiveness is a method of comparing certain actions in terms of the expense per item of interest or goal. A goal of this proposed regulatory action is to achieve the risk reduction standard in a [more] cost-effective manner, with estimated [lower] costs and [higher] net benefits, than other considered alternative regulatory actions (Ref. 3). The proposed regulatory action would cost $6.8–7.7 million per potential prevented cancer case while the primary alternative regulatory action would cost $7.1–8.0 million (using the 3% discount rate) to achieve the same goals. While the primary alternative regulatory action is lower in cost compared to the proposed regulatory action, the difference is small (Ref. 3).

## VIII. TSCA Section 9 Analysis, Section 14, and Section 26 Considerations

### *A. TSCA Section 9(a) Analysis*

TSCA section 9(a) provides that, if the Administrator determines, in the Administrator's discretion, that an unreasonable risk may be prevented or reduced to a sufficient extent by an action taken under a Federal law not administered by EPA, the Administrator must submit a report to the agency administering that other law that describes the risk and the activities that present such risk. TSCA section 9(a) describes additional procedures and requirements to be followed by EPA and the other Federal agency following submission of any such report. As discussed in this unit, for this proposed rule, the Administrator proposes to exercise his discretion not to determine that the unreasonable risk from TCE under the conditions of use may be prevented or reduced to a sufficient extent by an action taken under a Federal law not administered by EPA.

In addition, TSCA section 9(d) instructs the Administrator to consult and coordinate TSCA activities with other Federal agencies for the purpose of achieving the maximum enforcement of TSCA while imposing the least burdens of duplicative requirements. For this proposed rule, EPA has and continues to coordinate with appropriate Federal executive departments and agencies including OSHA and the Consumer Product Safety Commission (CPSC), to, among other things, identify their respective

authorities, jurisdictions, and existing laws with regard to TCE, which are summarized in this unit.

OSHA requires that employers provide safe and healthful working conditions by setting and enforcing standards and by providing training, outreach, education and assistance. As described in Unit II.C., OSHA, in 1971, established a PEL for TCE of 100 ppm of air as an 8-hour TWA with an acceptable ceiling concentration of 200 ppm and an acceptable maximum peak above the acceptable ceiling concentration for an eight-hour shift of 300 ppm, maximum duration of 5 minutes in any 2 hours. However, the exposure limits established by OSHA are higher than the exposure limit that EPA determined would be sufficient to address the unreasonable risk identified under TSCA from occupational inhalation exposures associated with certain conditions of use. Gaps exist between OSHA's authority to set workplace standards under the OSH Act and EPA's obligations under TSCA section 6 to eliminate unreasonable risk presented by chemical substances under the conditions of use. Health standards issued under section 6(b)(5) of the OSH Act must reduce significant risk only ''to the extent feasible.'' 29 U.S.C. 655(b)(5). To set PELs for chemical exposure, OSHA must first establish that the new standards are economically and technologically feasible (79 FR 61384 and 61387, Oct. 10, 2014). But under TSCA section 6(a), EPA's substantive burden is to demonstrate that, as regulated, the chemical substance no longer presents an unreasonable risk, with unreasonable risk being determined without consideration of costs or other nonrisk factors. Thus, if OSHA were to initiate a new action to lower its PEL, the difference in standards between the OSH Act and TSCA may well result in the OSHA PEL being set at a higher level than the exposure limit that EPA determined would be sufficient to address the unreasonable risk under TSCA.

In addition, OSHA may set exposure limits for workers, but its authority is limited to the workplace and does not extend to consumer uses of hazardous chemicals, and thus OSHA cannot address the unreasonable risk from TCE under all of its conditions of use, which include consumer uses. OSHA also does not have direct authority over State and local employees, and it has no authority over the working conditions of State and local employees in States that have no OSHA-approved State Plan under 29 U.S.C. 667.

CPSC, under authority provided to it by Congress in the CPSA, protects the public from unreasonable risk of injury or death associated with the use of consumer products. Under the CSPA, CPSC has the authority to regulate TCE in consumer products, but not in other sectors such as automobiles, industrial and commercial products, or aircraft for example (Ref. 81). Further, a consumer product safety rule under the CPSA must include a finding that ''the benefits expected from the rule bear a reasonable relationship to its costs,'' 15 U.S.C. 2058(f)(3)(E), whereas EPA must apply TSCA risk management requirements to the extent necessary so that the chemical no longer presents unreasonable risk and only consider costs and benefits of the regulatory action to the extent practicable, 15 U.S.C. 2605(a), (c)(2). Additionally, the 2016 amendments to TSCA reflect Congressional intent to ''delete the paralyzing 'least burdensome' requirement,'' 162 Cong. Rec. S3517 (June 7, 2016), a reference to TSCA section 6(a) as originally enacted, which required EPA to use ''the least burdensome requirements'' that protect ''adequately'' against unreasonable risk, 15 U.S.C. 2605(a) (1976). However, a consumer product safety rule under the CPSA must impose ''the least burdensome requirement which prevents or adequately reduces the risk of injury for which the rule is being promulgated.'' 15 U.S.C. 2058(f)(3)(F). Analogous requirements, also at variance with recent revisions to TSCA, affect the availability of action CPSC may take under the Federal Hazardous Substances Act (FHSA) relative to action EPA may take under TSCA. 15 U.S.C. 1262.

EPA therefore concludes that TSCA is the only regulatory authority able to prevent or reduce unreasonable risk of TCE to a sufficient extent across the range of conditions of use, exposures, and populations of concern. This unreasonable risk can be addressed in a more coordinated, efficient, and effective manner under TSCA than under different laws implemented by different agencies. Moreover, the timeframe and any exposure reduction as a result of updating OSHA or CPSC regulations cannot be estimated, while TSCA requires a much more accelerated 2-year statutory timeframe for proposing and finalizing regulatory requirements to address unreasonable risk. Further, there are key differences between the finding requirements of TSCA and those of the OSH Act, CPSA, and FHSA. For these reasons, in the Administrator's discretion, the Administrator has analyzed this issue and does not determine that unreasonable risk from TCE may be prevented or reduced to a sufficient extent by an action taken under a Federal law not administered by EPA. However, EPA is requesting public comment on this issue (*i.e.,* the sufficiency of an action taken under a Federal law not administered by EPA).

*B. TSCA Section 9(b) Analysis*

If EPA determines that actions under other Federal laws administered in whole or in part by EPA could eliminate or sufficiently reduce a risk to health or the environment, TSCA section 9(b) instructs EPA to use these other authorities to protect against that risk unless the Administrator determines in the Administrator's discretion that it is in the public interest to protect against such risk under TSCA. In making such a public interest finding, TSCA section 9(b)(2) states: ''the Administrator shall consider, based on information reasonably available to the Administrator, all relevant aspects of the risk . . . and a comparison of the estimated costs and efficiencies of the action to be taken under this title and an action to be taken under such other law to protect against such risk.''

Although several EPA statutes have been used to limit TCE exposure (Ref. 9), regulations under those EPA statutes have limitations because they largely regulate releases to the environment, rather than occupational or consumer exposures. While these limits on releases to the environment are protective in the context of their respective statutory authorities, regulation under TSCA is also appropriate for occupational and consumer exposures and in some cases can provide upstream protections that would prevent the need for release restrictions required by other EPA statutes (*e.g.,* Resource Conservation and Recovery Act (RCRA), CAA, Clean Water Act (CWA)).

The primary exposures and unreasonable risk to consumers, bystanders, workers, and ONUs would be addressed by EPA's proposed prohibitions and restrictions under TSCA section 6(a). In contrast, the timeframe and any exposure reduction as a result of updating regulations for TCE under the CAA, CWA, or RCRA cannot be estimated, nor would they address the direct human exposure to consumers, bystanders, workers, and ONUs from the conditions of use evaluated in the 2020 Risk Evaluation for TCE. More specifically, none of EPA's other statutes (*e.g.,* RCRA, CAA, CWA) can address exposures to workers and ONUs related to the specific

activities that result in occupational exposures, for example those associated with RCRA covered disposal requirements, such as in 40 CFR 261.24 and 40 CFR 268.3. EPA therefore concludes that TSCA is the most appropriate regulatory authority able to prevent or reduce risks of TCE to a sufficient extent across the range of conditions of use, exposures, and populations of concern.

For these reasons, the Administrator does not determine that unreasonable risk from TCE under the conditions of use evaluated in the 2020 TSCA Risk Evaluation for TCE, could be eliminated or reduced to a sufficient extent by actions taken under other Federal laws administered in whole or in part by EPA.

*C. TSCA Section 14 Requirements*

EPA is also providing notice to manufacturers, processors, and other interested parties about potential impacts to CBI that may occur if this rulemaking is finalized as proposed. Under TSCA section 14(b)(4), if EPA promulgates a rule pursuant to TSCA section 6(a) that establishes a ban or phase-out of a chemical substance, the protection from disclosure of any CBI regarding that chemical substance and submitted pursuant to TSCA will be ''presumed to no longer apply,'' subject to the limitations identified in TSCA section 14(b)(4)(B)(i) through (iii). If this rulemaking is finalized as proposed, then pursuant to TSCA section 14(b)(4)(B)(iii), the presumption against protection from disclosure would apply only to information about the specific conditions of use that this rulemaking would prohibit or phase out. Manufacturers or processors seeking to protect such information would be able to submit a request for nondisclosure as provided by TSCA sections 14(b)(4)(C) and 14(g)(1)(E). Any request for nondisclosure would need to be submitted within 30 days after receipt of notice from EPA under TSCA section 14(g)(2)(A). EPA anticipates providing such notice via the Central Data Exchange or CDX.

*D. TSCA Section 26 Considerations*

In accordance with TSCA section 26(h), EPA has used scientific information, technical procedures, measures, methods, protocols, methodologies, and models consistent with the best available science. As in the case of the unreasonable risk determination, risk management decisions for this proposed rule, as discussed in Unit III.B.3. and Unit V., were based on a risk evaluation, that was subject to public comment and independent, expert peer review, and was developed in a manner consistent with the best available science and based on the weight of the scientific evidence as required by TSCA sections 26(h) and (i) and 40 CFR 702.43 and 702.45.

In particular, the ECEL values considered for the WCPP are derived from the analysis in the 2020 Risk Evaluation for TCE. The proposed ECEL value of 0.0011 ppm as an 8-hour TWA is based on developmental toxicity, the most sensitive acute and chronic non-cancer health endpoint, specifically calculated based on the occupational acute, non-cancer human equivalent concentration (HEC) for fetal cardiac defects (Ref. 13). This is the concentration at which an adult human would be unlikely to experience the specified adverse effects if exposed for a working lifetime, including susceptible subpopulations. Similarly, the ECEL identified under the primary alternative regulatory option, based on a different health endpoint, immunotoxicity, is derived from the analysis in the 2020 Risk Evaluation for TCE. This ECEL is 0.0040 ppm as an 8-hour TWA which is based on the chronic non-cancer occupational HEC for autoimmunity (Ref. 14). As discussed in Unit VI.A., among the non-cancer adverse health effects, the drivers for EPA's whole chemical unreasonable risk determination for TCE under TSCA were identified as immunotoxicity, acute immunosuppression, and chronic autoimmunity, from inhalation and dermal exposures (Ref. 2). Therefore, reducing exposures remaining above the ECEL of 0.0040 ppm would reduce the contribution to the unreasonable risk of injury to health driven by inhalation exposures in an occupational setting for those conditions of use identified as presenting unreasonable risk in the 2020 Risk Evaluation for TCE under TSCA (Ref. 1, 14).

The extent to which the various information, procedures, measures, methods, protocols, methodologies or models, as applicable, used in EPA's decisions have been subject to independent verification or peer review is adequate to justify their use, collectively, in the record for this rulemaking. Additional information on the peer review and public comment process, such as the peer review plan, the peer review report, and the Agency's response to comments, can be found in EPA's risk evaluation docket (Docket ID No.: EPA–HQ–OPPT–2016–0737).

## IX. Requests for Comment

EPA is requesting public comment on all aspects of this proposal, including the proposed and primary alternative regulatory actions and all individual elements of these, and all supporting analysis. Additionally, within this proposal, the Agency is soliciting feedback from the public on specific issues throughout this proposed rule. For ease of review, this unit summarizes those specific requests for comment.

1. EPA is requesting public comment on all elements of the proposed regulatory action and the primary alternative regulatory action.

2. EPA is requesting public comment regarding the need for exemptions from the rule (and under what specific circumstances), including exemptions from the proposed regulatory action and the primary alternative regulatory action, pursuant to the provisions of TSCA section 6(g).

3. EPA requests comment on information that would allow EPA to quantify the magnitude of avoided risk of fetal cardiac defects due to reductions in TCE exposure under the proposed rulemaking.

4. EPA requests comment on whether EPA should promulgate definitions for each condition of use evaluated in the 2020 Risk Evaluation for TCE, and, if so, whether the descriptions in Unit III.B.1. are consistent with the conditions of use evaluated in the 2020 Risk Evaluation for TCE and whether they provide a sufficient level of detail to improve the clarity and readability of the regulation.

5. EPA requests comment on the proposed compliance dates for prohibitions of TCE manufacturing, processing, distribution in commerce, and use and whether additional time is needed, for example, for products to clear the channels of trade, or for implementing the use of substitutes; comments should include documentation such as the specific use of the chemical throughout the supply chain; concrete steps taken to identify, test, and qualify substitutes for those uses (including details on the substitutes tested and the specific certifications that would require updating); and estimates of the time required to identify, test, and qualify substitutes with supporting documentation. EPA also requests comment on whether these are the appropriate types of information for use in evaluating compliance requirements, and whether there are other considerations that should apply.

6. As noted in Unit III.B.1.f., this proposal does not apply to any substance excluded from the definition of ''chemical substance'' under TSCA section 3(2)(B)(ii) through (vi). EPA requests comment on the impacts, if any, that a prohibition on the processing

of TCE into a formulation, mixture or reaction product in other chemical products and preparations, or other aspects of this proposal, may have on the production and availability of any pesticide or other substance excluded from the TSCA definition of ''chemical substance.''

7. EPA requests comment on whether it should consider a *de minimis* level of TCE in formulations to account for impurities (*e.g.,* 0.1% or 0.5%) when finalizing the prohibitions described in Units V.A.1.b. and c., and, if so, information on and rationale for any level that should be considered *de minimis.*

8. EPA requests comment on whether additional recordkeeping requirements are warranted or additional time would be needed, for example, to begin the phaseout of processing TCE as an intermediate for the manufacture of HFC–134a.

9. EPA is seeking comment on the actions that manufacturers who process TCE for the production of HFC–134a would take as a result of the proposed phaseout in Unit V.A.1.d, and whether this would motivate a decision to cease manufacture earlier than they would otherwise under the AIM Act phase-down.

10. EPA requests comment on whether the 270-day proposed compliance date is practicable, whether additional time is needed, for example, for a regulated entity to implement a change to their disposal processes or to transition to alternative disposal methods and what those alternative disposal methods would be, and their cost and feasibility.

11. EPA is requesting comment on how entities could demonstrate that they are reducing exposures to the extent possible (including considerations for technological feasibility) and is also requesting comment on whether EPA's requirement should be that entities ensure that exposures are reduced below the ECEL, rather than to the extent possible or lowest achievable level.

12. For the ECEL value of 0.0011 ppm, proposed as part of the WCPP, EPA requests comment on the use of TSCA section 6(c)(2) to tailor the risk management actions where necessary to protect PESS.

13. EPA is requesting comment on the use of the ECEL value of 0.0040 ppm in the WCPP in the alternative regulatory action.

14. EPA is requesting comment on the selection of the fetal cardiac defects endpoint for the ECEL of 0.0011 ppm in the proposed regulatory action, rather than the immunotoxicity endpoint on which the unreasonable risk determination is based, which would result in an ECEL of 0.0040 ppm, as further detailed in Unit IV.A.

15. EPA is requesting comment on personal air sampling devices that are capable of detecting indoor air TCE concentrations at or below the proposed ECEL action level of 0.00055 ppm (0.0029 $mg/m^3$) with the requisite precision and accuracy.

16. EPA is requesting comment on using OSHA Method 1001, which has a personal breathing zone limit of detection for TCE of 18 ppb, or 0.018 ppm, to set an interim exposure limit of 0.036 ppm, with an action level of 0.018 ppm, as described further in Unit V.A.2.b.i.

17. EPA requests comments regarding replacing the proposed prohibitions with compliance with the WCPP, in the instance that regulated entities are able to consistently demonstrate compliance with an ECEL through effective controls.

18. EPA requests comment on the potential to develop future technologies (*e.g.,* engineering controls, administrative controls, PPE) involving TCE for the conditions of use listed in Unit V.A.1.a., Unit V.A.1.d., and Unit V.A.3 that would facilitate successful implementation of the WCPP, including an ECEL of 0.0011 ppm for TCE, dermal protection, and ancillary requirements described in Unit IV.A.

19. EPA requests comment on the feasibility of controlling worker exposures to TCE at or below the proposed ECEL, and the accuracy of detections measurements at this level.

20. EPA requests comment on whether a phased approach to an ECEL is desirable; that is, an approach that would establish a timeframe for meeting the ECEL as well as a shorter timeframe for meeting a concentration level higher than the ECEL (but lower than the PEL) that is currently considered achievable. EPA welcomes data or information to demonstrate that meeting the proposed ECEL over a sustained period of time would be feasible and measurable.

21. EPA requests comments that provide supported recommendations for one or more incremental exposure values and associated timelines for achieving the incremental exposure levels and the currently proposed ECEL of 0.0011 ppm, and comments that consider and provide information on the needed advancements in exposure monitoring methods, analytical methods, and exposure controls, including expected timelines for developing these capabilities.

22. EPA requests comment on how owners and operators should identify the lowest achievable exposure level, what documentation would be needed to support that further reductions are not possible, and whether EPA should provide a definition of meeting the ECEL to the extent possible. Additionally, EPA requests comment on whether current monitoring methods are able to detect airborne concentrations at the ECEL and action level values. EPA expects that detection and adherence to extremely low-ppm levels of TCE may present challenges to some in the regulated community; therefore, EPA is also requesting comment on whether EPA should propose specific requirements following results indicating non-detectable concentrations of TCE (non-detects), or a requirement that a specific monitoring method be used.

23. EPA is soliciting comment regarding an ECEL action level that is half the ECEL and any associated provisions related to the ECEL action level when the ECEL is significantly lower than the OSHA PEL. EPA is also soliciting comment on whether the ECEL action level should be aligned with the OSHA PEL action level (typically set at half the limit), due to the fact that PEL accounts for technological feasibility and the action level is not necessarily designed to be health protective. Since exposure below the ECEL would be health protective, EPA seeks comment on whether the action level should be set at a different value closer to the ECEL that would trigger increased monitoring to ensure that the ECEL is not exceeded, and whether technological feasibility should be considered in setting the action level..

24. EPA requests comment on whether the action level should be set at a different value closer to the ECEL that would trigger increased monitoring to ensure that the ECEL is not exceeded, and whether technological feasibility should be considered in setting the action level.

25. EPA is soliciting comments regarding the timing of the initial exposure monitoring so that it would be representative of all tasks involving TCE where exposures may approach the ECEL. EPA is also soliciting comments regarding use of area source monitoring instead of personal breathing zone as a representative sample of exposures.

26. EPA requests comment on the timeframes for periodic monitoring outlined in Table 1 of Unit V.A.2.

27. EPA is soliciting comment on requiring warning signs to demarcate regulated areas, such as the requirements found in OSHA's General Industry Standard for Beryllium.

28. EPA is requesting comment on whether the owner or operator should be required to permit designated representatives of employees and other workers to enter regulated areas to observe exposure monitoring similar to typical OSHA Standard requirements, *e.g.,* 29 CFR 1910.1024(d)(7).

29. EPA is requesting comment on whether there should be a requirement to replace cartridges or canisters after a certain number of hours, such as the requirements found in OSHA's General Industry Standard for 1,3-Butadiene, or a requirement for a minimum service life of non-powered air-purifying respirators such as the requirements found in OSHA's General Industry Standard for Benzene.

30. EPA is requesting comment on whether the timeframe to provide PPE to exposed workers should be shorter (*e.g.,* within two weeks after the receipt of any exposure monitoring that indicates exposure exceeding the ECEL), given the severity of the effect, as discussed in Unit V.A.2.

31. EPA requests comment on the degree to which additional guidance related to use of gloves might be necessary. Additionally, EPA requests comment on whether EPA should incorporate additional dermal protection requirements into the exposure control plan or require consideration of the hierarchy of controls for dermal exposures.

32. EPA is requesting comment on how owners and operators can engage with potentially exposed persons on the development and implementation of an exposure control plan and PPE program.

33. EPA requests comment relative to the ability of owners or operators to conduct initial monitoring within 6 months after date of publication of the final rule in the **Federal Register**, and anticipated timeframes for any procedural adjustments (*i.e.,* use of new technologies for personal breathing zone monitoring at extremely low-ppm levels of TCE) needed to comply with the requirements outlined in Unit V.A.2., including establishment of a respiratory protection program and development of an exposure plan.

34. EPA is requesting comment regarding the amount of time, if any, it would take the regulated community to develop a method to measure at or below the ECEL over an entire work shift. EPA is interested in what levels of detection are possible based on existing monitoring methods, justification for the timeframe of the specific steps needed to develop a more sensitive monitoring method, and any additional detailed information related to establishing a monitoring program to reliably measure TCE at or below the ECEL.

35. EPA also requests comment relative to the ability of owners or operators to implement dermal protection within 6 months of publication of the final rule in the **Federal Register**, and anticipated timeframes for any procedural adjustments needed to comply with the requirements outlined in Unit V.A.2.

36. EPA requests comment on whether 10 years is an appropriate timeframe for the TSCA section 6(g) exemption for industrial and commercial use of TCE as a processing aid for battery separator manufacturing (lead-acid and lithium battery separators).

37. EPA requests comment on whether 50 years is an appropriate timeframe for the TSCA section 6(g) exemption for the industrial and commercial use of TCE as a laboratory chemical (specifically in lab use essential for essential laboratory activities), Specifically, EPA requests comment on the anticipated duration of TCE cleanup projects, and whether there will be projects that continue and require the use of TCE as a laboratory chemical for the analysis of contaminated soil, air, and water samples past 50 years.

38. EPA requests comment on the TSCA section 6(g) exemption for continued emergency use of TCE in the furtherance of NASA's mission as described in Unit V.A.3.iii.a.vi, and whether any additional conditions of use should be included, in particular for any uses qualified for space flight for which no technically or economically feasible safer alternative is available. Additionally, EPA requests comment on what would constitute sufficient justification of an emergency.

39. EPA requests comments on the appropriateness of identified compliance timeframes for recordkeeping and downstream notification requirements described in Unit V.A.2.

40. EPA requests comment on the primary alternative regulatory action and whether any elements of this primary alternative regulatory action described in Unit IV.B. should be considered as EPA develops the final regulatory action. EPA also requests comment on the practicability of the timeframes under the primary alternative regulatory action outlined in Unit V.B. compared to the timeframes identified for the proposed regulatory action in Unit V.A.

41. EPA requests comment on the practicability of the timeframes outlined for the phaseout of processing TCE as an intermediate for HFC–134a manufacture in Unit V.B. compared to the timeframes identified for the proposed regulatory action in Unit V.A., including consideration of the need for manufacturing (including import), and distribution in commerce to continue during the period of the phaseout.

42. EPA requests comment on the applicability to the private sector of proposed regulatory actions pertaining specifically to Federal agencies, namely industrial uses for DoD vessel requirements and for closed-loop batch vapor degreasing for rayon fabric scouring for rocket booster nozzle production. EPA requests comment on the extent to which the private sector would be affected by a prohibition on these uses.

43. EPA requests comment on whether the three-year alternative timeline would be practicable or whether additional time is needed, for example, for a regulated entity to implement a change to their wastewater collection, treatment, or disposal processes or infrastructure, and what those alternative disposal methods may be.

44. EPA requests comment on the ability of regulated entities to conduct initial monitoring within 12 months, anticipated timeframes for any procedural adjustments needed to comply with the requirements, and the extent to which this option could result in additional exposure, compared to the proposed regulatory option as described in Unit V.A.

45. EPA requests comment on the practicability of the timeframes outlined in this unit, when compared to the timeframes identified for the proposed regulatory action in Unit V.A. EPA requests comment on whether any elements of the primary alternative regulatory action described in this unit should be considered as EPA develops the final regulatory action, *e.g.,* whether EPA should consider the timeframes for implementation of a WCPP presented in this primary alternative regulatory action and the ECEL value presented in the proposed regulatory action.

46. EPA requests comment on the existing practices (*e.g.,* engineering controls, administrative controls, PPE) involving TCE use in these conditions of use, as to whether activities may take place in closed systems and the degree to which users of TCE in these sectors could successfully implement an ECEL of 0.0011 ppm or an ECEL of 0.0040 ppm as an 8-hour TWA, dermal protection, and ancillary requirements described in Units V.A.2. and V.B.2.

47. EPA requests comment on the extent to which the use of TCE for vapor

degreasing of narrow tubing is a critical use for which no technically and economically feasible safer alternative is available.

48. EPA therefore requests comment on the Agency's consideration of an exemption from the prohibition on disposal of TCE by industrial pre-treatment, industrial treatment, or publicly owned treatment works for cleanup projects undertaken under the authority of CERCLA, RCRA, or other federal, state, or local government environmental laws, regulations, or requirements.

49. EPA requests comment on whether 50 years is a reasonable timeframe for a TSCA section 6(g)(1)(A) exemption for the cleanup of TCE-contaminated water and groundwater sites. Specifically, EPA requests comment on the anticipated duration of TCE cleanup projects, and whether there will be projects that may continue and require the disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works beyond 25 years.

50. EPA requests comment on whether industry anticipates increased releases of TCE to outdoor air associated with the implementation of the WCPP. EPA requests comment on whether owners and operators should be required to attest in their exposure control plan that engineering controls selected do not increase emissions of TCE to ambient air outside of the workplace and document in their exposure control plan whether additional equipment was installed to capture emissions of TCE to ambient air. EPA requests comment on how such a requirement could impact the availability, feasibility, or cost of engineering controls as a means to reduce workplace exposures to or below the proposed ECEL. EPA is also soliciting comment on the frequency and nature of air monitoring EPA should consider including as requirements in the final rule.

51. EPA requests comments on all aspects of the TSCA section 6(g) exemptions described in Units V.A.3. and V.B.3., including whether compliance with the WCPP should also be required during the period of the exemption.

52. EPA is soliciting comment on if the exemption for laboratory use of TCE as described in Unit V.A.3.a.iii should include lab use of TCE for research and development purposes for objectives broader than cleanup activities or exposure monitoring, such as research into TCE alternatives, whether these broader objectives should be limited to federal agencies and their contractors or expanded to include others, and whether a shorter time period, such as 10 years, should be imposed on these broader research and development activities.

53. EPA is soliciting comment on whether it should specify the type of batch vapor degreasing operation, such as open-top or closed loop batch vapor degreasing, that would be exempt from prohibition as part of the primary alternative regulatory action for the industrial and commercial use of TCE in batch vapor degreasing for essential aerospace parts and narrow tubing used in medical devices and whether EPA should consider different exemption timeframes for different types of vapor degreasing operations.

54. EPA requests comments on subsections of conditions of use, which by nature of their infrequent occurrence, could meet the ECEL without having their employees wear high APF levels of PPE on a daily basis.

55. EPA requests public comment on the rationale for proposing prohibitions as the preferred risk management approach. In addition, EPA requests comment regarding the number of businesses and other entities that could potentially close as well as associated costs with a prohibition of TCE for the industrial and commercial conditions of use identified in Unit V.A.1.

56. EPA requests comment on the effectiveness of a limited access program, such as a point-of-sale self-certification or other administrative controls, to address the unreasonable risk of TCE, in particular for facilities with occupational exposures to TCE that may not be able to meet the WCPP requirements of this proposed rulemaking.

57. EPA is soliciting comments on whether there are products in use or available for sale relevant to these conditions of use that contain TCE at this time, so that EPA can ascertain whether there are alternatives that benefit human health or the environment as compared to such use of TCE.

58. EPA is requesting comment on the Alternatives Assessment as a whole.

59. EPA is requesting public comment on an issue raised in its TSCA section 9(a) Analysis described in Unit VIII.A., (*i.e.,* the sufficiency of an action taken under a Federal law not administered by EPA).

60. Following Panel report recommendations (Ref. 32) and in response to input provided by SERs, EPA is requesting comment on the following topics as outlined in the SBAR Panel Report:

- EPA requests public comment on the extent to which a regulation under TSCA section 6(a) could minimize requirements, such as testing and monitoring protocols, recordkeeping, and reporting requirements, which may exceed those already required under OSHA's regulations for TCE.
- EPA requests public comment on reasonable compliance timeframes for small businesses, specifically on whether and how to provide longer compliance timeframes for transitioning to alternatives for uses requiring reformulation and cleaning processes for cleaning parts for national defense or cleaning medical devices.
- EPA requests public comment on differing compliance or reporting requirements or timetables that account for the resources available to small entities.
- EPA requests public comment on any additional appropriate factors for identifying reasonable compliance timeframes and how to weigh the factors for vapor degreasing and other industries.
- EPA requests public comment the feasibility of entities complying with and monitoring for a potential ECEL of either 0.0011 ppm or 0.0040 ppm, specifically regarding potential costs that could be incurred using strategies to meet the requirements of such a standard, such as engineering, administrative, or prescriptive controls and how feasible it would be for entities to implement these strategies in their operations.
- EPA requests public comment on the feasibility of use of alternatives to TCE and their availability for conditions of use that drive the unreasonable risk.
- EPA requests public comment on a training and certification program for a commercial user to obtain a TCE-containing product from a retailer, such as industrial supply stores or online retailers.
- EPA requests public comment on a *de minimis* level in the case of an impurity or trace amounts of TCE in products.
- EPA requests public comment on whether to allow the use of TCE by entities that could, based on demonstrated ability through monitoring data, meet the ECEL under a workplace chemical protection program.
- EPA requests public comment on how the rulemaking should consider TCE alternatives in light of ongoing regulatory scrutiny.
- EPA requests public comment on whether chemicals undergoing risk evaluation would be likely to be

considered as viable alternatives and, if so, in which circumstances.

- EPA requests public comment on potential challenges associated with monitoring TCE below 0.0011 ppm and 0.0040 ppm.
- EPA requests public comment on whether the use of TCE in a closed-loop vapor degreasing system, when combined with requirements of a potential workplace chemical protection program, could meet the ECELs for TCE.

## X. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not itself physically located in the docket. For assistance in locating these other documents, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.


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## XI. Statutory and Executive Order Reviews

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

### *A. Executive Orders 12866: Regulatory Planning and Review and 14094: Modernizing Regulatory Review*

This action is a ''significant regulatory action'' as defined in Executive Order 12866 (58 FR 51735, October 4, 1993), as amended by Executive Order 14094 (88 FR 21879, April 11, 2023). Accordingly, EPA submitted this action to OMB for Executive Order 12866 review. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket. EPA prepared an economic analysis (Ref. 3) of the potential costs and benefits associated with this action, which is available in the docket and is summarized in Unit VI.D.

### *B. Paperwork Reduction Act (PRA)*

The information collection activities in this proposed rule have been submitted to OMB under the PRA, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR No. 2775.01 (Ref. 82). You can find a copy of the ICR in the docket for this rulemaking, and it is briefly summarized here.

There are two primary provisions of the proposed rule that may increase burden under the PRA. The first is downstream notification, which would be carried out by updates to the relevant SDS and which would be required for manufacturers, processors, and distributors in commerce of TCE, who would provide notice to companies downstream upon shipment of TCE about the prohibitions. The information submitted to downstream companies through the SDS would provide knowledge and awareness of the restrictions to these companies. The second primary provision of the proposed rule that may increase burden under the PRA is WCPP-related information generation, recordkeeping, and notification requirements (including development of exposure control plans; exposure level monitoring and related recordkeeping; development of documentation for a PPE program and related recordkeeping; development of documentation for a respiratory protection program and related recordkeeping; development and notification to potentially exposed persons (employees and others in the workplace) about how they can access the exposure control plans, exposure monitoring records, PPE program implementation documentation, and respirator program documentation; and development of documentation demonstrating eligibility for an exemption from the proposed prohibitions, and related recordkeeping).

*Respondents/affected entities:* Persons that manufacture (including import), process, distribute in commerce, use, or dispose of TCE or products containing TCE. See also Unit I.A.

*Respondent's obligation to respond:* Mandatory (TSCA section 6(a) and 40 CFR part 751).

*Estimated number of respondents:* 22,113.

*Frequency of response:* On occasion.

*Total estimated burden:* 12,197 hours (per year). Burden is defined at 5 CFR 1320.3(b).

*Total estimated cost:* $1,702,625 (per year), includes $722,586 annualized capital or operation and maintenance costs.

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 OMB control numbers for certain EPA regulations in 40 CFR are listed in 40 CFR part 9 and displayed on the form and instructions or collection portal, as applicable.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden to the EPA using the docket identified at the beginning of this proposed rule. EPA will respond to ICR-related comments in the final rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs using the interface at *https://www.reginfo.gov/public/do/PRAMain.* Find this particular ICR by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. OMB must receive comments no later than November 30, 2023.

*C. Regulatory Flexibility Act (RFA)*

Pursuant to section 603 of the RFA, 5 U.S.C. 601 *et seq.,* EPA prepared an initial regulatory flexibility analysis (IRFA) (Ref. 33) that examines the impact of the proposed rule on small entities along with regulatory alternatives that could minimize that impact. The complete IRFA is available for review in the docket and is summarized here.

1. Need for the Rule

Under TSCA section 6(a) (15 U.S.C. 2605(a)), if EPA determines after a TSCA section 6(b) risk evaluation that a chemical substance presents an unreasonable risk of injury to health or the environment, without consideration of costs or other nonrisk factors, including an unreasonable risk to a PESS identified as relevant to the risk evaluation, under the conditions of use, EPA must by rule apply one or more requirements listed in TSCA section 6(a) to the extent necessary so that the chemical substance or mixture no longer presents such risk. TCE was the subject of a risk evaluation under TSCA section 6(b)(4)(A) that was issued in November 2020. In addition, in January 2023, EPA issued a revised unreasonable risk determination that TCE as a whole chemical substance presents an unreasonable risk of injury to health under the conditions of use. As a result, EPA is proposing to take action to the extent necessary so that TCE no longer presents such risk.

2. Objectives and Legal Basis

Under TSCA section 6(a) (15 U.S.C. 2605(a)), if EPA determines through a TSCA section 6(b) risk evaluation that a chemical substance presents an unreasonable risk of injury to health or the environment, EPA must by rule apply one or more requirements listed in TSCA section 6(a) to the extent necessary so that the chemical substance or mixture no longer presents such risk. EPA has determined through a TSCA section 6(b) risk evaluation that TCE presents an unreasonable risk under the conditions of use.

3. Description and Number of Small Entities to Which the Rule Will Apply

The proposed rule potentially affects small manufacturers (including importers), processors, distributors, retailers, users of TCE or of products containing TCE, and entities engaging in disposal. EPA estimates that the proposal would affect approximately 22,113 overall firms, of which 21,571 small entities have estimated impacts. End users with economic and technologically feasible alternatives are estimated to only incur costs associated with rule familiarization.

4. Projected Compliance Requirements

To address the unreasonable risk EPA has identified, EPA is proposing to: Prohibit the manufacture (including import), processing, and distribution in commerce of TCE for all uses (including all consumer uses), with longer timeframes for manufacture and processing related to certain uses; prohibit the industrial and commercial use and distribution in commerce of TCE, with longer timeframes for certain uses; prohibit the manufacture (including import) and processing of TCE as an intermediate for the manufacture of HFC 134-a, following an 8.5-year phaseout; prohibit the industrial and commercial use of TCE as a solvent for closed-loop batch vapor degreasing for rayon fabric scouring for end use in rocket booster nozzle production by Federal agencies and their contractors, following a 10-year phaseout; prohibit the manufacturing (including import), processing, distribution in commerce, and use of TCE as a processing aid for battery separator manufacturing following a 10-year TSCA section 6(g) exemption; prohibit the manufacturing (including import), processing, distribution in commerce, and use of TCE as a laboratory chemical (specifically in lab use essential for essential laboratory activities) following a 50-year TSCA section 6(g) exemption; Require strict workplace controls, including a TCE workplace chemical protection program (WCPP), which would include requirements for an inhalation exposure limit and glove requirements to limit dermal exposure to TCE, for conditions of use with long term phaseouts or time-limited exemptions under TSCA section 6(g); prohibit disposal to industrial pre-treatment, industrial treatment, or publicly owned treatment works following a 50-year TSCA section 6(g) exemption for cleanup projects; and establish recordkeeping and downstream notification requirements.

EPA is proposing to prohibit all conditions of use. EPA is proposing longer timeframes (with workplace controls) for prohibitions on certain conditions of use. For the reasons described in Unit V., EPA notes that long-term implementation of the WCPP is not a feasible means of addressing unreasonable risk and that prohibition of the COUs is ultimately necessary to address the unreasonable risk. Furthermore, when selecting among proposed prohibitions and other restrictions that would apply to those occupational conditions of use, EPA has also factored in considerations relating to health effects on PESS, including older pregnant women (the group identified as most susceptible to fetal cardiac defects), further discussed in Unit VI.A. EPA is proposing a WCPP for several conditions of use of TCE in order to address to the extent possible the unreasonable risk during the time period before a prohibition becomes effective. The WCPP would include the ECEL, the associated implementation requirements, and may include other components, such as dermal protection.

As described in Unit V.A., the TCE WCPP would be non-prescriptive, in the sense that regulated entities would not be required to use specific controls prescribed by EPA to achieve the exposure concentration limit. Rather, it would be a performance-based exposure limit that would enable owners or operators to determine how to most effectively meet the exposure limit based on conditions at their workplace.

A central component of the TCE WCPP is the exposure limit. Exposures remaining at or below the ECEL would address any unreasonable risk of injury to health driven by inhalation exposures for occupational conditions of use in the TSCA 2020 Risk Evaluation. For TCE, EPA is proposing an ECEL of 0.0011 parts per million (ppm) (0.0059 $mg/m^3$) for inhalation exposures to TCE as an 8-hour TWA. As discussed in Unit V.A.2.b.i., EPA acknowledges the challenges of complying with the WCPP due to suitable personal breathing zone monitoring methods to detect TCE air concentration levels at the ECEL, and requests comment on using OSHA

Method 1001 to set an interim exposure limit.

Where elimination, substitution, engineering controls, and administrative controls are not feasible to reduce the air concentration to or below the ECEL for all potentially exposed persons, EPA is proposing to require implementation of a PPE program in alignment with OSHA's General Requirements for Personal Protective Equipment at 29 CFR 1910.132. Consistent with 29 CFR 1910.132, owners and operators would be required to provide PPE, including respiratory protection and dermal protection selected in accordance with the guidelines described in this unit, that is of safe design and construction for the work to be performed. EPA is proposing to require owners and operators ensure each potentially exposed person who is required by this unit to wear PPE to use and maintain PPE in a sanitary, reliable, and undamaged condition. Owners and operators would be required to select and provide PPE that properly fits each potentially exposed person who is required by this unit to use PPE and communicate PPE selections to each affected person.

As described further in Unit VI., EPA believes that long-term implementation of the WCPP for continued use of TCE is not a feasible means of addressing unreasonable risk such that prohibition may ultimately be necessary to address the unreasonable risk.

EPA is not proposing reporting requirements beyond downstream notification (third-party notifications). Regarding recordkeeping requirements, three primary provisions of the proposed rule relate to recordkeeping. The first is recordkeeping of general records: all persons who manufacture, process, distribute in commerce, or engage in industrial or commercial use of TCE or TCE-containing products must maintain ordinary business records, such as invoices and bills-of-lading related to compliance with the prohibitions, restrictions, and other provisions of the regulation.

The second is recordkeeping related to WCPP compliance: under the proposed regulatory action, facilities complying with the rule through the WCPP would be required to develop and maintain records associated with ECEL exposure monitoring (including measurements, compliance with Good Laboratory Practice Standards, and information regarding monitoring equipment); compliance with the ECEL or lowest achievable exposure level (including the exposure control plan, PPE program implementation, and workplace information and training); PPE compliance (including the exposure control plan, PPE program implementation, basis for specific PPE selection, and workplace information and training); and workplace participation. This would also include recordkeeping related to the exemptions proposed under TSCA section 6(g), which would provide longer compliance dates for entities engaged in specific activities with TCE for which prohibition in the short term would be disruptive to national security or critical infrastructure. To maintain eligibility for the time-limited exemptions, EPA is proposing that owners and operators maintain records demonstrating compliance with the specific conditions of the exemption, including compliance with the WCPP by meeting the ECEL to the extent possible. To support and demonstrate compliance, EPA is proposing that each owner or operator of a workplace subject to the WCPP retain compliance records for five years.

The third is recordkeeping related to the phaseouts for processing TCE in manufacture of HFC–134a (for which each manufacturer of HFC–134a who uses TCE as an intermediate would be required to maintain production volume records demonstrating compliance with setting the baseline and the phaseout) or use as a solvent for closed-loop batch vapor degreasing for rayon fabric scouring (for which each person using TCE would be required to maintain records demonstrating that the end use is for rocket booster nozzle production for Federal agencies and their contractors and would, within five years, be required to maintain records that demonstrate that a final pre-launch test of rocket booster nozzles was completed without using TCE in the production of rocket booster nozzles for Federal agencies and their contractors).

a. Classes of Small Entities Subject to the Compliance Requirements

The small entities that would be potentially directly regulated by this rulemaking are small entities that manufacture (including import), process, distribute in commerce, use, or dispose of TCE, including retailers of TCE for end-consumer uses.

b. Professional Skills Needed To Comply

Entities that would be subject to this proposal that manufacture (including import), process, or distribute TCE in commerce would be required to cease under the proposed rule. The entity would be required to modify their SDS or develop another way to inform their customers of the prohibition on manufacture, processing, and distribution of TCE. They would also be required to maintain ordinary business records, such as invoices and bills-of-lading, that demonstrate compliance with the prohibitions, restrictions, and other provisions of this proposed regulation. These are all routine business tasks that do not require specialized skills or training.

Entities that use TCE in any industrial and commercial capacity would be required to cease under the proposed rule, with some timeframes for prohibitions longer than others. Restriction or prohibition of these uses would likely require the implementation of an alternative chemical or the cessation of use of TCE in a process or equipment that may require persons with specialized skills, such as engineers or other technical experts. Instead of developing an alternative method themselves, commercial users of TCE may choose to contract with another entity to do so.

Entities that would be permitted to continue on a time-limited basis until prohibition to manufacture, process, distribute, or use TCE would be required to implement a WCPP and would have to attempt to meet the provisions of the program to the extent possible for continued use of TCE. A transition to a WCPP may require persons with specialized skills such as an engineer or health and safety professional. Instead of implementing the WCPP to the extent possible, entities that use TCE may choose to contract with another entity to do so. Records would have to be maintained for compliance with a WCPP by meeting the ECEL to the extent possible. While this recording activity itself may not require a special skill, the information to be measured and recorded may require persons with specialized skills such as an industrial hygienist.

5. Relevant Federal Rules

Because of its health effects, TCE is subject to numerous State, Federal, and international regulations restricting and regulating its use. The following is a summary of the regulatory actions pertaining to TCE; for a full description see appendix A of the 2020 Risk Evaluation for TCE and the summary in the docket (Ref. 9).

EPA has published numerous rules and **Federal Register** documents pertaining to TCE under its various authorities.

Under a Significant New Use Rule (SNUR), (81 FR 20535, April 8, 2016), issued under the authority of TSCA section 5(a), TCE is subject to notifications for manufacture (including import) or processing of TCE for use in

a consumer product except for use in cleaners and solvent degreasers, film cleaners, hoof polishes, lubricants, mirror edge sealants and pepper spray. This SNUR ensures that EPA will have the opportunity to review any new consumer uses of TCE and, if appropriate, take action to prohibit or limit those uses.

The TSCA section 8(a) Chemical Data Reporting (CDR) Rule requires manufacturers (including importers) to give EPA basic exposure-related information on the types, quantities and uses of chemical substances produced domestically and imported into the United States. TCE manufacturing (including importing), processing, and use information is reported under the CDR rule (76 FR 50816, August 16, 2011).

TCE is a hazardous air pollutant under the CAA (42 U.S.C. 7412(b)(1)). Under section 112(d), EPA has established national emission standards for hazardous air pollutants (NESHAPs) for a number of source-specific categories that emit TCE, including synthetic organic chemical manufacturing (40 CFR part 63, subparts F, G, and H), miscellaneous organic chemical manufacturing (40 CFR part 63, subpart FFFF), and aerospace manufacturing and rework facilities (40 CFR part 63, subpart GG). Under sections 112(d) and 112(f), EPA has promulgated a number of risk and technology review (RTR) NESHAPs, including the RTR NESHAP for Halogenated Solvent Cleaning (40 CFR part 63, subpart T). With this proposed rule under TSCA section 6, uses and emissions already regulated under these NESHAPs would be prohibited, with some of these uses identified for a longer phaseout timeframe under TSCA section 6.

Under the CAA section 612, EPA's Significant New Alternatives Policy (SNAP) program listed TCE as an acceptable substitute for methyl chloroform and chlorofluorocarbon (CFC)-113 in metals, electronics, and precision cleaning; as an alternative to CFC–11, CFC–113, methyl chloroform, and hydrochlorofluorocarbon (HCFC)-141b for aerosol solvent use; and as an alternative for methyl chloroform for use as a carrier solvent in adhesives, coatings, and inks (59 FR 13044, March 18, 1994). TCE was also noted to have essentially no ozone depletion potential and cited as a volatile organic compound (VOC)-exempt solvent and acceptable substitute for ozone-depleting substances (72 FR 30142, May 30, 2007). TCE is also listed under the National Volatile Organic Compound Emission Standards for Aerosol Coatings (40 CFR part 59, subpart E). Under the American Innovation and Manufacturing Act (AIM Act) that directs EPA to phase down the production and consumption of HFCs, EPA set HFC production and consumption baseline levels from which reductions will be made (86 FR 55116, October 5, 2021). The rule also establishes an initial methodology for allocating and trading HFC allowances for 2022 and 2023. TCE is identified as a feedstock chemical for HFC production, specifically HFC–134a.

TCE is designated as a toxic pollutant under section 307(a)(1) of the Clean Water Act and as such is subject to effluent limitations. Also under section 304, TCE is included in the list of total toxic organics (TTO) (40 CFR 413.02(i)). In 2015, EPA published updated ambient water quality criteria for TCE, including recommendations for ''water + organism'' and ''organism only'' human health criteria for States and authorized tribes to consider when adopting criteria into their water quality standards (80 FR 36986, June 29, 2015). TCE is also subject to National Primary Drinking Water Regulations (NPDWR) under the Safe Drinking Water Act (SDWA) with a maximum contaminant level goal (MCGL) of zero and an enforceable maximum contaminant level (MCL) of 0.005 mg/L (40 CFR 141.50; 40 CFR 141.61).

Programs within EPA implementing other environmental statutes, including, but not limited to, the RCRA, the Comprehensive Environmental Response, Compensation and Liability Act, the Safe Drinking Water Act, and the CWA, classify TCE as a characteristic and listed hazardous waste (40 CFR 261.24, 40 CFR 261.31, 40 CFR 261.33(f)). In 2013, EPA modified its hazardous waste management regulations to conditionally exclude solvent-contaminated wipes that have been cleaned and reused from the definition of solid waste under RCRA and to conditionally exclude solvent-contaminated wipes that are disposed from the definition of hazardous waste (78 FR 46448, July 31, 2013). However, TCE-contaminated wipes were not eligible for this exclusion due to health and safety concerns.

EPA notes that TCE was first registered as an antimicrobial and conventional chemical in 1985 pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). TCE is not currently used in pesticides, either as an active or inert ingredient. While TCE was previously used as an inert, EPA removed TCE from its list of inert ingredients used in pesticide products in 1998 (63 FR 34384, June 24, 1998).

While TSCA shares equity in the regulation of TCE, EPA does not anticipate this rulemaking to duplicate nor conflict with the aforementioned programs' classifications and associated rules.

In addition to EPA actions, TCE is also subject to other Federal regulations. Under the OSH Act, OSHA established the PEL for TCE at 100 ppm as an 8-hour TWA with an acceptable ceiling concentration of 200 ppm and an acceptable maximum peak above the acceptable ceiling concentration for an 8-hour shift of 300 ppm, maximum duration of 5 minutes in any 2 hours (29 CFR 1910.1000). However, EPA recognizes that the existing PEL does not eliminate the unreasonable risk identified by EPA under TSCA, and EPA is therefore proposing prohibitions based on the unreasonable risk identified following the TSCA 2020 Risk Evaluation for TCE, with time-limited requirements to meet to the extent possible a new, lower exposure limit. The implementation of those requirements would align with existing OSHA requirements where possible. For TCE, this approach would eliminate the unreasonable risk driven by certain conditions of use, reduce burden for complying with the regulations, and provide the familiarity of a pre-existing framework for the regulated community.

Under the FFDCA, the Food and Drug Administration established tolerances for residues of TCE resulting from its use as a solvent in the manufacture of decaffeinated coffee and spice oleoresins (21 CFR 173.290). Under the Atomic Energy Act, the Department of Energy Worker Safety and Health Program requires its contractor employees to use the 2005 ACGIH TLV for TCE, which is 10 ppm (8-hour TWA) and 25 ppm Short Term Exposure Limit. Under the Federal Hazardous Material Transportation Act, the Department of Transportation has designated TCE as a hazardous material, and there are special requirements for marking, labeling, and transporting it (49 CFR part 171, 49 CFR part 172, 40 CFR 173.202, and 40 CFR 173.242).

6. Significant Alternatives to the Proposed Rule

EPA analyzed alternative regulatory approaches to identify which would be feasible, reduce burden to small businesses, and achieve the objective of the statute (*i.e.,* applying one or more requirements listed in TSCA section 6(a) to the extent necessary so that the chemical substance or mixture no longer presents an unreasonable risk). As

described in more detail in Unit V., EPA considered several factors, in addition to identified unreasonable risk, when selecting among possible TSCA section 6(a) requirements. To the extent practicable, EPA factored into its decisions: the effects of TCE on health and the environment, the magnitude of exposure to TCE of human beings and the environment, the benefits of TCE for various uses, and the reasonably ascertainable economic consequences of the rule. As part of this analysis, EPA considered—in addition to the prohibitions described in Unit V.—a wide variety of control measures to address the unreasonable risk from TCE such as a WCPP, weight fractions, a certification and limited access program, and prescriptive controls. EPA's analysis of these risk management approaches is detailed in Unit V.A.3. In general, EPA determined that these approaches alone would either not be able to address the unreasonable risk, or, in the case of a weight fraction limit, would result in a product containing so little TCE that it would have the effect of a prohibition.

Additionally, in this proposed rule and the Economic Analysis, EPA has examined a primary alternative regulatory action. The primary alternative regulatory action described in this proposed rule and considered by EPA combines prohibitions and requirements for a WCPP. While in some ways it is similar to the proposed regulatory action, the primary alternative regulatory action described in this NPRM differs from the proposed regulatory action by providing longer timeframes for prohibitions and by describing an ECEL based on a different health endpoint (*i.e.,* immunotoxicity), as part of the WCPP, for the conditions of use of TCE that would be permitted to continue for longer than 1 year after publication of the final rule until the prohibition compliance dates. The primary alternative regulatory action was considered and found to provide greater uncertainty in addressing the unreasonable risk from TCE under the conditions of use, resulting in EPA's proposed action. Estimated costs of the primary alternative regulatory action can be found in Chapter 7 of the Economic Analysis (Ref. 3).

As indicated by this overview, and detailed in Unit VI.A., in the review of alternatives, EPA determined that some methods either did not effectively eliminate the unreasonable risk presented by TCE or, for many conditions of use, there was a high degree of uncertainty regarding whether compliance with a comprehensive WCPP would be possible to adequately protect potentially exposed persons. While EPA is soliciting comments about all aspects on the alternative regulatory actions, which may be incorporated into the final rulemaking, EPA has considered the primary alternative regulatory action and found that the proposed action is more suitable for addressing the unreasonable risk to the extent necessary so that TCE no longer presents such risk, while also allowing flexibility for regulated entities to continue operations under time-limited exemptions, as described in more detail in Units V.A. and VI.A.

Regarding timeframes for compliance, as described in Units V.A.1., 2., and 3., the proposed compliance dates incorporate EPA's consideration of sustained awareness of risks resulting from TCE exposure as well as precedent established by the OSHA standards (62 FR 1494, January 10, 1997). TSCA requires that EPA propose timeframes that are ''as soon as practicable'' under TSCA section 6(d)(1)(B) and 6(d)(1)(D). EPA has no information indicating that the proposed compliance dates are not practicable for the activities that would be prohibited, or that additional time is needed for products affected by the proposed restrictions to clear the channels of trade. As noted in Unit IX., EPA is seeking public comment on whether additional time is needed for compliance with prohibitions, for products to clear the channels of trade, or for implementing a WCPP. EPA may finalize shorter or longer compliance timeframes based on public comment. Regarding potential regulatory flexibilities for compliance dates and timeframes, EPA notes that the alternative regulatory action would include longer compliance timeframes for prohibitions. Given the potential severity of impacts from exposure to TCE, EPA's proposed regulatory action would include relatively rapid compliance timeframes. However, it is possible that longer timeframes would be needed for entities to come into compliance; therefore, the primary alternative regulatory action described in the proposed rule would include longer timeframes for implementation than the proposed regulatory action. These timeframes are detailed in Unit V.B.

As required by section 609(b) of the RFA, the EPA also convened a SBAR Panel to obtain advice and recommendations from SERs that potentially would be subject to the rule's requirements. The SBAR Panel evaluated the assembled materials and small-entity comments on issues related to elements of an IRFA. A copy of the full SBAR Panel Report (Ref. 32) is available in the rulemaking docket.

### *D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain a Federal mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action would affect entities that use TCE. It is not expected to affect State, local, or Tribal governments because the use of TCE by government entities is minimal. This action is not expected to result in expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more (when adjusted annually for inflation) in any 1 year. Accordingly, this action is not subject to the requirements of sections 202, 203, or 205 of UMRA.

### *E. Executive Order 13132: Federalism*

EPA has concluded that this action has federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because regulations under TSCA section 6(a) may preempt State law. As set forth in TSCA section 18(a)(1)(B), the issuance of rules under TSCA section 6(a) to address the unreasonable risk presented by a chemical substance has the potential to trigger preemption of laws, criminal penalties, or administrative actions by a State or political subdivision of a State that are: (1) Applicable to the same chemical substance as the rule under TSCA section 6(a); and (2) Designed to prohibit or otherwise restrict the manufacture, processing, or distribution in commerce or use of that same chemical. TSCA section 18(c)(3) applies that preemption only to the ''hazards, exposures, risks, and uses or conditions of use'' of such chemical included in the final TSCA section 6(a) rule.

EPA provides the following preliminary federalism summary impact statement. The Agency consulted with State and local officials early in the process of developing the proposed action to permit them to have meaningful and timely input into its development. This included background presentation on September 9, 2020, and a consultation meeting on July 22, 2021. EPA invited the following national organizations representing State and local elected officials to these meetings: Association of State Drinking Water Administrators, National Association of Clean Water Agencies, Western States Water Council, National Water Resources Association, American Water Works Association, Association of Metropolitan Water Agencies,

Association of Clean Water Administrators, Environmental Council of the States, National Association of Counties, National League of Cities, County Executives of America, U.S. Conference of Mayors, and National Association of Attorneys General. As described in Unit III.A.1., during the meeting participants and EPA discussed preemption; the authority given under TSCA section 6 to regulate identified unreasonable risk; which activities would be potentially regulated in the proposed rule; TSCA reporting requirements; key local constituencies; and the relationship between TSCA and existing statutes, particularly the CWA and SDWA. A summary of the meeting with these organizations, including the views that they expressed, is available in the docket (Ref. 26). EPA provided an opportunity for these organizations to provide follow-up comments in writing but did not receive any such comments.

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

This action does not have Tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000), because it will not have substantial direct effects on Tribal governments, on the relationship between the Federal Government and the Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. This rulemaking would not have substantial direct effects on Tribal government because TCE is not manufactured, processed, or distributed in commerce by Tribes. TCE is not regulated by Tribes, and this rulemaking would not impose substantial direct compliance costs on Tribal governments. Thus, Executive Order 13175 does not apply to this action.

Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, EPA consulted with Tribal officials during the development of this action. The Agency held a Tribal consultation from May 17, 2021, to August 20, 2021, with meetings on June 15, 2021, and July 8, 2021. Tribal officials were given the opportunity to meaningfully interact with EPA risk managers concerning the current status of risk management. During the consultation, EPA discussed risk management under TSCA section 6(a). EPA risk managers briefed Tribal officials on the Agency's risk management considerations and Tribal officials raised issues and concerns. Issues raised by Tribal officials included concerns from Tribal members about the TCE OSHA exposure limits being outdated, Tribal interest in seeing TCE phased out and an interest in reducing greenhouse gas emissions, and concerns that third party disposal may be occurring near Tribal lands, with a particular interest in protecting workers at publicly owned treatment works.

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

Executive Order 13045 (62 FR 19885, April 23, 1997) directs Federal agencies to include an evaluation of the health and safety effects of the planned regulation on children in Federal health and safety standards and explain why the regulation is preferable to potentially effective and reasonably feasible alternatives. While the environmental health or safety risks addressed by this action present a disproportionate risk to children due to TCE's developmental toxicity, this action is not subject to Executive Order 13045 because it is not a significant regulatory action under section 3(f)(1) of Executive Order 12866.

However, EPA's 2021 Policy on Children's Health applies to this action. Information on how the Policy was applied is presented in Unit III.A.3. In addition, this action's health and risk assessments are contained in Units III.B.2., VI.A. and B., and the 2020 Risk Evaluation for TCE (section 4 in Ref. 1) and the Economic Analysis for this proposed rulemaking (Ref. 3).

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

This action is not a ''significant energy action'' under Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution or use of energy.

*I. National Technology Transfer and Advancement Act (NTTAA)*

Pursuant to the NTTAA section 12(d), 15 U.S.C. 272., the Agency has determined that this rulemaking involves environmental monitoring or measurement, specifically for occupational inhalation exposures to TCE. Consistent with the Agency's Performance Based Measurement System (PBMS), the Agency proposes not to require the use of specific, prescribed analytic methods. Rather, the Agency plans to allow the use of any method that meets the prescribed performance criteria. The PBMS approach is intended to be more flexible and cost-effective for the regulated community; it is also intended to encourage innovation in analytical technology and improved data quality. EPA is not precluding the use of any method, whether it constitutes a voluntary consensus standard or not, as long as it meets the performance criteria specified.

For this rulemaking, the key consideration for the PBMS approach is the ability to accurately detect and measure airborne concentrations of TCE at the ECEL and the ECEL action level. Some examples of methods which meet the criteria are included in appendix B of the ECEL memo (Ref. 46). EPA recognizes that there may be voluntary consensus standards that meet the proposed criteria (Ref. 12). EPA request comments on whether it should incorporate such voluntary consensus standards in the rule and seeks information in support of such comments regarding the availability and applicability of voluntary consensus standards that may achieve the sampling and analytical requirements of the rule in lieu of the PBMS approach.

EPA requests comment on the degree to which additional guidance related to use of methods might be necessary.

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

EPA believes that the human health or environmental conditions that exist prior to this action result in or have the potential to result in disproportionate and adverse human health or environmental effects on communities with environmental justice concerns. As described more fully in the Economic Analysis, EPA conducted an analysis to characterize the baseline conditions faced by communities and workers affected by the regulation to identify the potential for disproportionate impacts on communities with EJ concerns in accordance with Executive Order 12898 (59 FR 7629, February 16, 1994) and Executive Order 14096 (88 FR 25251, April 26, 2023). The baseline characterization suggests that workers in affected industries and regions, as well as residents of nearby communities, are more likely to be people of color than the general population in affected states, although this varied by use assessed. Based on reasonably available information, EPA believes that there are potential EJ concerns in communities surrounding facilities subject to this regulation (Ref. 3).

EPA believes that this action is likely to reduce existing disproportionate and adverse effects on communities with

environmental justice concerns. While the regulatory options are anticipated to address the unreasonable risk from exposure to TCE to the extent necessary so that it is no longer unreasonable, EPA is not able to quantify the distribution of the change in risk for affected populations. EPA is also unable to quantify the changes in risks for affected populations from non-TCE-using technologies or practices that firms may adopt in response to the regulation to determine whether any such changes could pose EJ concerns. Data limitations that prevent EPA from conducting a more comprehensive analysis are summarized in the Economic Analysis (Ref. 3).

EPA additionally identified and addressed EJ concerns by conducting outreach to advocates of communities that might be subject to disproportionate exposure to TCE. On June 16, 2021, and July 6, 2021, EPA held public meetings as part of this consultation (Ref. 32). See also Unit III.A.1. Following the EJ meetings, EPA received five written comments, in addition to oral comments provided during the consultations. In general, commenters supported strong regulation of TCE to protect lower-income communities and workers. Commenters supported strong outreach to affected communities, encouraged EPA to follow the hierarchy of controls, favored prohibitions, and noted the uncertainty, and, in some cases, inadequacy, of PPE.

The information supporting the review under Executive Order 12898 and Executive Order 14096 is contained in Units I.E., II.D., III.A.1., VI.A., and in the Economic Analysis (Ref. 3). EPA's presentations and fact sheets for the EJ consultations related to this rulemaking, are available at *https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/materials-june-and-july-2021-environmental-justice.* These materials and a summary of the consultation are also available in the public docket for this rulemaking (Ref. 32).

**List of Subjects in 40 CFR Part 751**

Environmental protection, Chemicals, Export notification, Hazardous substances, Import certification, Reporting and recordkeeping.

**Michael S. Regan,**

*Administrator.*

Therefore, for the reasons stated in the preamble, EPA proposes to amend 40 CFR part 751 as follows:

## PART 751—REGULATION OF CERTAIN CHEMICAL SUBSTANCES AND MIXTURES UNDER SECTION 6 OF THE TOXIC SUBSTANCES CONTROL ACT

■ 1. The authority citation for part 751 continues to read as follows:

**Authority:** 15 U.S.C. 2605, 15 U.S.C. 2625(l)(4).

■ 2. Amend § 751.5 by adding in alphabetical order definitions for ''Authorized person'', ''ECEL'', ''Exposure group'', ''Owner or operator'', ''Potentially exposed person'', ''Regulated area'', and ''Retailer'' to read as follows:

**§ 751.5 Definitions.**

* * * * *

*Authorized person* means any person specifically authorized by the owner or operator to enter, and whose duties require the person to enter a regulated area.

* * * * *

*ECEL* is an Existing Chemical Exposure Limit and means an airborne concentration calculated as an eight (8)-hour time-weighted average (TWA).

* * * * *

*Exposure group* means a group consisting of every person performing the same or substantially similar operations in each work shift, in each job classification, and in each work area where exposure to chemical substances or mixtures is reasonably likely to occur.

*Owner or operator* means any person who owns, leases, operates, controls, or supervises a workplace covered by this part.

* * * * *

*Potentially exposed person* means any person who may be occupationally exposed to a chemical substance or mixture in a workplace as a result of a condition of use of that chemical substance or mixture.

*Regulated area* means an area established by the regulated entity to demarcate areas where airborne concentrations of a specific chemical substance exceed, or there is a reasonable possibility they may exceed, the ECEL or the EPA STEL.

*Retailer* means a person who distributes in commerce or makes available a chemical substance or mixture to consumer end users, including e-commerce internet sales or distribution. Any distributor with at least one consumer end user customer is considered a retailer. A person who distributes in commerce or makes available a chemical substance or mixture solely to commercial or industrial end users or solely to commercial or industrial businesses is not considered a retailer.

■ 2. Add new subpart D to read as follows:

**Subpart D—Trichloroethylene**



**§ 751.301 General.**

This subpart establishes prohibitions and restrictions on the manufacture (including import), processing, distribution in commerce, use, and disposal of trichloroethylene (TCE) (CASRN 79–01–6) to prevent unreasonable risk of injury to health in accordance with TSCA section 6(a).

**§ 751.303 Definitions.**

The definitions in subpart A of this part apply to this subpart unless otherwise specified in this section. In addition, the following definitions apply:

*Distribute in commerce* has the same meaning as in section 3 of the Act, except that the term does not include retailers for purposes of §§ 751.313 and 751.315.

*ECEL action level* means a concentration of airborne TCE of 0.00055 parts per million (ppm) calculated as an eight (8)-hour time-weighted average (TWA).

**§ 751.305 Prohibitions of manufacturing, processing, distribution in commerce, use and disposal.**

(a) *Applicability.* The provisions of this section apply to the following:

(1) Manufacturing (including importing);

(2) Processing;

(3) All industrial and commercial uses;

(4) All consumer uses;

(5) Distribution in commerce; and

(6) Disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works.

(b) *Prohibitions.* (1) After [DATE 3 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], all persons are prohibited from manufacturing (including importing)

TCE, except as specified in paragraphs (b)(4) through (13) of this section.

(2) After [DATE 6 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], all persons are prohibited from processing and distributing in commerce (including making available) TCE, including any TCE-containing products, except as specified in paragraphs (b)(4) through (13) of this section.

(3) After [DATE 9 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], all persons are prohibited from industrial and commercial use of TCE, including any TCE-containing products, except as specified in paragraphs (b)(4) through (13) of this section.

(4) After [DATE 6 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], all persons are prohibited from manufacturing (including importing) TCE for industrial and commercial use for batch vapor degreasing in open-top and closed-loop degreasing equipment, except for the use specified in paragraphs (b)(9) and (11) of this section.

(5) After [DATE 9 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], all persons are prohibited from processing TCE for industrial and commercial use for batch vapor degreasing in open-top and closed-loop degreasing equipment, except for the use specified in paragraphs (b)(9) and (11) of this section.

(6) After [DATE 1 YEAR AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], all persons are prohibited from the industrial and commercial use of TCE for batch vapor degreasing in open-top and closed-loop degreasing equipment, except for the use specified in paragraphs (b)(9) and (11) of this section.

(7) After [DATE 18 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], all persons are prohibited from manufacturing (including importing) TCE for processing of TCE as a reactant/intermediate and processing TCE for the industrial and commercial use of TCE as a processing aid for: battery separator manufacturing; process solvent used in polymer fiber spinning, fluoroelastomer manufacture and Alcantara manufacture; extraction solvent used in caprolactam manufacture; precipitant used in beta-cyclodextrin manufacture, except for those uses specified in paragraphs (b)(10) and (12) of this section.

(8) After [DATE 2 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], all persons are prohibited from processing TCE as a reactant/intermediate and from processing TCE for the industrial and commercial use of TCE as a processing aid in: process solvent used in battery manufacture; process solvent used in polymer fiber spinning, fluoroelastomer manufacture and Alcantara manufacture; extraction solvent used in caprolactam manufacture; precipitant used in beta-cyclodextrin manufacture, except for those uses specified in paragraphs (b)(10) and (12) of this section.

(9) After [DATE 5 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] all persons are prohibited from the industrial and commercial use of TCE as a solvent in closed-loop batch vapor degreasing for rayon fabric scouring for end use in producing rocket booster nozzles for Federal agencies and their contractors, and manufacturing (including importing), processing, and distribution in commerce of TCE for such use, unless such persons obtain and maintain the records required by § 751.309 demonstrating that a final pre-launch test was completed using an alternative to TCE in the production of the rocket booster nozzles.

(10) After [DATE 8 YEARS AND 6 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], all persons are prohibited from manufacturing (including import), distribution in commerce, and processing of TCE as an intermediate for manufacturing hydrofluorocarbon 134-a, also known as 1,1,1,2-Tetrafluroethane (HFC–134a: CAS Number 811–97–2).

(11) After [DATE 10 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], all persons are prohibited from the industrial and commercial use of TCE as a solvent in closed-loop batch vapor degreasing for rayon fabric scouring for end use in producing rocket booster nozzles for Federal agencies and their contractors, and manufacturing (including importing), processing, and distribution in commerce of TCE for such use.

(12) After [DATE 10 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], all persons are prohibited from the industrial and commercial use of TCE as a processing aid for battery separatory manufacturing, and the manufacturing (including importing), processing, and distribution in commerce of TCE for such use.

(13) After [DATE 10 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], for DoD naval vessels and their systems, and in the maintenance, fabrication, and sustainment for and of such vessels and systems, prohibit the industrial and commercial use of TCE as potting compounds for naval electronic systems and equipment; sealing compounds for high and ultra high vacuum systems; bonding compounds for materials testing and maintenance of underwater systems and bonding of nonmetallic materials; and cleaning requirements (which includes degreasing using wipes, sprays, solvents and vapor degreasing) for: materials and components required for military ordnance testing; temporary resin repairs in vessel spaces where welding is not authorized; ensuring polyurethane adhesion for electronic systems and equipment repair and installation of elastomeric materials; various naval combat systems, radars, sensors, equipment; fabrication and prototyping processes to remove coolant and other residue from machine parts; machined part fabrications for naval systems; installation of topside rubber tile material aboard vessels; and vapor degreasing required for substrate surface preparation prior to electroplating processes.

(14) After [DATE 50 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], all persons are prohibited from industrial and commercial uses of TCE for the laboratory uses for essential laboratory uses described in § 751.317(b)(1), and from the manufacturing (including importing), processing, and distribution in commerce of TCE for such uses.

(15) After [DATE 9 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], all persons manufacturing (including importing), processing, and using TCE are prohibited from disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works except as specified in paragraph (b)(16) of this section.

(16) After [DATE 50 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], all persons are prohibited from disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works for the purposes of cleanup projects of TCE-contaminated water and groundwater as described in § 751.317(b)(2).

(17) After [DATE 7 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], all persons are prohibited from the industrial and commercial use of TCE as a solvent in closed-loop vapor degreasing necessary for human-rated rocket engine cleaning by NASA and its contractors as described in § 751.317(c)(3) and the manufacturing (including importing), processing, and distribution in commerce of TCE for such use.

**§ 751.307 Phaseout of trichloroethylene use in manufacture of HFC–134a.**

(a) *Baseline.* Before [DATE 6 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], each manufacturer of HFC–134a who processes TCE as an intermediate must establish a baseline annual volume of TCE processed as an intermediate.

(1) The manufacturer must use the average of any 12 consecutive months in the 36 months preceding [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] to calculate the baseline.

(2) The manufacturer must retain records that demonstrate how the baseline annual volume was calculated, in accordance with § 751.315(d)(1).

(b) *Phaseout.* (1) Beginning [DATE 2 YEARS AND 6 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], each manufacturer of HFC–134a who processes TCE as an intermediate is not permitted to process TCE as an intermediate at an annual volume greater than 75 percent of the baseline.

(2) Beginning [DATE 4 YEARS AND 6 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], each manufacturer of HFC–134a who processes TCE as an intermediate is not permitted to processes TCE as an intermediate at an annual volume greater than 50 percent of the baseline.

(3) Beginning [DATE 6 YEARS AND 6 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], each manufacturer of HFC–134a who processes TCE as an intermediate is not permitted to processes TCE as an intermediate at an annual volume greater than 25 percent of the baseline so established.

(4) Beginning [DATE 8 YEARS AND 6 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], each manufacturer of HFC–134a who processes TCE as an intermediate is prohibited from processing TCE as an intermediate.

(c) *Workplace chemical protection program.* All persons using TCE in accordance with this section must comply with § 751.311.

**§ 751.309 Phaseout of trichloroethylene use in vapor degreasing for booster rocket nozzles.**

(a) In accordance with § 751.305(b)(9), until [DATE 5 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], TCE may be manufactured (including imported), processed, distributed in commerce, and used as a solvent in closed-loop batch vapor degreasing for rayon fabric scouring for end use in rocket booster nozzle production by Federal agencies and their contractors.

(b) From [DATE 5 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] until [DATE 10 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], TCE may only be manufactured (including imported), processed, distributed in commerce, and used as a solvent in closed-loop batch vapor degreasing for rayon fabric scouring, for end use in rocket booster nozzle production by Federal agencies and their contractors by persons who maintain records demonstrating that a final pre-launch test of rocket booster nozzles without using TCE was completed.

(c) All persons using TCE in accordance with this section must comply with § 751.311.

**§ 751.311 Workplace chemical protection program.**

(a) *Applicability.* The provisions of this section apply to workplaces engaged in the following conditions of use of TCE that are allowed to temporarily continue past one year, in accordance with § 751.305(b)(4) through (13), § 751.307, and § 751.309:

(1) Manufacturing (domestic manufacture);

(2) Manufacturing (import);

(3) Processing as a reactant/intermediate;

(4) Processing into formulation, mixture or reaction product;

(5) Processing (repackaging);

(6) Processing (recycling);

(7) Industrial and commercial use as a processing aid in process solvent used in battery manufacture; process solvent used in polymer fiber spinning, fluoroelastomer manufacture and Alcantara manufacture; extraction solvent used in caprolactam manufacture; precipitant used in beta-cyclodextrin manufacture;

(8) Industrial and commercial use in other miscellaneous industrial and commercial uses (laboratory use for essential laboratory activities);

(9) Industrial and commercial use of TCE as a solvent in closed-loop batch vapor degreasing for rayon fabric scouring for end use in rocket booster nozzle production by Federal agencies and their contractors;

(10) Disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works for the purposes of cleanup projects of TCE-contaminated water and groundwater;

(11) Industrial and commercial use of TCE for DoD naval vessels and their systems, and in the maintenance, fabrication, and sustainment for and of such vessels and systems; as potting compounds for naval electronic systems and equipment; sealing compounds for high and ultra high vacuum systems; bonding compounds for materials testing and maintenance of underwater systems and bonding of nonmetallic materials; and cleaning requirements (which includes degreasing using wipes, sprays, solvents and vapor degreasing) for: materials and components required for military ordnance testing; temporary resin repairs in vessel spaces where welding is not authorized; ensuring polyurethane adhesion for electronic systems and equipment repair and installation of elastomeric materials; various naval combat systems, radars, sensors, equipment; fabrication and prototyping processes to remove coolant and other residue from machine parts; machined part fabrications for naval systems; installation of topside rubber tile material aboard vessels; and vapor degreasing required for substrate surface preparation prior to electroplating processes; and

(12) Industrial and commercial use of TCE as a solvent in closed-loop vapor degreasing necessary for human-rated rocket engine cleaning by NASA and its contractors.

(b) *Existing chemical exposure limit (ECEL).* (1) Applicability. The provisions of this paragraph (b) apply to any workplace engaged in the conditions of use listed in paragraphs (a)(1) through (9) of this section.

(2) *ECEL.* Beginning [DATE 9 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], or beginning 4 months after introduction of TCE into the workplace if TCE use commences after [DATE 6 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], the owner or operator must ensure to the extent possible that no person is exposed to an airborne

concentration of TCE in excess of 1.1 parts of TCE per billion parts of air (0.0011 ppm) as an eight (8)-hour TWA, in accordance with the requirements of paragraph (c) of this section and, if necessary, paragraph (e) of this section:

(3) *Exposure monitoring*—(i) *General.* (A) Owners or operators must determine each potentially exposed person's exposure by either:

(*1*) Taking a personal breathing zone air sample of each potentially exposed person's exposure; or

(*2*) Taking personal breathing zone air samples that are representative of the 8-hour TWA of each person whose exposure must be monitored.

(B) Representative 8-hour TWA exposures must be determined on the basis of one or more full-shift exposure of at least one person that represents, and does not underestimate, the potential exposure of every person in each exposure group and that represents the highest TCE exposures likely to occur under reasonably foreseeable conditions of use.

(C) Exposure samples must be analyzed using an appropriate analytical method by a laboratory that complies with the Good Laboratory Practice Standards in 40 CFR part 792.

(D) Owners or operators must ensure that methods used to perform exposure monitoring produce results that are accurate, to a confidence level of 95 percent, to within plus or minus 25 percent for airborne concentrations of TCE.

(ii) *Initial monitoring.* (A) Each owner or operator who has a workplace or work operation covered by this section, except as provided for in paragraph (b)(3)(ii)(B) of this section, must perform initial monitoring of potentially exposed persons regularly working in areas where TCE is present.

(B) The initial monitoring required in paragraph (b)(3)(ii)(A) of this section must be completed by [DATE 6 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] or within 30 days of introduction of TCE into the workplace, whichever is later. Where the owner or operator has monitoring within five years prior to [DATE 2 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] and the monitoring satisfies all other requirements of this section, the owner or operator may rely on such earlier monitoring results to satisfy the requirements of paragraph (b)(3)(ii)(A) of this section.

(iii) *Periodic monitoring.* The owner or operator must establish an exposure monitoring program for periodic monitoring of exposure to TCE in accordance with Table 1 to this paragraph (b)(3)(iii).

TABLE 1 TO PARAGRAPH (b)(3)(iii)—PERIODIC MONITORING REQUIREMENTS

| Air concentration condition | Periodic monitoring requirement |
|---|---|
| If all initial exposure monitoring is below the ECEL action level (<0.00055 ppm 8-hour TWA). | Periodic exposure monitoring is required at least once every 5 years. |
| If the initial or most recent exposure monitoring indicates that airborne exposure is above the ECEL (>0.0011 ppm 8-hour TWA). | Periodic exposure monitoring is required within 3 months of the most recent exposure monitoring. |
| If the initial or most recent exposure monitoring indicates that airborne exposure is at or above the ECEL action level but at or below the ECEL (≥0.00055 ppm 8-hour TWA, ≤0.0011 ppm 8-hour TWA). | Periodic exposure monitoring is required within 6 months of the most recent exposure monitoring. |
| If the two most recent (non-initial) exposure monitoring measurements, taken at least seven days apart, indicate that airborne exposure is below the ECEL action level (<0.00055 ppm 8-hour TWA). | Periodic exposure monitoring is required within 5 years of the most recent exposure monitoring. |
| If the owner or operator engages in a condition of use for which compliance with the WCPP would be required but does not manufacture, process, use, or dispose of TCE in that condition of use over the entirety of time since the last required monitoring event. | The owner or operator may forgo its current periodic monitoring event. However, documentation of cessation of use of TCE as well as periodic monitoring would be required when the owner or operator resumes any of the conditions of use for which compliance with the WCPP is proposed. |

(iv) *Additional monitoring.* (A) The owner or operator must conduct additional initial exposure monitoring whenever there has been a change in the production, process, control equipment, personnel or work practices that may reasonably be expected to result in new or additional exposures above the ECEL action level or when the owner or operator has any reason to believe that new or additional exposures above the ECEL action level have occurred.

(B) Whenever start-ups, shutdown, spills, leaks, ruptures, or other breakdowns occur that may lead to exposure to potentially exposed persons, the owner or operator must conduct additional initial exposure monitoring (using personal breathing zone sampling) after the cleanup of the spill or repair of the leak, rupture, or other breakdown.

(v) *Notification of monitoring results.* (A) The owner or operator must inform persons whose exposures are represented by the monitoring of the monitoring results within 15 working days.

(B) This notification must include the following:

(*1*) Exposure monitoring method(s) and results;

(*2*) Identification and explanation of the ECEL and ECEL action level in plain language;

(*3*) Any corresponding required respiratory protection as described in paragraph (e) of this section;

(*4*) Descriptions of actions taken by the regulated entity to reduce exposure to or below the ECEL;

(*5*) Quantity of TCE in use;

(*6*) Location of TCE use;

(*7*) Manner of TCE use;

(*8*) Identified releases of TCE; and

(*9*) Whether the airborne concentration of TCE exceeds the ECEL.

(C) Notice must be provided in plain language writing, in a language that the person understands, to each potentially exposed person or posted in an appropriate and accessible location outside the regulated area with an English-language version and a non-English language version representing the language of the largest group of workers who do not read English.

(4) *Regulated areas.* (i) Beginning [DATE 9 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], beginning 4 months after introduction of trichloroethylene into the workplace if trichloroethylene use commences after [DATE 6 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], owners or operators must establish a regulated

area wherever any person's exposure to airborne concentrations of TCE exceeds or can reasonably be expected to exceed the ECEL.

(ii) The owner or operator must limit access to regulated areas to authorized persons.

(iii) The owner or operator must demarcate regulated areas from the rest of the workplace in a manner that adequately establishes and alerts persons to the boundaries of the area and minimizes the number of authorized persons exposed to TCE within the regulated area.

(iv) The owner or operator must supply a respirator that complies with the requirements of paragraph (e) of this section and must ensure that all persons within the regulated area are using the provided respirators whenever TCE exposures may exceed the ECEL.

(v) An owner or operator who has implemented all feasible engineering, work practice and administrative controls as required in paragraph (c)(1)(i) of this section, and who has established a regulated area as required by paragraph (b)(4)(i) of this section where TCE exposure exceeds or can reasonably be expected to exceed the ECEL only on certain days (for example, because of work or process schedule) must have persons use respirators in that regulated area on those days.

(vi) The owner or operator must ensure that, within a regulated area, persons do not engage in non-work activities which may increase TCE exposure.

(vii) The owner or operator must ensure that while persons are wearing respirators in the regulated area, they do not engage in activities which interfere with respirator seal or performance.

(c) *ECEL control procedures and plan*—(1) *Methods of compliance.* The owner or operator must institute one or a combination of elimination, substitution, engineering controls or administrative controls to reduce exposure to or below the ECEL except to the extent that the owner or operator can demonstrate that such controls are not feasible as an interim measure. Wherever the feasible exposure controls, including one or a combination of elimination, substitution, engineering controls or administrative controls, which can be instituted are not sufficient to reduce exposure at or below the ECEL, the owner or operator must use them to reduce exposure to the lowest levels achievable by these controls and must supplement them by the use of respiratory protection that complies with the requirements of paragraph (e) of this section. Where an owner or operator cannot demonstrate exposure below the ECEL or exposure at the lowest achievable level for the facility, including through the use of engineering controls or work practices, and has not demonstrated that it has supplemented feasible exposure controls with respiratory protection, this will constitute a failure to comply with the ECEL. The owner or operator must maintain the effectiveness of engineering controls or administrative controls instituted under paragraph (d)(1)(i)(A) of this section. The owner or operator must not implement a schedule of personnel rotation as a means of compliance with the ECEL. The owner or operator must document their exposure control strategy and implementation in an exposure control plan in accordance with paragraph (d)(2) of this section.

(2) *Exposure control plan requirements.* If any monitoring conducted in accordance with paragraph (b)(3) of this section shows worker exposures at or above the ECEL action level in the workplace, the owner or operator, within [DATE 12 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], must include and document in an exposure control plan the following:

(i) Identification and rationale of exposure controls used or not used as a time-limited measure in the following sequence: elimination of TCE, substitution of TCE, engineering controls and administrative controls to reduce exposures in the workplace to either at or below the ECEL or to the lowest achievable level of TCE in the workplace;

(ii) The exposure controls selected based on feasibility, effectiveness, and other relevant considerations;

(iii) If exposure controls were not selected, document the efforts identifying why these are not feasible, not effective, or otherwise not implemented;

(iv) Actions taken to implement exposure controls selected, including proper installation, maintenance, training or other steps taken;

(v) Description of any regulated area and how it is demarcated, and identification of authorized persons; and description of when the owner or operator expects exposures may be likely to exceed the ECEL or lowest achievable exposure level;

(vi) Identification of the lowest achievable exposure level and why further reductions are not possible;

(vii) Regular inspections, evaluations, and updating of the exposure controls to ensure effectiveness and confirmation that all persons are implementing them as required until the prohibition compliance date;

(viii) Occurrence and duration of any start-up, shutdown, or malfunction of the facility that causes air concentrations to be above the ECEL or lowest achievable exposure level and subsequent corrective actions taken during start-up, shutdown, or malfunctions to mitigate exposures to TCE; and

(ix) Availability of the exposure control plan and associated records for potentially exposed persons.

(d) *Workplace information and training.* (1) The owner or operator must provide information and training for each person prior to or at the time of initial assignment to a job involving potential exposure to TCE.

(2) The owner or operator must ensure that information and training is presented in a manner that is understandable to each person required to be trained.

(3) The following information and training must be provided to all persons assigned to a job involving potential exposure to TCE:

(i) The requirements of this section, as well as how to access or obtain a copy of these requirements in the workplace;

(ii) The quantity, location, manner of use, release, and storage of TCE and the specific operations in the workplace that could result in exposure to TCE, particularly noting where exposures may be above the ECEL;

(iii) Methods and observations that may be used to detect the presence or release of TCE in the workplace (such as monitoring conducted by the owner or operator, continuous monitoring devices, visual appearance or odor of TCE when being released, etc.);

(iv) The health hazards of TCE in the workplace; and

(v) The principles of safe use and handling of TCE and measures potentially exposed persons can take to protect themselves from TCE, including specific procedures the owner or operator has implemented to protect potentially exposed persons from exposure to TCE, such as appropriate work practices, emergency procedures, and personal protective equipment to be used.

(4) The owner or operator must re-train each potentially exposed person annually to ensure that each such person maintains the requisite understanding of the principles of safe use and handling of TCE in the workplace.

(5) Whenever there are workplace changes, such as modifications of tasks or procedures or the institution of new tasks or procedures, which increase

exposure, and where those exposures exceed or can reasonably be expected to exceed the ECEL action level, the owner or operator must update the training as necessary to ensure that each potentially exposed person has the requisite proficiency.

(e) *Personal protective equipment (PPE)*—(1) *Applicability.* The provisions of this paragraph (e) apply to any owner or operator that is required to provide respiratory protection or dermal protection pursuant to paragraphs (c)(1) and (d) of this section.

(2) *Selection.* PPE, including respiratory and dermal protection, that is of safe design and construction for the work to be performed must be provided, used, and maintained in a sanitary, reliable, and undamaged condition. Owners and operators must select PPE that properly fits each affected person and communicate PPE selections to each affected person.

(3) *Respiratory protection.* (i) After 3 months of receipt of any exposure monitoring or within [DATE 9 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], the owner or operators must supply a respirator, selected in accordance with this paragraph, to each person who enters a regulated area and must ensure that all persons within the regulated area are using the provided respirators whenever TCE exposures may exceed the ECEL.

(ii) Owners or operators must provide respiratory protection in accordance with the provisions outlined in 29 CFR 1910.134(a) through (l) (except (d)(1)(iii)) and as specified in this paragraph for persons exposed or who may be expose to TCE in concentrations above the ECEL. For the purpose of this paragraph (e), the maximum use concentration (MUC) as used in 29 CFR 1910.134 must be calculated by multiplying the assigned protection factor (APF) specified for a respirator by the ECEL. For the purposes of this paragraph (e), provisions in 29 CFR 1910.134(a) through (l) (except (d)(1)(iii)) applying to an ''employee'' also apply equally to potentially exposed persons, and provisions applying to an ''employer'' also apply equally to owners or operators.

(iii) Owners or operators must select and provide to persons appropriate respirators as indicated by the most recent monitoring results, as follows:

(A) If the measured exposure concentration is at or below 0.0011 ppm (1.1 ppb): no respiratory protection is required.

(B) If the measured exposure concentration is above 0.0011 ppm (1.1 ppb) and less than or equal to 0.0055 ppm (5.5 ppb) (5 times ECEL): Any National Institute for Occupational Safety and Health (NIOSH)-certified air-purifying quarter mask respirator (APF 5).

(C) If the measured exposure concentration is above 0.0055 ppm (5.5 ppb) and less than or equal to 0.011 ppm (110 ppb) (10 times ECEL): Any NIOSH-certified air-purifying half mask or full facepiece respirator equipped with NIOSH-approved organic vapor cartridges or canisters (APF 10).

(D) If the measured exposure concentration is above 0.011 ppm (11.0 ppb) and less than or equal to 0.0275 ppm (27.5 ppb) (25 times ECEL): Any NIOSH-certified air-purifying full facepiece respirator equipped with NIOSH-approved organic vapor cartridges or canisters; any NIOSH-certified powered air-purifying respirator equipped with NIOSH-approved organic vapor cartridges; or any NIOSH-certified continuous flow supplied air respirator equipped with a hood or helmet (APF 25).

(E) If the measured exposure concentration is above 0.0275 ppm (27.5 ppb) and less than or equal to 0.055 ppm (55.0 ppb) (50 times ECEL): Any NIOSH-certified air-purifying full facepiece respirator equipped with NIOSH-approved organic vapor cartridges or canisters; or any NIOSH-certified powered air-purifying respirator equipped with a tight-fitting half facepiece and a NIOSH-approved organic vapor cartridges or canisters; any NIOSH-certified negative pressure (demand mode) supplied-air respirator equipped with a full facepiece; any NIOSH-certified continuous flow supplied-air respirator equipped with a tight-fitting half facepiece; any NIOSH-certified supplied air respirator equipped with a half facepiece and operated in a pressure demand or other positive pressure mode; or any NIOSH-certified negative pressure (demand mode) self-contained breathing apparatus respirator equipped with a full facepiece (APF 50).

(F) If the measured exposure concentration is above 0.055 ppm (55.0 ppb) and less than or equal to 1.1 ppm (1,100 ppb) (1,000 times ECEL): Any NIOSH-certified powered air-purifying respirator equipped with a full facepiece and NIOSH-approved organic vapor cartridges or canisters; any NIOSH-certified supplied air respirator equipped with a full facepiece and operated in a continuous flow mode or pressure demand or other positive pressure mode (APF 1,000).

(G) If the measured exposure concentration is greater than 1.1 ppm (1,100 ppb) (1,000 times ECEL) or the concentration is unknown: Any NIOSH-certified self-contained breathing apparatus equipped with a full facepiece and operated in a pressure demand or other positive pressure mode; or any NIOSH-certified supplied air respirator equipped with a full facepiece and operated in a pressure demand or other positive pressure mode in combination with an auxiliary self-contained breathing apparatus operated in a pressure demand or other positive pressure mode (APF 10,000).

(iv) The respiratory protection requirements in this paragraph represent the minimum respiratory protection requirements, such that any respirator affording a higher degree of protection than the required respirator may be used.

(v) When a person whose job requires the use of a respirator cannot use a negative-pressure respirator, the owner or operator must provide that person with a respirator that has less breathing resistance than the negative-pressure respirator, such as a powered air-purifying respirator or supplied-air respirator, when the person is able to use it and if it provides the person with adequate protection.

(vi) Owners or operators must document the notice to and ability of any potentially exposed person to access the exposure control plan and other associated records.

(4) *Dermal protection.* The owner or operator must supply and require the donning of gloves that are chemically resistant to TCE with activity-specific training where dermal contact with TCE is possible, after application of the requirements in paragraph (e) of this section, in accordance with the hierarchy of controls.

(5) *PPE training.* (i) Owners and operators must provide PPE training in accordance with 29 CFR 1910.132(f) to all persons required to use PPE prior to or at the time of initial assignment to a job involving potential exposure to TCE. For the purposes of this paragraph (e)(5)(i), provisions in 29 CFR 1910.132(f) applying to an ''employee'' also apply equally to potentially exposed persons, and provisions applying to an ''employer'' also apply equally to owners or operators.

(ii) Owners and operators must retrain each potentially exposed person required to use PPE annually or whenever the owner or operator has reason to believe that a previously trained person does not have the required understanding and skill to properly use PPE, or when changes in the workplace or in PPE to be used render the previous training obsolete.

**§ 751.313 Downstream notification.**

(a) Beginning on [DATE 2 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], each person who manufactures (including imports) TCE for any use must, prior to or concurrent with the shipment, notify companies to whom TCE is shipped, in writing, of the restrictions described in this subpart in accordance with paragraph (c) of this section.

(b) Beginning on [DATE 6 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], each person who processes or distributes in commerce TCE or any TCE-containing products for any use must, prior to or concurrent with the shipment, notify companies to whom TCE is shipped, in writing, of the restrictions described in this subpart in accordance with paragraph (c) of this section.

(c) The notification required under paragraphs (a) and (b) of this section must occur by inserting the following text in section 1(c) and 15 of the Safety Data Sheet (SDS) provided with the TCE or with any TCE-containing product:

After [DATE 6 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], this chemical/product is and can only be distributed in commerce or processed for the following purposes until the following prohibitions take effect: (1) Processing as an intermediate; a) for the manufacture of HFC–134a until [DATE 8.5 YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**] and b) for all other processing as a reactant/intermediate until [DATE 2 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**]; (2) Industrial and commercial use as a solvent for open-top batch vapor degreasing until [DATE 1 YEAR AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**]; (3) Industrial and commercial use as a solvent for closed-loop batch vapor degreasing until [DATE 1 YEAR AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], except for industrial and commercial use as a solvent for closed-loop batch vapor degreasing necessary for human-rated rocket engine cleaning by NASA and its contractors until [DATE 7 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], and except for industrial and commercial use as a solvent for closed-loop batch vapor degreasing for rayon fabric scouring for end use in rocket booster nozzle production by Federal agencies and their contractors until [DATE 10 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**]; (4) Industrial and commercial use as a processing aid in: a) battery separator manufacturing until [DATE 10 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] and b) process solvent used in polymer fiber spinning, fluoroelastomer manufacture and Alcantara manufacture; extraction solvent used in caprolactam manufacture; precipitant used in beta-cyclodextrin manufacture until [DATE 2 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**]; (5) Industrial and commercial uses for DoD naval vessels and their systems, and in the maintenance, fabrication, and sustainment for and of such vessels and systems until [DATE 10 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**]; and (6) Industrial and commercial use for laboratory use for essential laboratory activities until [DATE 50 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**].

**§ 751.315 Recordkeeping requirements.**

(a) *General records.* After [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], all persons who manufacture, process, distribute in commerce, or engage in industrial or commercial use of TCE or TCE-containing products must maintain ordinary business records, such as invoices and bills-of-lading related to compliance with the prohibitions, restrictions, and other provisions of this subpart.

(b) *Workplace chemical protection program compliance—(1) ECEL exposure monitoring.* For each monitoring event of TCE, owners or operators subject to the ECEL described in § 751.311(b) must document the following:

(i) Dates, duration, and results of each sample taken;

(ii) All measurements that may be necessary to determine the conditions that may affect the monitoring results;

(iii) Identification of all persons represented by the representative sampling monitoring, indicating which persons were actually monitored;

(iv) Name, workplace address, work shift, job classification, and work area of the person monitored; documentation of all potentially exposed persons whose exposures the monitoring is intended to represent if using a representative sample; and type of respiratory protective device worn by the monitored person, if any;

(v) Use of appropriate sampling and analytical methods, such as analytical methods already approved by EPA, Occupational Safety and Health Administration (OSHA) or NIOSH, or compliance with an analytical method verification procedure;

(vi) Compliance with the Good Laboratory Practice Standards in accordance with 40 CFR part 792; and

(vii) Information regarding air monitoring equipment, including: type, maintenance, calibrations, performance tests, limits of detection, and any malfunctions.

(2) *ECEL compliance.* Owners or operators subject to the ECEL described in § 751.311(b) must retain records of:

(i) Exposure control plan as described in § 751.311(d)(2);

(ii) Facility exposure monitoring records;

(iii) Notifications of exposure monitoring results;

(iv) The name, workplace address, work shift, job classification, work area and respiratory protection used by each potentially exposed person and PPE program implementation, as described in § 751.311(e), including fit-testing and training; and

(v) Information and training provided by the regulated entity to each person prior described in paragraph § 751.311(d) and (e).

(c) *Records related to § 751.317 exemptions.* To maintain eligibility for an exemption described in § 751.317, owners or operators must maintain records demonstrating compliance with the specific conditions of the exemption.

(d) *Records related to §§ 751.307 and 751.309 phaseouts.* (1) Each manufacturer of HFC–134a who uses TCE as an intermediate must maintain records of the annual quantity of TCE purchased and processed from the year 2023 until the termination of all processing of TCE as an intermediate.

(2) Each person using TCE under § 751.309 for industrial and commercial use as a solvent for closed-loop batch vapor degreasing for rayon fabric scouring for end use in rocket booster nozzle production by Federal agencies and their contractors, must maintain records demonstrating that the end use is in rocket booster nozzle production for Federal agencies and their contractors.

(3) After [DATE 5 YEARS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**],

each person using TCE under § 751.309 for industrial and commercial use as a solvent for closed-loop batch vapor degreasing, specifically for rayon fabric scouring, must maintain records that demonstrate that a final pre-launch test of rocket booster nozzles without using TCE was completed.

(e) *Minimum record retention periods.* (1) The records required under paragraphs (a) through (c) of this section must be retained for at least 5 years from the date that such records were generated.

(2) The records required under paragraph (d) of this section must be retained for at least 5 years after the use of TCE has ceased.

**§ 751.317 Exemptions.**

(a) *In general.* (1) The time-limited exemptions established in § 751.305(b)(12) and (13) are established in accordance with 15 U.S.C. 2605(g).

(2) In order to be eligible for the exemptions, regulated parties must comply with all conditions established for such exemptions in accordance with 15 U.S.C. 2605(g)(4).

(b) *Exemptions under 15 U.S.C. 2605(g)(1)(A).* (1) Laboratory use for essential laboratory activities until [DATE 50 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**]. The following are specific conditions of the exemption for laboratory use at § 751.305(b)(13):

(i) The industrial and commercial use of TCE as a laboratory chemical must only be for the following:

(A) Essential laboratory activities, including chemical analysis, chemical synthesis, extracting or purifying other chemicals, dissolving other substances, and research and development for the advancement of cleanup activities and analytical methods for monitoring related to TCE contamination or exposure monitoring.

(B) Federal agencies and their contractors conducting research and development activities and test and evaluation method activities, other than those described in paragraph (b)(1)(i)(A) of this section, and similar laboratory activities, provided the use is essential to the agency's mission.

(ii) TCE must not be used as a laboratory chemical for testing asphalt.

(iii) The use of TCE as a laboratory chemical must be performed on the premises of industrial or commercial laboratories.

(iv) The owner or operator of the location where such use of TCE occurs, and manufacturers (including importers) and processors of TCE for such use, must comply with the Workplace Chemical Protection Program provisions in § 751.311.

(v) The owner or operator of the location where such use of TCE occurs must comply with the recordkeeping requirements in § 751.315.

(2) Disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works for the purposes of cleanup projects of TCE-contaminated water and groundwater until [DATE 50 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**]. The following are specific conditions of the exemption for disposal at § 751.305(b)(15):

(i) The disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works must only be for the purposes of cleanup projects of TCE-contaminated water and groundwater. The disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works is limited to only sites undergoing remediation under CERCLA, RCRA, or other Federal, state, and local government laws, regulations, or requirements.

(ii) The owner or operator of the location where workers are handling TCE wastewater, and owners or operators of facilities where TCE is disposed to industrial pre-treatment, industrial treatment, or publicly owned treatment works, must comply with the Workplace Chemical Protection Program provisions in § 751.311.

(iii) The owner or operator of the location where such use of TCE occurs must comply with the recordkeeping requirements in § 751.315.

(3) Use of TCE or TCE-containing products for the specific conditions of use identified in paragraph (b)(3)(i) of this section in an emergency by the National Aeronautics and Space Administration (NASA) and its contractors operating within the scope of their contracted work until [DATE 10 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**].

(i) *Applicability.* The emergency use exemption described in this paragraph (b)(3) applies to the following specific conditions of use as described in paragraph (b)(3)(i)(A) of this section.

(A) *Conditions of use subject to this exemption*—(*1*) Industrial and commercial use as solvent for open-top or closed-loop batch vapor degreasing.

(*2*) Industrial and commercial use as solvent for cold cleaning.

(*3*) Industrial and commercial use as a solvent for aerosol spray degreaser/cleaner and mold release.

(*4*) Industrial and commercial use as a lubricant and grease in tap and die fluid.

(*5*) Industrial and commercial use as a lubricant and grease in penetrating lubricant.

(*6*) Industrial and commercial use as an adhesive and sealant in solvent-based adhesives and sealants.

(*7*) Industrial and commercial as a functional fluid in heat exchange fluid.

(*8*) Industrial and commercial use in corrosion inhibitors and anti-scaling agents.

(*9*) Industrial and commercial use of TCE as a processing aid.

(B) *Emergency use*—(*1*) *In general.* An emergency is a serious and sudden situation requiring immediate action, within 15 days or less, necessary to protect:

(*i*) Safety of NASA's or their contractors' personnel;

(*ii*) NASA's missions;

(*iii*) Human health, safety, or property, including that of adjacent communities; or

(*iv*) The environment.

(*2*) *Duration.* Each emergency is a separate situation; if use of TCE exceeds 15 days, then justification must be documented.

(*3*) *Eligibility.* To be eligible for the exemption, the NASA and its contractors must:

(*i*) Select TCE because there are no technically and economically feasible safer alternatives available during the emergency.

(*ii*) Perform the emergency use of TCE at locations controlled by NASA or its contractors.

(ii) *Requirements.* To be eligible for the emergency use exemption described in this paragraph (b)(3), the NASA and its contractors must comply with the following conditions:

*(A) Notification.* Within 15 working days of the emergency use by NASA and its contractors, NASA must provide notice to EPA that includes the following:

(*1*) Identification of the conditions of use detailed in paragraph (b)(3)(i)(A) of this section that the emergency use fell under;

(*2*) An explanation for why the emergency use met the definition of emergency in paragraph (b)(3)(i)(B) of this section; and

(*3*) An explanation of why TCE was selected, including why there were no technically and economically feasible safer alternatives available in the particular emergency.

*(B) Exposure control.* The owner or operator must comply with the Workplace Chemical Protection Program provisions in § 751.311, to the extent

technically feasible in light of the particular emergency.

*(C) Recordkeeping.* The owner or operator of the location where the use takes place must comply with the recordkeeping requirements in § 751.315.

*(c) Exemptions under 15 U.S.C. 2605(g)(1)(B)—(1) Lead-acid and lithium battery separator manufacturing until [DATE 10 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE* **FEDERAL REGISTER**]. The following are specific conditions of the exemption for use as a processing aid in the manufacturing of lead-acid and lithium battery separators at § 751.305(b)(12):

(i) The use of TCE as a processing aid for battery separator manufacturing must be limited to lead acid or lithium battery separator manufacturing.

(ii) The owner or operator of the location where such use occurs, and manufacturers (including importers) and processors of TCE for such use, must comply with the Workplace Chemical Protection Program provisions in § 751.311.

(iii) The owner or operator of the location where such use of TCE occurs must comply with the recordkeeping requirements in § 751.315.

(2) *Certain industrial and commercial uses of TCE for DoD naval vessels and their systems, and in the maintenance, fabrication, and sustainment for and of such vessels and systems until [DATE 10 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE* **FEDERAL REGISTER**]. The following are specific conditions of the exemption for industrial and commercial uses of TCE for DoD naval vessel and their systems, and in the maintenance, fabrication, and sustainment for and of such vessels and systems:

(i) The industrial and commercial use of TCE must be limited for DoD naval vessels and their systems, and in the maintenance, fabrication, and sustainment for and of such vessels and systems; as potting compounds for naval electronic systems and equipment; sealing compounds for high and ultra high vacuum systems; bonding compounds for materials testing and maintenance of underwater systems and bonding of nonmetallic materials; and cleaning requirements (which includes degreasing using wipes, sprays, solvents and vapor degreasing) for: materials and components required for military ordnance testing; temporary resin repairs in vessel spaces where welding is not authorized; ensuring polyurethane adhesion for electronic systems and equipment repair and installation of elastomeric materials; various naval combat systems, radars, sensors, equipment; fabrication and prototyping processes to remove coolant and other residue from machine parts; machined part fabrications for naval systems; installation of topside rubber tile material aboard vessels; and vapor degreasing required for substrate surface preparation prior to electroplating processes.

(ii) The owner or operator of the location where such use occurs, and manufacturers (including importers) and processors of TCE for such use, must comply with the Workplace Chemical Protection Program provisions in § 751.311.

(iii) The owner or operator of the location where such use of TCE occurs must comply with the recordkeeping requirements in § 751.315.

(3) *Closed-loop vapor degreasing necessary for human-rated rocket engine cleaning by NASA and its contractors until [DATE 7 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE* **FEDERAL REGISTER**]. The following are specific conditions of the exemption for industrial and commercial use of TCE as a solvent for closed-loop vapor degreasing necessary for human-rated rocket engine cleaning by NASA and its contractors § 751.305(b)(12):

(i) The use of TCE in industrial and commercial as a solvent for closed-loop vapor degreasing is limited to the closed-loop vapor degreasing necessary for human-rated rocket engine cleaning by NASA and its contractors.

(ii) The owner or operator of the location where such use occurs, and manufacturers (including importers) and processors of TCE for such use, must comply with the Workplace Chemical Protection Program provisions in § 751.311.

(iii) The owner or operator of the location where such use of TCE occurs, and manufacturers (including importers) and processors of TCE for such use, must comply with the recordkeeping requirements in § 751.315.

[FR Doc. 2023–23010 Filed 10–30–23; 8:45 am]

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# FEDERAL REGISTER

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Part IV

## Consumer Financial Protection Bureau

12 CFR Parts 1001 and 1033
Required Rulemaking on Personal Financial Data Rights; Proposed Rule

## CONSUMER FINANCIAL PROTECTION BUREAU

### 12 CFR Parts 1001 and 1033

**[Docket No. CFPB–2023–0052]**

**RIN 3170–AA78**

## Required Rulemaking on Personal Financial Data Rights

**AGENCY:** Consumer Financial Protection Bureau.

**ACTION:** Proposed rule; request for public comment.

**SUMMARY:** The Consumer Financial Protection Bureau (CFPB) is proposing a rule to implement personal financial data rights under the Consumer Financial Protection Act of 2010 (CFPA). The proposed rule would require depository and nondepository entities to make available to consumers and authorized third parties certain data relating to consumers' transactions and accounts; establish obligations for third parties accessing a consumer's data, including important privacy protections for that data; provide basic standards for data access; and promote fair, open, and inclusive industry standards.

**DATES:** Comments must be received on or before December 29, 2023.

**ADDRESSES:** You may submit comments, identified by Docket No. CFPB–2023–0052 or RIN 3170–AA78, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. A brief summary of this document will be available at *https://www.regulations.gov/docket/CFPB-2023-0052.*
- *Email: 2023-NPRM-Data-Rights@cfpb.gov.* Include Docket No. CFPB–2023–0052 or RIN 3170–AA78 in the subject line of the message.
- *Mail/Hand Delivery/Courier:* Comment Intake—FINANCIAL DATA RIGHTS, c/o Legal Division Docket Manager, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552.

*Instructions:* The CFPB encourages the early submission of comments. All submissions should include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. Commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to *https://www.regulations.gov.*

All submissions, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Submissions will not be edited to remove any identifying or contact information.

**FOR FURTHER INFORMATION CONTACT:** Dave Gettler, Paralegal Specialist; Anna Boadwee or Vince Mancini, Attorney-Advisors; Briana McLeod, Counsel; Joseph Baressi, Sarita Frattaroli, David Jacobs, Mark Morelli, Kristen Phinnessee, Michael Scherzer, Yaritza Velez or Priscilla Walton-Fein, Senior Counsels, Office of Regulations, at 202–435–7700 or *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

**SUPPLEMENTARY INFORMATION:**

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### Abbreviations and Acronyms

The following abbreviations and acronyms are used in this proposed rule:

ACH = Automated Clearing House
ANPR = Advance Notice of Proposed Rulemaking
API = Application programming interface
APR = Annual percent rate
ATO = Account takeover
BLS = Bureau of Labor Statistics
EBT = Electronic benefit transfer
FDIC = Federal Deposit Insurance Corporation
FFIEC = Federal Financial Institutions Examination Council
FRFA = Final regulatory flexibility analysis
FTC = Federal Trade Commission
HHS = Department of Health and Human Services
IRFA = Initial regulatory flexibility analysis
LEI = Legal entity identifier
MSA = Metropolitan statistical area
NAICS = North American Industry Classification System
NCUA = National Credit Union Administration
NPRM = Notice of Proposed Rulemaking
OCC = Office of the Comptroller of the Currency
OMB = Office of Management and Budget
SBA = Small Business Administration
SSN = Social Security number
TAN = Tokenized account number
URL = Uniform resource locator

## I. Background

### *A. Introduction*

Digitization and decentralization in consumer finance create new possibilities for more seamless consumer switching and greater competitive intensity. For example, when consumers are able to share their personal financial data, they can share details about their income and expenses that may give lenders more confidence when extending credit. When a consumer can switch with less friction, this will create incentives for superior customer service and more favorable terms. At the same time, sharing personal financial data can also lead to misuse and abuse, given its commercial value.

In 2010, Congress explicitly recognized the importance of personal financial data rights in section 1033 of the Consumer Financial Protection Act of 2010 (CFPA).[1] However, to date, the CFPB has not issued a rule to implement this provision of law.

Many market participants have already sought to develop technologies and standards to facilitate consumer access to personal financial data. The CFPB intends to accelerate the shift to a more open and decentralized system through the issuance of a final rule.

[1] The CFPA is title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376, 2008 (2010).

*B. Electronic Access to Personal Financial Data*

Development of Electronic Data Access

By 1999, 20 percent of national banks offered online banking, including all national banks with over $10 billion in assets, and accounting for over 80 percent of all small deposit accounts held by national banks.[2] Adoption grew from 14 million consumers in 2000 to 37 million in 2002, and to 53 million in 2004.[3] Around this time, the first wave of online-only financial services providers emerged. In the late 2000s, smartphones made digital banking still more available.

Today, most consumers with a bank account are enrolled in digital banking through online banking or mobile applications, and more than two-thirds use it as their primary method of account access.[4] Consumer interfaces generally provide free access to information such as balances, transactions, and at least some terms of service. These consumer interfaces may provide additional functionality, such as allowing consumers to move money, manage their accounts, and download financial data.

Development of Open Banking

Building on these developments, open banking [5] emerged in the early 2000s, along with interfaces designed for developers of products or services to request consumer information, and related industry standard-setting activity.[6] These developer interfaces facilitated consumer-authorized data access that was necessary for many new products and services. Third parties often outsourced establishing and maintaining connections with data providers to data aggregators. These intermediaries largely relied on ''screen scraping,'' which uses consumer credentials to log in to consumer accounts to retrieve data.[7] Widespread screen scraping allowed open banking to grow quickly in the United States.

Screen scraping became a significant point of contention between third parties and data providers, in part due to its inherent risks, such as the proliferation of shared consumer credentials and overcollection of data. Aggregators often declined to seek permission from financial institutions they ''scraped,'' and some methods aggregators used to solicit credential sharing led to litigation.[8] In late 2015, several large retail banks took actions that disrupted screen scraping, albeit temporarily.[9]

Around that same time, efforts accelerated to establish agreements for third parties to access data via a provider's developer interface.[10] While the progress of access agreements has been uneven, the open banking system has nevertheless grown as consumer reliance on products and services powered by consumer-authorized data access expanded. This growth led to further disputes and litigation between system participants,[11] and concerns over privacy and harmful uses of consumer-authorized data increased.[12]

Despite these challenges, financial institutions have begun to dedicate more resources to develop open banking infrastructure. This includes multilateral efforts, some of which have been controversial.[13] Other incumbents, most notably large payment networks, have sought to acquire aggregators.[14]

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[2] Alyssa Bentz, *First in Online Banking,* Wells Fargo Corp. Archives (Mar. 14, 2019), *https://www.wellsfargohistory.com/first-in-online-banking/*; Karen Furst *et al., internet Banking: Developments and Prospects,* Off. of the Comptroller of the Currency (2000), *https://www.occ.treas.gov/publications-and-resources/publications/economics/working-papers-archived/pub-econ-working-paper-2000-9.pdf.*

[3] Susannah Fox, *Online Banking 2002,* Pew Rsch. Ctr. (Nov. 17, 2002), *https://www.pewresearch.org/internet/2002/11/17/online-banking-2002/;* Susannah Fox, *Online Banking 2005,* Pew Rsch. Ctr. (Feb. 9, 2005), *https://www.pewresearch.org/internet/2005/02/09/online-banking-2005/.*

[4] Fed. Deposit Ins. Corp., *National Survey of Unbanked and Underbanked Households* (2021), *https://www.fdic.gov/analysis/household-survey/2021report.pdf.*

[5] This **Federal Register** notice generally uses the term ''open banking'' to refer to the network of entities sharing personal financial data with consumer authorization. Some stakeholders use the term ''open finance'' because of the role of nondepositories as important data sources. The CFPB views the two terms as interchangeable, but generally uses ''open banking'' because that term is more commonly used in the United States.

[6] Maria Trombly, *Citibank's Aggregation Portal a Big Draw,* Computerworld (Sept. 18, 2000), *https://www.computerworld.com/article/2597099/citibank-s-aggregation-portal-a-big-draw.html;* Off. of the Comptroller of the Currency, *Bank-Provided Account Aggregation Services: Guidance to Banks* (2001), *https://www.occ.treas.gov/news-issuances/bulletins/2001/bulletin-2001-12.html;* CNET, *Net earnings: E-commerce in 1997* (Dec. 24, 1997), *https://www.cnet.com/tech/tech-industry/net-earnings-e-commerce-in-1997/;* Microsoft, *OFX Consortium Expands with Bank of America, Citigroup, Corillian, E*TRADE and TD Waterhouse* (Oct. 2, 2001), *https://news.microsoft.com/2001/10/02/ofx-consortium-expands-with-bank-of-america-citigroup-corillian-etrade-and-td-waterhouse/.*

[7] Unless otherwise stated, the term ''screen scraping'' in this document refers to credential-based screen scraping, which is prevalent in the market today.

[8] *See, e.g.,* Plaid, Inc., *In re Plaid, Inc. Privacy Litigation—Frequently Asked Questions, https://www.plaidsettlement.com/frequently-asked-questions.php* (last visited Sept. 18, 2023); TD Bank, *TD Bank Files Trademark Counterfeiting and Infringement Lawsuit Against Plaid in the U.S.* (Oct. 14, 2020), *https://stories.td.com/us/en/article/td-bank-files-trademark-counterfeiting-and-infringement-lawsuit-against-plaid-in-the-u-s;* Penny Crosman, *PNC sues Plaid for trademark infringement,* Am. Banker (Dec. 23, 2020), *https://www.americanbanker.com/news/pnc-sues-plaid-for-trademark-infringement.*

[9] Robin Sidel, *Big Banks Lock Horns with Personal-Finance Web Portals,* Wall St. J. (Nov. 4, 2015), *https://www.wsj.com/articles/big-banks-lock-horns-with-personal-finance-web-portals-1446683450;* Peter Rudegeair, *J.P. Morgan Warns It Could Unplug Quicken and Quickbooks Users,* Wall St. J. (Nov. 24, 2015), *https://www.wsj.com/articles/j-p-morgan-may-unplug-some-customers-access-to-account-data-1448375950;* Daniel Huang & Peter Rudegeair, *Bank of America Cut Off Finance Sites From Its Data,* Wall St. J. (Nov. 9, 2015), *https://www.wsj.com/articles/bank-of-america-cut-off-finance-sites-from-its-data-1447115089.*

[10] *See, e.g.,* Penny Crosman, *Wells Fargo strikes data-sharing agreement with Plaid,* Am. Banker (Sept. 19, 2019), *https://www.americanbanker.com/news/wells-fargo-strikes-data-sharing-agreement-with-plaid;* Finicity, *Enhancing the Data-sharing Experience at USAA* (July 2, 2018), *https://www.finicity.com/blog/data-sharing-usaa-direct-api/;* Mary Wisniewski, *JPMorgan Chase and Finicity ink data-sharing agreement,* Am. Banker (July 11, 2017), *https://www.americanbanker.com/news/jpmorgan-chase-and-finicity-ink-data-sharing-agreement.*

[11] Nathan DiCamillo, *In data dispute with Capital One, Plaid stands alone,* Am. Banker (July 17, 2018), *https://www.americanbanker.com/news/in-data-dispute-with-capital-one-plaid-stands-alone;* Yuka Hayashi, *Venmo Glitch Opens Window on War Between Banks, Fintech Firms,* Wall St. J. (Dec. 14, 2019), *https://www.wsj.com/articles/venmo-glitch-opens-window-on-war-between-banks-fintech-firms-11576319402;* Penny Crosman, *PNC sues Plaid for trademark infringement,* Am. Banker (Dec. 23, 2020), *https://www.americanbanker.com/news/pnc-sues-plaid-for-trademark-infringement;* TD Bank, *TD Bank Files Trademark Counterfeiting and Infringement Lawsuit Against Plaid in the U.S.* (Oct. 14, 2020), *https://stories.td.com/us/en/article/td-bank-files-trademark-counterfeiting-and-infringement-lawsuit-against-plaid-in-the-u-s.*

[12] *See, e.g.,* Maeve Allsup, *App Users Say Plaid Collects Bank Logins Without Consent,* Bloomberg L. (May 5, 2020), *https://news.bloomberglaw.com/class-action/app-users-say-plaid-collects-bank-logins-without-consent;* Ron Wyden, *Wyden, Brown, Eshoo Urge FTC to Investigate Firm Collecting and Selling Americans' Financial Data* (Jan. 17, 2020), *https://www.wyden.senate.gov/news/press-releases/wyden-brown-eshoo-urge-ftc-to-investigate-firm-collecting-and-selling-americans-financial-data.*

[13] *E.g.,* OpenID Found., *Announcing the Financial API (FAPI) Working Group* (May 23, 2016), *https://openid.net/announcing-the-financial-api-fapi-working-group/;* Fin. Data Exch., *Financial Industry Unites to Enhance Data Security, Innovation and Consumer Control* (Oct. 18, 2018), *https://www.financialdataexchange.org/FDX/FDX/News/Press-Releases/Financial_Industry_Unites_Data_Security.aspx; E.g.,* Penny Crosman, *Fidelity data-sharing hub aims to end screen scraping,* Am. Banker (June 11, 2019), *https://www.americanbanker.com/news/fidelity-data-sharing-hub-aims-to-end-screen-scraping;* PR Newswire, *S&P Global enhances KY3P® risk management capabilities with acquisition of TruSight Solutions LLC* (Jan. 9, 2023), *https://www.prnewswire.com/news-releases/sp-global-enhances-ky3p-risk-management-capabilities-with-acquisition-of-trusight-solutions-llc-301715878.html;* Penny Crosman, *Fidelity's data-sharing unit Akoya to be jointly owned with The Clearing House, 11 banks*(Feb. 20, 2020), *Am. Banker, https://www.americanbanker.com/news/fidelitys-data-sharing-unit-akoya-to-be-jointly-owned-with-the-clearing-house-11-banks.*

[14] *See, e.g.,* Visa, *Visa to Acquire Plaid* (Jan. 13, 2020), *https://usa.visa.com/about-visa/newsroom/*

Continued

Most recently, large payments-focused nondepositories have looked to enter the aggregation space by developing internal business units, sometimes partnering with incumbent aggregators.[15] These efforts indicate the potential for incumbents to mitigate or neutralize competitive threats from open banking, demonstrating the need for strong rules to protect the openness of the system.

**State of the Open Banking System**

The CFPB estimates that at least 100 million consumers have authorized a third party to access their account data. In 2022, the number of individual instances in which third parties accessed or attempted to access consumer financial accounts exceeded 50 billion and may have been as high as 100 billion, figures that vastly exceed the comparable public figures from some other jurisdictions' open banking systems, even on a per-capita basis.[16]

The open banking system also engages a large number of entities. While loans and deposits in the United States are concentrated among the largest depositories, there are more than nine thousand banks and credit unions across the country,[17] most of which serve as data providers, as do numerous nondepository financial institutions.[18] The number of third parties may total as many as ten thousand, driven by a large financial technology sector.[19] A growing number of entities now serve as both data providers and third parties. For example, many depositories now offer personal financial management tools, while some so-called neobank accounts and digital wallets serve as important transaction accounts for consumers. Most third party access is effectuated via a small number of aggregators, although some third parties elect to access at least some data directly.

Third party data access is generally enabled by one of two methods. In screen scraping, consumers usually share their consumer interface credentials with a third party or their service provider. That entity uses (and may store) those credentials to access the consumer's account to retrieve data for use in the third party's products and services. The second method is through developer interfaces maintained by data providers or their service providers. These often take the form of APIs that can be accessed without consumer credentials, for example, by using secure tokens. Such interfaces enable the direct transmission of structured machine-readable data, promote standardization, and reduce risks of inaccuracies and security breaches, among other benefits. Data providers also have offered APIs accessed using consumer interface credentials or deployed tokenized access to their consumer interface, but most stakeholders agree that such measures are best viewed as a stopgap, and that credential-free access to developer interfaces is preferable.

Based on feedback received through public comments and stakeholder outreach, there is nearly universal consensus that developer interfaces should supplant screen scraping.[20] Stakeholders responding to the SBREFA Outline, including small entity representatives, several data aggregators, data providers, and a trade association representing third party data recipients and aggregators, supported a general transition towards the use of developer interfaces.[21] However, such a transition requires certain conditions. First, data providers must commit resources to develop and maintain developer interfaces. While large depository and nondepository institutions might have sufficient information technology budgets to do this themselves, small institutions tend to rely on a few core service providers, and frequently report problems with the services that ''cores'' offer. Second, connecting to a developer interface generally requires a third party to agree to a data provider's terms of access, a process that has been impeded as discussed below. Today, the CFPB estimates that about half of third party data access currently occurs through APIs; scraping comprises the bulk of the balance. This is a significant shift: as recently as 2021, most access was via screen scraping. Much of this progress has been concentrated among the largest data providers.

Open banking use cases continue to emerge and develop. Major use cases, which the CFPB understands generally rely heavily or exclusively on data from transaction accounts, include personal financial management tools of all kinds, payment applications and digital wallets, credit underwriting (including cashflow underwriting), and identity verification. While many major use cases began as innovative offerings by third parties, incumbent financial institutions have adopted many of them in response to consumer demand. Many use cases also compete with the core offerings of other types of financial institutions, such as card networks and credit bureaus.[22]

*C. Challenges in the Open Banking System*

Despite these developments, commercial actors are able to use their market power and incumbency to privilege their concerns and interests above fair competition that could benefit consumers. Divergent interests in the market with respect to the scope, terms, and mechanics of data access, and problems with the responsible collection, use, and retention of data have impeded the negotiation of access agreements and the development of market-wide standards. This leads to inconsistent data access for consumers

*press-releases.releaseId.16856.html;* Visa, *Visa Completes Acquisition of Tink* (Mar. 10, 2022), *https://usa.visa.com/about-visa/newsroom/press-releases.releaseId.18881.html;* Mastercard, *Mastercard to Acquire Finicity to Advance Open Banking Strategy* (June 23, 2020), *https://www.finicity.com/in-the-news/mastercard-to-acquire-finicity-to-advance-open-banking-strategy/.*

[15] *See, e.g.,* John Adams, *Stripe adds tech for Plaid-like account aggregation,* Am. Banker (May 4, 2022), *https://www.americanbanker.com/payments/news/stripe-adds-tech-for-plaid-like-account-aggregation;* Klarna, *Klarna launches 'Klarna Kosma' sub-brand and business unit to harness rapid growth of Open Banking platform* (Mar. 31, 2022), *https://www.klarna.com/international/press/klarna-launches-klarna-kosma-sub-brand-and-business-unit-to-harness-rapid-growth-of-open-banking-platform/.*

[16] *See* Competition & Mkts. Auth., *UK reaches 7 million Open Banking users milestone* (Feb. 20, 2023), *https://www.openbanking.org.uk/news/uk-reaches-7-million-open-banking-users-milestone/,* and Bnamericas, *Open Finance completes two years with 17.3 million customer consents* (Feb. 2, 2023), *https://www.bnamericas.com/en/news/brazil-open-finance-completes-two-years-with-173-million-customer-consents.*

[17] Fed. Deposit Ins. Corp., *Statistics at a Glance—Industry Trends* (Mar. 31, 2023), *https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2023mar/industry.pdf;* Nat'l Credit Union Admin., *Quarterly Credit Union Data Summary—2022 Q4* (Mar. 8, 2023), *https://ncua.gov/files/publications/analysis/quarterly-data-summary-2022-Q4.pdf.*

[18] Some aggregators report even more data providers. *See, e.g., https://plaid.com/* (over 12,000 as of Sept. 16, 2023); *https://www.mx.com/*(over 13,000 as of Sept. 16, 2023); *https://docs.finicity.com/search-institutions/*(over 16,000 as of Sept. 16, 2023); *https://www.yodlee.com/data-aggregation* (over 17,000 as of Sept. 16, 2023).

[19] In 2022, Plaid indicated that they alone have over 6,000 customers. Plaid, *Ushering in Fintech's Next Phase* (May 19, 2022), *https://plaid.com/blog/ushering-in-fintechs-next-phase/.*

[20] *See, e.g.,* Consumer Fin. Prot. Bureau, *Bureau Symposium: Consumer Access to Financial Records Report,* at 3–4 (July 2020), *https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_bureau-symposium-consumer-access-financial-records_report.pdf.*

[21] *See* Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on the CFPB's Proposals and Alternatives Under Consideration of the Required Rulemaking on Personal Financial Data Rights,* at 30–31 (Mar. 30, 2023), *https://files.consumerfinance.gov/f/documents/cfpb_1033-data-rights-rule-sbrefa-panel-report_2023-03.pdf.*

[22] Conversely, data-sharing schemes owned by large depositories can also compete with open banking-supported products and services; *see, e.g.,* Early Warning Sys., *Verify Identity—Expand your customer base with confidence, https://www.earlywarning.com/products/verify-identity* (last visited Sept. 7, 2023).

and costs for the market. Most notably, these dynamics impel third parties to rely on intermediaries. The commercial interests of such intermediaries may not always advance open banking, since they stand to benefit from protecting private network effects against open standards that could displace them or lower their rents.

Market participants' interests may diverge due to interrelated competitive, legal, and regulatory factors. Data providers may minimize the data they share or refrain from sharing altogether to protect their market position. Data providers may also have data security, risk management, and data privacy concerns regarding consumer-authorized access to their data and systems.[23] Motivated by their own self-interest, third parties may use screen scraping to collect more data than they reasonably need. Diverging self-interests also lead to disagreements over issues such as the frequency and duration of data access, the imposition of access caps, the assignment of liability, and consumer authorization procedures. These dynamics undermine the efficient functioning of the open banking system for consumers and the system's ability to move away from screen scraping.

Third parties' data use can also contribute to problems in the current open banking system. When consumers go into the market to obtain a product, they do not want third parties to serve their own commercial interests by collecting, using, or retaining data beyond what they need to provide that product.[24] For example, third parties with surveillance revenue models monetize consumer data by targeting consumers with unwanted ads or services or selling the consumer data, undermining consumers' ability to limit data use to providing the product they sought. Third parties also collect data using methods that may compromise consumers' data privacy, security, and accuracy, as well as data provider interests related to security, liability, and risk management. For example, screen scraping may pose risks to consumers' data privacy and security by capturing and storing consumer credentials and potentially capturing more data than are reasonably necessary to provide the requested product or service. Additionally, because screen scraping requires a third party to parse through a data provider's consumer interface and transpose the unstructured information that a consumer sees into a structured format the third party can use, any errors in the transposition or any changes a data provider makes to the consumer interface can increase the risks of data inaccuracy in the third party's product or service. Screen scraping also presents risks to data providers because it involves third parties accessing data on an automated basis from a system not designed for that purpose, leading some data providers to report that screen scraping puts undue strain on their information systems. Screen scraping exacerbates data provider concerns with respect to liability, because it entails giving third parties a way to access data provider information systems and initiate payments in a way that can impede data providers' efforts to monitor them.

Impacts of These Challenges on the Open Banking System

The challenges described above in this part I.C have impeded progress in negotiating access agreements in several respects. Data providers may decide not to establish a developer interface in the first instance, making it difficult for third parties to access data without resorting to screen scraping. Even where data providers have a developer interface, conflicting interests may inhibit parties from reaching access agreements. And even where such agreements are reached, negotiating them has often proved costly, and their terms often vary in key respects that undermine the consistency of data access across the system. For example, the scope of and frequency with which data are made available vary from agreement to agreement. Attempts to standardize or streamline negotiations by publishing model agreements generally have been undertaken only by certain segments of the market, limiting their effectiveness.[25]

These challenges also hamper efforts by industry to establish standards for open banking. The absence of clarity around the scope of consumers' data rights and the appropriate role of various parties has left standard setters to negotiate a thicket of conflicting interests. The result has been standards limited in their scope, specificity, and adoption. These dynamics have limited standard setters from taking on other functions for which they are potentially well-suited, such as apportioning liability and developing an accreditation system.

Due to the lack of progress on access agreements and the establishment of open, fair, and inclusive industry standards, the open banking system has come to depend heavily on a handful of data aggregators. Aggregators currently function as connectors and, as a practical matter, standardize how many third parties receive data. As such, they accrue economic benefits from the system's inability to scale bilateral access agreements and open industry standards. Dependency on a handful of data aggregators creates incentives for them to rent-seek and self-preference. In a more open system where developer interfaces are appropriately accessible and third parties are easily verified, third parties and data providers may choose to connect without intermediaries if they wish, or continue to use them to the extent they offer compelling value.

When the challenges impeding progress described above in this part I.C are resolved, consumers should be able to safely exercise their data access rights in an open system not dominated by the interests of any one segment of the market.

*D. Overview of Rulemaking Objectives*

The CFPB is proposing regulations to implement CFPA section 1033. In addition to ensuring consumers can access covered data in an electronic form from data providers, the proposed regulations would address the challenges described above in part I.C with respect to the open banking system by delineating the scope of data that third parties can access on a consumer's behalf, the terms on which data are made available, and the mechanics of data access. The proposed regulations also would ensure that third parties act on consumers' behalf when collecting, using, or retaining data.

If finalized as proposed, this rule will foster a data access framework that is (1) safe, by ensuring third parties are acting on behalf of consumers when accessing their data, including with respect to consumers' privacy interests; (2) secure, by applying a consistent set of security standards across the market; (3) reliable, by promoting the accurate and consistent transmission of data that are usable by consumers and authorized

[23] *See, e.g.,* Off. of the Comptroller of the Currency, *Third-Party Relationships: Interagency Guidance on Risk Management* (June 6, 2023), *https://www.occ.gov/news-issuances/bulletins/2023/bulletin-2023-17.html.*

[24] Dan Murphy *et al., Financial Data—The Consumer Perspective,* at 15, 18, Fin. Health Network (June 30, 2021), *https://finhealthnetwork.org/wp-content/uploads/2021/04/Consumer-Data-Rights-Report_FINAL.pdf;* Brooke Auxier, *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information,* Pew Rsch. Ctr. (Nov. 15, 2019), *https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/.*

[25] *See, e.g.,* The Clearing House, *The Clearing House Releases Model Agreement to Help Facilitate Safe Sharing of Financial Data* (Nov. 12, 2019), *https://www.theclearinghouse.org/payment-systems/articles/2019/11/model_agreement_press_release_11-12-19.*

third parties; and (4) competitive, by promoting standardization and not entrenching the roles of incumbent data providers, intermediaries, and third parties whose commercial interests might not align with the interests of consumers and competition generally. The proposed rule is intended to foster this kind of framework by direct regulation of practices in the market and by identifying areas in which fair, open, and inclusive standards can develop to provide additional guidance to the market. Consistent with the statutory mandate in CFPA section 1033(d), various provisions in the proposed rule would promote the use and development of standardized formats.

1. Clarifying Scope of Data Rights

The CFPB is proposing to define key terms, establish which covered persons would be required to make data available to consumers, and define which data would need to be made available to consumers. As discussed in part IV.A, the CFPB is proposing to first apply part 1033 to a subset of covered persons—namely, entities providing asset accounts subject to the Electronic Fund Transfer Act (EFTA) [26] and Regulation E,[27] credit cards subject to the Truth in Lending Act (TILA) [28] and Regulation Z,[29] and related payment facilitation products and services. This proposed scope is intended to prioritize some of the most beneficial use cases for consumers and leverage data providers' existing capabilities. The proposed definition of covered data would ensure consumers have access to key pricing terms, transaction and balance information, payment initiation information, and terms and conditions. As discussed in part IV.B, this would facilitate consumer choice, including the ability of consumers to change providers of products or services. Clarifying the scope of the data right also would promote consistency in the data made available to consumers, reduce costs of negotiating the inclusion of such data in access agreements, and focus the development of technical standards around such data.

2. Establishing Basic Standards for Data Access

As discussed in part IV.C, the proposed rule would require data providers to establish and maintain a developer interface for third parties to access consumer-authorized data. Developer interfaces would need to make available covered data in a standardized format, in a commercially reasonable manner, without unreasonable access caps, and pursuant to certain security specifications. In addition, data providers would need to follow certain procedures to disclose information about themselves and their developer interfaces, which would ensure that consumers and authorized third parties have information necessary to make requests and use the developer interface. Data providers also would be required to establish and maintain certain written policies and procedures to promote these objectives. Altogether, these provisions would ensure data providers make data available reliably, securely, and in a way that promotes competition.

3. Transitioning the Market From Screen Scraping

The proposed rule would prevent data providers from relying on screen scraping to comply with the proposal because it is not a viable long-term method of access for the reasons discussed in part I.C above. Instead, data providers would be required to establish and maintain developer interfaces that would make data available in a machine-readable, standardized format and could not allow a third party to access the system using consumer interface credentials. These provisions would help the market move away from screen scraping, even outside of the product markets covered under the proposed rule. Once developer interfaces have been established by data providers with respect to covered data, it will be more efficient for these data providers to provide access to other data types via the same developer interface. And, as the infrastructure for establishing and using developer interfaces embeds itself in the market for accessing consumer financial data, data providers outside the scope of the proposed rule will face competitive pressure to adopt and use developer interfaces as well. During the rule's implementation period, and for data accessed outside its coverage, the CFPB plans to monitor the market to evaluate whether data providers are blocking screen scraping without a bona fide and particularized risk management concern or without making a more secure and structured method of data access available (*e.g.,* through a developer interface). If so, the CFPB would consider using the tools at its disposal to address this topic in advance of the proposed compliance dates.

4. Clarifying Mechanics of Data Access

As discussed in part IV.C, the CFPB is proposing certain requirements and clarifications to implement CFPA section 1033 with respect to when a data provider must make available covered data upon request to consumers and authorized third parties. These proposed provisions address how a data provider can manage requests for third parties to access a developer interface and when a data provider must respond to requests for information through a consumer and developer interface. While the CFPB is not proposing amendments to Regulation E at this time, proposed part 1033 contains multiple provisions that would reduce fraud and unauthorized access risk in the open banking system. These provisions include requiring that third party access be effected through a developer interface (rather than through credential-based screen scraping); prohibiting a developer interface from requiring a third party to obtain or possess credentials for the consumer interface; and allowing data providers to share tokenized account and routing numbers. The proposed rule would allow data providers to restrict access to their developer interface when they have reasonable risk management grounds to do so.

5. Ensuring Third Parties are Acting on Behalf of Consumers

To effectuate consumers' control of access to their data, the proposed rule contains provisions intended to ensure that when consumers authorize a third party to access data on their behalf, the third party is actually doing so. To that end, the proposed rule would require a third party to certify to consumers that it will only collect, use, and retain the consumer's data to the extent reasonably necessary to provide the consumer's requested product or service. The proposed rule also would aim to improve consumers' understanding of third parties' data practices by requiring a clear and conspicuous authorization disclosure including key facts about the third party and its practices. Other key protections in the proposed rule include limiting the length of data access authorizations and requiring deletion of consumer data in many cases when a consumer's authorization expires or is revoked.

Separately, the proposed rule would exercise the CFPB's authority to define financial products or services under the CFPA to ensure that it includes providing financial data processing. Although the CFPB has tentatively concluded that this activity would

[26] 15 U.S.C. 1693 *et seq.*

[27] 12 CFR part 1005.

[28] 15 U.S.C. 1601 *et seq.*

[29] 12 CFR part 1026.

qualify as a financial product or service without a CFPB rule, this rule provision would provide additional assurance that financial data processing by third parties or others is subject to the CFPA and its prohibition on unfair, deceptive, and abusive acts or practices.

6. Promoting Fair, Open, and Inclusive Industry Standards

Industry standard-setting bodies that operate in a fair, open, and inclusive manner have a critical role to play in ensuring a safe, secure, reliable, and competitive data access framework. Accordingly, indicia of compliance with various provisions in the rule, if finalized as proposed, would include conformance with standards promulgated by fair, open, and inclusive standard-setting bodies recognized by the CFPB.

Comprehensive and detailed technical standards mandated by Federal regulation could not address the full range of technical issues in the open banking system in a manner that keeps pace with changes in the market and technology. A rule with very granular coding and data requirements risks becoming obsolete almost immediately, which means the CFPB and regulated entities would experience constant regulatory amendment, or worse, the rule would lock in 2023 technology, and associated business practices, potentially for decades. In developing the proposal, the CFPB is mindful of these limitations and the risk that they may adversely impact the development and efficient evolution of technical standards over time. In contrast, industry standards appropriately developed within the CFPB's proposed data access framework would not be subject to these limitations.

To help support and maintain a data access framework that enables consumer access in a consistently safe, reliable, and secure manner across the market, industry standards must be widely adopted. To meaningfully scale, standards must reflect a diverse set of interests, increasing the likelihood that market participants will adopt the standards and maintain their integrity. Conversely, if standards are controlled by dominant incumbents or intermediaries, they may enable rent-extraction and cost increases for smaller participants. Fair, open, and inclusive standard-setting bodies are vital to promote standards that can support a data access system that works for consumers, rather than the interests of dominant firms.

*E. Applicability of Other Laws*

1. Electronic Fund Transfer Act

This proposed rule would not alter a consumer's statutory right under EFTA to resolve errors through their financial institution. Regulation E financial institutions—including digital wallet providers, entities that refer to themselves as neobanks, and traditional depository institutions—have and will continue to have error resolution obligations in the event of a data breach where stolen account or ACH credentials are used to initiate an unauthorized transfer from a consumer's account and the consumer provides proper notice. Consumers are protected from liability from these unauthorized transfers under EFTA and Regulation E, although the relevant financial institution may be able to seek reimbursement from other parties through private network rules, contracts, and commercial law. For example, although a consumer's financial institution is required to reimburse the consumer for an unauthorized transfer under Regulation E, ACH private network rules generally dictate that the receiving financial institution is entitled to reimbursement from the originating depository institution that initiated the unauthorized payment.

Various stakeholders have suggested that consumer-authorized data sharing may create risks to consumers and financial costs to financial institutions arising from an increased risk of unauthorized transactions and other errors, especially when data access relies on screen scraping. In implementing CFPA section 1033, the CFPB is proposing a variety of measures to mitigate unauthorized transfer and privacy risks to data providers and consumers, including allowing data providers to share TANs, not allowing data providers to rely on credential-based screen scraping to satisfy their obligations under CFPA section 1033, clarifying that data providers can engage in reasonable risk management activities, and implementing authorization procedures for third parties that would require they commit to data limitations and compliance with the Gramm-Leach-Bliley Act (GLBA) [30] Safeguards Framework. These provisions are intended to drive market adoption of safer data sharing practices.

2. Fair Credit Reporting Act

As described above, entities engaged in data aggregation activities play a role in the open banking system by transmitting consumer-authorized data from data providers to third parties. When the data bears on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living and is used or expected to be used, or collected, for ''permissible purposes'' as defined by the FCRA, such as when a third party uses the data to underwrite a loan to a consumer, and when the entity, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating such data for the purpose of furnishing reports containing the data to third parties (and uses any means or facility of interstate commerce to prepare or furnish such reports), the data aggregator is regulated as a consumer reporting agency under the FCRA.

## II. Legal and Procedural Background

In 2010, Congress passed the CFPA, including section 1033. This is the first proposed CFPB rule under section 1033.

*A. Small Business Advisory Review Panel*

Pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[31] the CFPB issued its Outline of Proposals and Alternatives under Consideration for the Required Rulemaking on Personal Financial Data Rights (Outline or SBREFA Outline).[32] The CFPB convened a SBREFA Panel for this proposed rule on February 1, 2023, and held two Panel meetings on February 1 and 2, 2023.[33] Representatives from 18 small businesses were selected as small entity representatives for this SBREFA process. These entities represented small businesses that would likely be directly affected by a CFPA section 1033 rule. On March 30, 2023, the Panel completed the Final Report of the Small Business Review Panel on the CFPB's Proposals Under Consideration for the Required Rulemaking on Personal Financial Data Rights Rulemaking (Panel Report or SBREFA Panel Report). The CFPB released the Panel Report on

[30] 15 U.S.C. 6801 *et seq.*

[31] Public Law 104–121, 110 Stat. 857 (1996).

[32] Consumer Fin. Prot. Bureau, *Small Business Advisory Review Panel for Required Rulemaking on Personal Financial Data Rights, Outline of Proposals and Alternatives under Consideration* (Oct. 27, 2022), *https://files.consumerfinance.gov/f/documents/cfpb_data-rights-rulemaking-1033-SBREFA_outline_2022-10.pdf.*

[33] The Panel consists of a representative from the CFPB, the Chief Counsel for Advocacy of the SBA, and a representative from the Office of Information and Regulatory Affairs in OMB.

April 3, 2023.[34] The CFPB invited other stakeholders to submit feedback on the SBREFA Outline by January 25, 2023.[35] The CFPB has considered the feedback it received from small entity representatives, the findings and recommendations of the Panel, and the feedback from other stakeholders in preparing this proposed rule.

*B. Other Stakeholder Outreach*

In the years leading up to the release of this proposed rule, the CFPB held a number of outreach meetings with financial institutions, trade associations, nondepositories, aggregators, community groups, consumer advocates, researchers, and other stakeholders regarding the CFPA section 1033 rule, and about the open banking system generally. Findings from such market monitoring activities inform the CFPB on the state of the open banking system.

In January 2023, the CFPB issued two sets of CFPA section 1022(c)(4) market monitoring orders to collect information related to personal financial data rights—one set of orders was sent to a group of data aggregators (Aggregator Collection);[36] the second to a group of large data providers (Provider Collection).[37] The information gathered through these orders informs this proposed rule, including the CFPA section 1022(b) analysis in part VI below.

The CFPB regularly hears from several advisory committees on emerging trends and practices in the consumer financial marketplace and engages with advisory committee members in different formats, including non-public and public engagements. In November 2022, the CFPB Director and CFPB staff engaged in a discussion about data privacy in the context of CFPA section 1033 with members of the Consumer Advisory Board. Additionally, the CFPB Director and CFPB staff received two briefings related to the CFPA section 1033 rule—one from the Consumer Advisory Board and one from the combined Community Bank Advisory Council and Credit Union Advisory Council.[38]

Prior to issuing this proposed rule (in accordance with CFPA sections 1033(e) and 1022(b)(2)(B), and as recommended by the SBREFA Panel), the CFPB consulted on several occasions with staff from the prudential regulators and the FTC to discuss various aspects of this proposed rule. Specifically, the CFPB met with staff from the Board of Governors of the Federal Reserve System, the OCC, the FDIC, the NCUA, the FTC, the Department of Treasury's Bureau of the Fiscal Service, the United States Department of Justice, and the Financial Crimes Enforcement Network. The CFPB also met with a number of State regulators and an association of State regulators to discuss the CFPB's proposals under consideration. The CFPB also met with its foreign counterparts to discuss open banking frameworks in their respective countries.

## III. Legal Authority

The CFPB is issuing this proposed rule pursuant to its authority under the CFPA. This part includes a general discussion of several CFPA provisions on which the CFPB relies in this proposed rule.[39] As set forth in section 1021 of the CFPA, Congress established the CFPB to ensure that ''all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.'' Congress also authorized the CFPB to exercise its authorities under Federal consumer financial law, including the CFPA, to ensure that, with respect to consumer financial products and services, consumers have ''timely and understandable information to make responsible decisions about financial transactions,'' ''consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination,'' that ''markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation,'' and that ''Federal consumer financial law is enforced consistently without regard to the status of a person as a depository institution in order to promote fair competition.''

*A. CFPA Section 1033*

CFPA section 1033(a) and (b) provide that, subject to rules prescribed by the CFPB, a covered person shall make available to a consumer, upon request, information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from such covered person, subject to certain exceptions. The information must be made available in an electronic form usable by consumers. Section 1002 of the CFPA defines certain terms used in CFPA section 1033, including defining consumer as ''an individual or an agent, trustee, or representative acting on behalf of an individual.'' In light of these purposes and objectives of section 1033 and the CFPA generally, the CFPB interprets CFPA section 1033 as authority to establish a framework that readily makes available covered data in an electronic form usable by consumers and third parties acting on behalf of consumers, upon request, including authorized third parties offering competing products and services. In addition, CFPA section 1033(d) provides that the CFPB, by rule, shall prescribe standards applicable to covered persons to promote the development and use of standardized formats for information, including through the use of machine-readable files, to be made available to consumers under this section. Moreover, the CFPB interprets CFPA section 1033 as authority to specify procedures to ensure third parties are truly acting on behalf of consumers when accessing covered data. These procedures would help ensure the market for consumer-authorized data operates fairly, transparently, and competitively.

CFPA section 1033(c) provides that nothing in CFPA section 1033 shall be construed to impose any duty on a covered person to maintain or keep any information about a consumer. Further, CFPA section 1033(e) requires that the CFPB consult with the prudential regulators and the FTC to ensure, to the extent appropriate, that certain objectives are met.

*B. CFPA Sections 1022(b) and 1024(b)(7)*

CFPA section 1022(b)(1) authorizes the CFPB to, among other things,

[34] Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on the CFPB's Proposals and Alternatives Under Consideration for the Required Rulemaking on Personal Financial Data Rights* (Mar. 30, 2023), *https://files.consumerfinance.gov/f/documents/cfpb_1033-data-rights-rule-sbrefa-panel-report_2023-03.pdf.* As required under SBREFA, the CFPB considers the Panel's findings in its IRFA, as set out in part VII below.

[35] *See https://www.regulations.gov/document/CFPB-2023-0011-0001/comment* (last visited Aug. 28, 2023). Feedback from these other stakeholders was not considered by the Panel and is not reflected in the Panel Report.

[36] Consumer Fin. Prot. Bureau, *Generic Order for Data Aggregators, https://files.consumerfinance.gov/f/documents/cfpb_generic-1022-order-data-aggregator_2023-01.pdf* (last visited Aug. 28, 2023).

[37] Consumer Fin. Prot. Bureau, *Generic Order for Data Providers, https://files.consumerfinance.gov/f/documents/cfpb_generic-1022-order-data-provider_2023-01.pdf* (last visited Aug. 28, 2023).

[38] *See* Consumer Fin. Prot. Bureau, *Consumer Advisory Board Meeting* (Nov. 2, 2022), *https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_consumer-advisory-board-meeting_summary_2022-11.pdf;* Consumer Fin. Prot. Bureau, Cmty. Bank Advisory Council & Credit Union Advisory Council, *Combined Advisory Councils Meeting* (Nov. 3, 2022), *https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_combined-advisory-board-meeting_summary_2022-11.pdf.*

[39] Part IV contains additional material on these authorities.

prescribe rules ''as may be necessary or appropriate to enable the CFPB to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.'' The CFPA is a Federal consumer financial law.[40] Accordingly, in issuing the proposed rule, the CFPB is exercising its authority under CFPA section 1022(b) to prescribe rules that carry out the purposes and objectives of the CFPA and to prevent evasions thereof. This would include, at least in part, provisions to require covered persons or service providers to establish and maintain reasonable policies and procedures, such as those to create and maintain records that demonstrate compliance with the rule when final. CFPA section 1024(b)(7) also grants the CFPB authority to impose record retention requirements on CFPB-supervised nondepository covered persons ''for the purposes of facilitating supervision of such persons and assessing and detecting risks to consumers.''

CFPA section 1022(b)(3)(A) generally provides that the CFPB, by rule, may conditionally or unconditionally exempt any class of covered persons, service providers, or consumer financial products or services, from any provision of the CFPA, or from any rule issued under the CFPA, as the CFPB determines necessary or appropriate to carry out the purposes and objectives of the CFPA, taking into consideration several factors. For a discussion of the CFPB's proposed use of this authority, see the discussion in part IV.A. The statutory language indicates that the CFPB should evaluate the case for creating such an exemption in light of its general purposes and objectives as Congress articulated them in section 1021 of the CFPA, as described above.

*C. CFPA Section 1032*

CFPA section 1032(a) provides that the CFPB may prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances. Under CFPA section 1032(a), the CFPB is empowered to prescribe rules regarding the disclosure of the ''features'' of consumer financial products and services generally. CFPA section 1032(c) provides that, in prescribing rules pursuant to CFPA section 1032, the CFPB shall consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services.

*D. CFPA Section 1002*

Certain provisions of the CFPA, such as its prohibition on unfair, deceptive, or abusive acts or practices, apply in connection with a consumer financial product or service. Under CFPA section 1002(5), this is generally defined as a financial product or service that is ''offered or provided for use by consumers primarily for personal, family, or household purposes.'' In turn, CFPA section 1002(15) defines a financial product or service by reference to a number of categories. In addition, CFPA section 1002(15)(A)(xi)(II) authorizes the CFPB to issue a regulation to define as a financial product or service, for purposes of the CFPA, ''such other financial product or service'' that the CFPB finds is ''permissible for a bank or for a financial holding company to offer or to provide under any provision of a Federal law or regulation applicable to a bank or a financial holding company, and has, or likely will have, a material impact on consumers.'' The CFPB is proposing to exercise this authority in proposed § 1001.2(b).

## IV. Discussion of the Proposed Rule

*12 CFR Part 1033*

*A. Subpart A—General*

1. Overview

Proposed subpart A would establish the coverage and terminology necessary to implement CFPA section 1033 for this proposed rule, beginning with proposed § 1033.101, which would describe the authority, purpose, and organization of the regulation in proposed part 1033. It contains defined terms appearing throughout the regulatory text, which are described in this part IV.A and elsewhere in part IV and sets forth tiered compliance dates to provide appropriate flexibility to smaller institutions in implementing the rule's requirements.

2. Coverage of Data Providers (§ 1033.111(a) Through (c))

Regulation Z Card Issuers, Regulation E Financial Institutions, and Other Payment Facilitation Providers

In this first proposed rule to implement CFPA section 1033(a), the CFPB is proposing to define a subset of covered persons and consumer financial products or services that would be required to make data available under section 1033(a) of the CFPA. The proposed rule would cover the following consumer financial products or services, as defined at proposed § 1033.111(b)(1) through (3)—generally, Regulation E asset accounts, Regulation Z credit cards, and products or services that facilitate payments from a Regulation E account or a Regulation Z credit card. The latter category—products or services that facilitate payments from a Regulation E account or a Regulation Z credit card—would be intended to clarify that the proposed rule would cover all consumer-facing entities involved in facilitating the transactions the CFPB intends to cover.

Payment data from these products and services support common beneficial consumer use cases today, including transaction-based underwriting, payments, deposit account switching, and comparison shopping for bank and credit card accounts. Credit cards are increasingly used as payment devices for everyday expenses, and credit card transaction data have in some cases become interchangeable with Regulation E account transaction data. In addition, digital wallet providers hold valuable data that can provide a complete understanding of a consumer's finances. Today, a digital wallet can initiate payments from multiple credit cards, prepaid accounts, and checking accounts. A digital wallet can facilitate payments from accounts that the digital wallet provider offers through depository institution partners, or from linked accounts that were originally issued by other institutions (sometimes referred to as pass-through payments).

The CFPB has preliminarily determined that the marginal burden of including other payment facilitation products and services would be minimal given how these providers would generally already be covered as Regulation E financial institutions. Digital wallet providers and entities that refer to themselves as neobanks generally qualify as Regulation E financial institutions and sometimes also may be Regulation Z card issuers. Adopting a broad definition could help avoid creating unintentional loopholes as the market evolves.

Covering Regulation E asset accounts, Regulation Z credit cards, and payment facilitation products and services would have additional benefits. This coverage would leverage existing infrastructure for consumer-authorized data sharing, which would facilitate implementation. Data providers generally share the

[40] *See* 12 U.S.C. 5481(14) (defining ''Federal consumer financial law'' to include the provisions of the CFPA).

covered data described in this proposed rule on consumer interfaces today, and some share covered data with third parties. Additionally, given the current level of data sharing associated with these products and services, the proposed coverage would prioritize these data for greater protection compared to what is available today. In particular, consumers' payment data can be used to access consumer funds or track household spending. As discussed in part I.D, this proposal would include a number of measures to foster a safe and secure data access framework.

The SBREFA Panel recommended that the CFPB consider clarifying the types of products that would be covered under the proposed rule.[41] In addition, the CFPB received feedback from small entity representatives and other stakeholders indicating confusion about whether the CFPB intended to cover nondepository data providers and their products, and whether all credit card products would be included.

Consistent with the Panel recommendation and the feedback received, the proposal would make clear that a data provider generally would have obligations to make available covered data with respect to a covered consumer financial product or service. Proposed § 1033.111(b) would define covered consumer financial product or service to mean (1) a Regulation E account, a defined term that would have the same meaning as defined in 12 CFR 1005.2(b); (2) a Regulation Z credit card, a defined term that would have the same meaning as defined in 12 CFR 1026.2(a)(15)(i); and (3) the facilitation of payments from a Regulation E account or Regulation Z credit card. Proposed § 1033.111(c) would define data provider to mean (1) a Regulation E financial institution, as defined in 12 CFR 1005.2(i); (2) a Regulation Z card issuer as defined in 12 CFR 1026.2(a)(7); or (3) any other person that controls or possesses information concerning a covered consumer financial product or service the consumer obtained from that person. Proposed example 1 to § 1033.111(c) explains that a digital wallet provider is a data provider. The CFPB requests feedback on the proposed definitions, including whether any further clarification is needed to demonstrate that entities that refer to themselves as neobanks, digital wallet providers, and similar nondepository entities would qualify as data providers.

Other Consumer Financial Products and Services

Today, covered persons typically share information concerning financial products and services that would not fall within the definition of covered data in proposed § 1033.211, such as mortgage, automobile, and student loans. Similar to the payment data that would be covered, information about these products is generally shared through consumer interfaces and supports a variety of beneficial use cases. A significant difference is that this information does not typically support transaction-based underwriting across a range of markets or payment facilitation. Accordingly, the CFPB has preliminarily concluded that prioritizing Regulation E accounts, Regulation Z credit cards, and payment facilitation products and services in this proposed rule could serve to advance competition goals across a broader range of markets. The CFPB intends to implement CFPA section 1033 with respect to other covered persons and consumer financial products or services through supplemental rulemaking.

When distributed electronically, needs-based benefits established under State or local law or administered by a State or local agency are primarily issued to consumers via EBT cards. EBT-related data are mainly accessed directly by the consumer through private entities that have contracted with State or local governments that administer programs for Federal government agencies. The CFPB has received feedback from small entity representatives and other stakeholders that there can be limitations to the availability of EBT-related data and that third party access to EBT data could address these issues. EBT cards are exempt from EFTA coverage by statute; pursuant to the Consolidated Appropriations Act of 2023, the U.S. Department of Agriculture has been directed to engage in a rulemaking and issue guidance on EBT card security practices.[42]

The CFPB is considering whether to add EBT-related data to the final rule, or whether to reach EBT cards in a subsequent rulemaking. While EBT cards differ from the current scope of data types included in the proposed regulation in some ways, they have some significant similarities, including that they are used by consumers to make regular purchases. The CFPB requests comment on whether the most appropriate way to solve issues related to EBT data accessed directly by the consumer is through section 1033 of the CFPA, and whether it should do so as part of this first rulemaking related to payments data or a subsequent rule under section 1033. The CFPB also seeks comment on third party practices related to consumer-authorized EBT data, including the interaction between those practices and the limitations on uses that are not reasonably necessary in proposed § 1033.421(a) and (c). Finally, the CFPB seeks comment on the benefits and drawbacks of enabling third party access to EBT-related data, including with respect to data security.

3. Excluded Data Providers (§ 1033.111(d))

Pursuant to CFPA section 1022(b)(3), proposed § 1033.111(d) generally would exempt data providers (as defined in proposed § 1033.111(c)) from the requirements of the proposed rule if they have not established a consumer interface as of the applicable compliance date. Proposed § 1033.131 would define consumer interface as an interface that a data provider maintains to receive requests for covered data and make available covered data in an electronic form usable by consumers in response to the requests. The term is intended to encompass consumer-facing digital banking interfaces that allow consumers to make requests for information, as described in part I.A above.

While the vast majority of banks and credit unions offer consumer interfaces, such as online banking or mobile banking applications, a small number of depository institutions do not offer any such service. For example, among credit unions with fewer than 1,000 deposit accounts, only 21 percent offer online banking services.[43] These institutions tend to be very small and may not have adequate resources to support or maintain these online or mobile banking systems. They may also use a relationship banking model and have a more personalized relationship with their customers.[44]

Some depositories do not offer digital banking in the current environment, despite the ubiquity of computers and smartphones, broad consumer utilization of online banking and mobile banking applications, and the impact of the COVID–19 pandemic, which impeded many consumers' access to

[41] SBREFA Panel Report at 42.

[42] Public Law 117–328, 136 Stat. 5985 (2022).

[43] CFPB calculations based on NCUA data. For details on data see part VII.B.6.

[44] *See, e.g.,* Consumer Fin. Prot. Bureau, *Request for Information Regarding Relationship Banking and Customer Service* (June 14, 2022), *https://www.federalregister.gov/documents/2022/07/20/2022-15243/request-for-information-regarding-relationship-banking-and-customer-service.*

traditional banking channels. This suggests that, first, such entities have not found that the business reasons to provide these services justify the associated costs; and, second, that their customers have not switched to institutions that do provide digital banking services, indicating that such services may not be an important factor for such customers when choosing where to deposit or borrow money.[45] The CFPB notes that it has preliminarily determined to limit this proposed exclusion to depositories that qualify as financial institutions under Regulation E or as card issuers under Regulation Z. Not all CFPA-covered persons will necessarily have the same incentives to facilitate direct customer service with consumers. For example, there may be covered persons that do not market to or contract with consumers and that do not have the same incentives to invest in customer service.

The SBREFA Panel recommended that the CFPB consider whether to create complete or partial exemptions for data providers, or whether to delay implementation for certain data providers for certain aspects of the proposed rule, such as a requirement to establish a developer interface.[46] The Panel also recommended that the CFPB seek comment on how to define potential exemption eligibility requirements or implementation tiers, such as by establishing a threshold based on asset size or activity level, or by exempting data providers based on entity type.[47] Consistent with these recommendations, the CFPB considered whether to exempt all data providers, not just certain depository institutions, that do not provide a consumer interface and, if so, how to structure such an exemption. However, the complicating factors that exist for these types of depository institutions may be less likely to exist for these types of nondepository institutions. For example, nondepository data providers within the scope of the proposed rule tend to be institutions whose business models are built upon providing interfaces to consumers. This is not the case for depository institutions that do not provide an interface for their customers. The CFPB requests comment on whether there are nondepositories that do not provide an interface for their customers, and if so, whether an exemption should include them. The CFPB also seeks comment on whether it should require any exempt depositories to make covered data available in a non-electronic form.

As noted in the discussion of the proposed rule's compliance dates, the CFPB is proposing to provide a longer compliance period for the smallest depository institution data providers. The CFPB also considered not proposing an exemption for any data providers, and instead simply giving some data providers more time to comply. However, because of the dynamics with respect to depository institutions that do not provide an interface for their customers, the compliance burden on these entities would most likely outweigh the marginal benefit of the rule covering an additional very small set of consumer accounts.

The proposed rule would not provide a grace period for depository institutions that do not have a consumer interface as of the effective date but subsequently offer such an interface to their customers. The CFPB requests comment on whether such depositories should be offered some grace period to achieve compliance. Proposed § 1033.111(d) would not exempt depositories that stop providing a customer interface after the effective date. Such depositories possessed the ability to provide an interface for their consumers, and so should remain subject to the rule.

Under CFPA section 1022(b)(3)(A), the CFPB may exercise exemption authority as it determines necessary or appropriate to carry out the purposes and objectives of CFPA section 1033, taking into consideration, as appropriate: (1) the total assets of the class of covered persons; (2) the volume of transactions involving consumer financial products or services in which the class of persons engages; and (3) existing provisions of law which are applicable to the consumer financial product or service and the extent to which such provisions provide consumers with adequate protections.

The CFPB has preliminarily determined that the proposed exemption would promote the CFPB's objectives, discussed in part I above, to ensure that the markets for consumer financial products and services operate transparently and efficiently to facilitate access, as well as its objective to ensure that consumers are provided with timely and understandable information to make responsible decisions about financial transactions. The CFPB has also preliminarily determined that the proposed exemption would promote the CFPA's purpose of ensuring that markets for consumer financial products and services are competitive. As noted above, the depository institutions that would be exempt from the proposed rule's requirements tend to be very small institutions that may not be as technologically sophisticated as larger institutions and likely do not have the resources to support or maintain the interfaces that would be required by the proposed rule. Subjecting these institutions to the proposal could significantly disrupt their businesses, potentially threatening access to consumer financial products and services and reducing competition for consumer financial products and services—both contrary to carrying out the objectives of CFPA section 1033.

The CFPB acknowledges that some consumers would not be given the benefits provided by the proposed rule if these entities were exempt. However, as noted above, these small depository institutions generally provide timely and understandable information through ongoing personal relationships to assist customers in making decisions about financial transactions. The CFPB seeks comment on whether the exclusion for depository institutions that do not provide an interface for their customers should be limited solely to the provision of the interfaces required by the proposed rule, or whether the rule should still require such institutions to comply with the general obligations outlined in proposed § 1033.201(a) and allow flexible compliance with this section. The CFPB also seeks comment on whether different or additional criteria, such as an institution's asset size or activity level, should be taken into consideration when determining what depository institutions would be exempt from the proposed rule.

As noted above, the CFPB considers, as appropriate, the applicable statutory factors in CFPA section 1022(b)(3)(A). Because the requirements of this proposed rule would focus on consumers' data, a suitable proxy for considering two of the three factors—total assets of the class of covered persons and the volume of transactions—would be the number of accounts exempted. The CFPB expects the number of data requests will be approximately proportional to the number of accounts. By exempting depository institutions that do not have an interface, the proposed rule would exempt approximately 0.64 percent of total deposit accounts, a very small percentage of deposit accounts covered by the proposed rule.

[45] *See, e.g.,* Miriam Cross, *Credit Unions Podcast: A tiny credit union's tall order,* Am. Banker (May 25, 2023), *https://www.americanbanker.com/podcast/a-tiny-credit-unions-tall-order* (discussing factors some customers of very small credit unions use when determining whether to continue to patronize such institutions).

[46] SBREFA Panel Report at 43.

[47] *Id.* at 42.

This exemption would treat some depository data providers differently than nondepository ones. However, nondepository data providers within scope of this proposed rule tend to use business models built on the ability to innovate with respect to technology and move quickly to implement technological changes and solutions, in contrast to depository institutions that have not established a consumer interface for their customers. Thus, the CFPB preliminarily concludes that these two groups are not similarly situated for purposes of this proposed rule. By exempting these depository institutions from regulations that would be more costly and burdensome for them than it would be for their peers with greater technological capabilities, the CFPB would be promoting fair competition.

The CFPB's preliminary determination regarding exempting depository institution data providers that do not provide a consumer interface to their customers is specific to this proposed rule and the data that would be covered by it. Further rulemaking under section 1033 of the CFPA may make different determinations based upon the types of data providers and types of data covered.

4. Compliance Dates (§ 1033.121)

Proposed § 1033.121 would stagger dates by which data providers need to comply with proposed §§ 1033.201 and 1033.301 (the obligations to make data available and establish interfaces) into four distinct tiers to ensure timely compliance with the rule's requirements. From the SBREFA process and other stakeholder feedback, the CFPB understands that a number of factors may affect how quickly a data provider could comply with the proposed rule. These include, for example, a data provider's size, relative technological sophistication, use of third party service providers to build and maintain software and hardware systems, and, in the case of many data providers, the existence of multiple legacy hardware and software systems that impact their ability to layer on new technology.[48] Many smaller depository data providers will need to rely on cores and other third party service providers to create interfaces required by the proposed rule.[49] These entities may experience significant wait times since many other entities may be relying on the same providers for the development of their interfaces.[50] If a depository institution data provider builds its own interface without the assistance of a third party service provider, it may need additional time to do so.

The CFPB preliminarily believes nondepository data providers do not have the same obstacles with respect to compliance as depository institutions because they do not have as many vendors and information technology systems that would need to be connected, and implementation could occur in-house.[51] Thus, these data providers would be able to move more quickly to implement the proposed rule's requirements.

The SBREFA Panel made several recommendations related to compliance dates. Generally, the Panel recommended that the CFPB seek comment on ways to facilitate implementation for small entities, and on implementation options that reduce impacts on small entities, including staging implementation based on categories of data to be made available, entity size, or other factors.[52] The Panel also recommended that the CFPB continue to study the time needed for vendors to establish a data portal on behalf of data providers, as well as the time needed by data providers, data aggregators, and data recipients to integrate into data portals at the scale envisioned by the proposal.[53] Lastly, the Panel recommended that the CFPB consider whether to delay implementation for certain data providers for certain aspects of the rule, such as a requirement to establish a third party access portal, and should seek comment on how to define implementation tiers, such as by establishing a threshold based on asset size or activity level.[54] (The CFPB is proposing to define and use the term developer interface in lieu of the SBREFA Outline's ''third-party access portal.'')

The CFPB considered a number of alternatives to the four tiers outlined in the proposed rule. One option was to have the same compliance date for all data providers. For the reasons discussed in this part IV.A, the CFPB has preliminarily determined that it is necessary to provide some data providers with a longer compliance period than others. The CFPB has preliminarily determined that the proposed exemption combined with the tiered compliance dates based on asset size or revenue appropriately balances the need to provide relief to the smallest data providers that may not be as technologically sophisticated as larger providers while providing a longer timeline for compliance to entities that may need more time. The CFPB also considered basing the compliance tiers on an institution's number of accounts/activity level, rather than asset size or revenue. With respect to number of accounts, the CFPB has preliminarily determined that, because of the breadth of types of data providers and services covered by the proposed rule, it would be difficult to define accounts to properly segment data providers into appropriate tiers, and asset size and revenue provide more precise metrics in which to separate compliance tiers.

Subject to a data provider's ability to deny access, as described in § 1033.321, and the exclusion for data providers described in proposed § 1033.111(d), proposed § 1033.121 would require data providers to grant access to the interfaces required by proposed § 1033.301 to consumers and third parties by four applicable compliance dates based on asset size or revenue, depending on the type of data provider. Under proposed § 1033.121(a), the first compliance date would occur approximately six months after publication of the final rule in the **Federal Register** and would apply to depository institutions that hold at least $500 billion in total assets, and to nondepository institutions that generate at least $10 billion in revenue in the preceding calendar year or are projected to generate at least $10 billion in revenue in the current calendar year. The CFPB uses the term ''total assets'' to make clear that this amount is based upon the total consolidated assets of the institution as reported in published financial statements, as used by the FFIEC.[55] Under proposed § 1033.121(b), the second compliance date would occur approximately one year after **Federal Register** publication and would apply to depository institutions that hold at least $50 billion in total assets but less than $500 billion in total assets, and to nondepository institutions that generate less than $10 billion in revenue in the preceding calendar year and are projected to generate less than $10 billion in revenue in the current calendar year. The CFPB has preliminarily determined that placing all nondepository data providers in the first two tiers for compliance appropriately balances the need to provide data providers enough time for compliance with depository data

[48] *Id.* at 36.

[49] *Id.* at 36–37.

[50] *Id.* at 36.

[51] *Id.* at 38.

[52] *Id.* at 46.

[53] *Id.*

[54] *Id.* at 43.

[55] *See, e.g.,* Fed. Fin. Insts. Examination Council, *Large Holding Companies, https://www.ffiec.gov/npw/Institution/TopHoldings* (last visited Sept. 22, 2023).

providers potentially needing additional time. Under proposed § 1033.121(c), the third compliance date would occur approximately 2.5 years after **Federal Register** publication and would apply to depository institutions that hold at least $850 million but less than $50 billion in total assets. Finally, under proposed § 1033.121(d), the fourth and final compliance date would occur approximately four years after **Federal Register** publication and would apply to depository institutions with less than $850 million in total assets.

The CFPB seeks comment on whether different or additional criteria, such as an institution's number of accounts or other criteria, should be taken into consideration when determining compliance dates. The CFPB also seeks comment on the structure of each tier, and whether nondepository institutions should be included in all four tiers.

The CFPB recognizes that data providers may need to transition third parties to developer interfaces in a staggered order. Under the proposed rule, a data provider not excluded from coverage could delay a third party's access to an interface in accordance with proposed § 1033.321. The CFPB seeks comment on whether the proposed rule provides data providers sufficient flexibility for such a transition or whether revisions to the proposed rule or additional guidance is needed. For example, the CFPB seeks comment on whether the final rule should include language clarifying that data providers should be granted any period of time to fully transition third parties to the interfaces that would be required under proposed § 1033.301 to ensure that data providers do not impede timely third party access to an interface while accounting for reasonable risk management concerns.

5. Third Party, Authorized Third Party, Consumer, and Data Aggregator (§ 1033.131)

The CFPB is proposing that a third party acting on behalf of a consumer would be able to access covered data. Proposed § 1033.131 includes several definitions that are used in describing the proposed processes and conditions for a third party to access covered data on behalf of a consumer. The CFPB is proposing these definitions to carry out the objectives of CFPA section 1033.

The CFPB is proposing to define the term third party as any person or entity that is not the consumer about whom the covered data pertains or the data provider that controls or possesses the consumer's covered data. The proposed rule uses the term third party to refer to entities seeking access to covered data and to other parties, including data aggregators.

As discussed in part III above, the CFPB interprets CFPA section 1033(a) to require data providers to make available covered data to certain third parties ''acting on behalf'' of a consumer. The CFPB is proposing to define the term authorized third party as a third party that has complied with the authorization procedures described in proposed § 1033.401. Proposed § 1033.401, discussed in part IV.D, specifies what requirements a third party must satisfy to become an authorized third party that is entitled to access covered data on behalf of a consumer.

The CFPB is proposing to define the term data aggregator to mean an entity that is retained by and provides services to the authorized third party to enable access to covered data. As discussed below, some third parties retain data aggregators for assistance in obtaining access to data from data providers. The proposed rule includes certain provisions in proposed § 1033.431 that specify what role data aggregators would play in the third party authorization procedures, what information about data aggregators would have to be included in the authorization disclosure, and what conditions data aggregators would have to certify that they agree to as part of the third party authorization procedures. The CFPB requests comment on whether data aggregator is an appropriate term for describing third parties that may provide assistance in accessing covered data or whether there are other terms, such as ''data intermediary,'' that would be more appropriate.

Proposed § 1033.131 would also define the term consumer for purposes of part 1033. The CFPB is proposing to define the term consumer to mean a natural person. The definition would further specify that trusts established for tax or estate planning purposes are considered natural persons for purposes of the definition of consumer. The proposed definition of consumer differs from the definition of consumer in CFPA section 1002(4), which defines one as ''an individual or an agent, trustee, or representative acting on behalf of an individual.'' The CFPB is proposing to define the term consumer to be a natural person to distinguish the term from the third parties that are authorized to access covered data on behalf of consumers pursuant to the proposed procedures in subpart D.

6. Qualified Industry Standard (§§ 1033.131 and 1033.141)

As discussed in part I.D, fair, open, and inclusive industry standards are a critical element in the maintenance of an effective and efficient data access system. To promote the development of such external standards, the CFPB is generally proposing throughout part 1033 that indicia of compliance with certain provisions include conformance to an applicable industry standard issued by a fair, open, and inclusive standard-setting body. Proposed §§ 1033.131 and 1033.141 would carry out the objectives of CFPA section 1033 by encouraging the development of fair, open, and competitive industry standards that would satisfy certain provisions of the proposed rule. The CFPB also is proposing §§ 1033.131 and 1033.141 pursuant to its authority under CFPA sections 1022(b)(1) and 1033(d).

Proposed § 1033.131 would define the term qualified industry standard to mean a standard that is issued by a standard-setting body that is fair, open, and inclusive. In turn, proposed § 1033.141 provides that a standard-setting body is fair, open, and inclusive and is an issuer of qualified industry standards when the body has the following attributes: (1) openness (sources and processes used are open to all interested parties, including consumer and other public interest groups, authorized third parties, data providers, and data aggregators); (2) balance (decision-making power is balanced across all interested parties, including consumer and other public interest groups, with no single interest dominating decision-making); (3) due process (publicly available policies and procedures, adequate notice of meetings and standards development, and a fair process for resolving conflicts); (4) an impartial appeals process; (5) consensus (general agreement, not unanimity, reached through fair and open processes); (6) transparency (procedures are transparent to participants and publicly available); and (7) the body has been recognized by the CFPB within the last three years as an issuer of qualified industry standards.

Under this proposed rule, indicia of compliance with a particular rule provision would include conformance to a qualified industry standard. However, an entity does not have to show adherence to a qualified industry standard to demonstrate compliance with a provision of the rule, as long as its conduct meets the requirement of the rule provision. Conversely, adherence to a qualified industry standard would not guarantee that the entity has complied

with the rule provision. There are provisions in the proposed rule that would not mention qualified industry standards at all, generally because their terms do not leave the same room for compliance to be informed by adherence to an external standard.

The one instance in which the proposed rule would take account of external standards in a manner that differs from that described above is the proposed requirement in § 1033.311(b) that data providers use standardized formats. There, the CFPB is proposing that if a data provider's interface makes covered data available in a format that is set forth in a qualified industry standard, then the interface is deemed to satisfy the proposed requirement to use a standardized format. The CFPB is also proposing that a data provider's developer interface would be deemed to satisfy the proposed format requirement if, in the absence of an industry standard, it makes covered data available in a format that is widely used by the developer interfaces of other similarly situated data providers. For certain other proposed requirements, indicia of compliance may include conformance to a qualified industry standard; for this one alone, however, conformance with such a standard would be deemed to constitute compliance. CFPA section 1033(d) requires the CFPB by rule to prescribe standards to promote the development of standardized data formats. Conformance with a qualified industry standard with respect to standardized formats would carry out this objective of CFPA section 1033(d).

To promote a competitive data access framework in which standard-setting bodies do not inappropriately use their position to benefit a single set of interests, the CFPB has preliminarily determined they should reflect a full range of relevant interests—consumers and firms, incumbents and challengers, and large and small actors. The proposed definition would respond to the recommendation of the SBREFA Panel that the CFPB consider to what extent existing external standards for data sharing should inform the proposed rule.[56] In line with the Panel recommendation, the CFPB has preliminarily determined that external standards would reflect the requisite input from the full range of relevant interests, and therefore would properly serve as indicia of compliance with various provisions of proposed part 1033, if the standards were to achieve the status of being a qualified industry standard as defined. A qualified industry standard, by definition, would be developed, adopted, and maintained by a fair, open, and inclusive standard-setting body, and such a body would, per the proposed attributes listed above, necessarily be a body that reflects the full range of relevant interests.

The proposed rule would be agnostic about what specific technical format a data provider must use and would not envision that the CFPB would develop the infrastructure through which data could be processed, as was suggested by a small entity representative.[57] While the CFPB has not ruled out these types of alternatives, the CFPB has preliminarily determined that they could inappropriately stifle ongoing evolution of financial industry data-sharing practices.

The proposed attributes of the qualified industry standard definition would be consistent with longstanding OMB Circular A–119, which addresses Federal participation in the development and use of standards,[58] and which is well accepted by standard-setting experts as setting forth ''a limited set of foundational attributes of standardization activities.'' [59] Nonetheless, the CFPB acknowledges that the open banking system comprises arguably a more diverse and larger set of participants than many other environments to which industry standards might apply. Accordingly, the CFPB requests comment on the adequacy of these proposed attributes for ascertaining whether an open banking standard-setting body is fair, open, and inclusive. In this regard, the CFPB emphasizes that it intends the proposed attributes to pertain only to industry standards and standard-setting bodies; the attributes would not be pertinent with respect to standards issued by governmental standard-setting bodies such as the National Institute of Standards and Technology.

The CFPB's proposed approach to defining qualified industry standards aligns with the statutory purposes and objectives for the CFPB established in section 1021 of the CFPA, which include ensuring that consumer financial markets, such as the market for data sharing, are fair, transparent, competitive, and efficient, and ensuring that Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution. Moreover, the proposed industry standard definition would align with the language of CFPA section 1033(e)(3) that rules do not inappropriately ''promote the use of any particular technology.''

CFPB Recognition of Industry Standard-Setting Bodies

Proposed § 1033.141(b) provides that a standard-setting body may request that the CFPB recognize it as an issuer of qualified industry standards. The attributes of fairness, openness, and inclusion listed as factors in proposed § 1033.141(a)(1) through (6) would inform the CFPB's consideration of the request. CFPB recognition would help provide clarity to market participants that a standard-setting body has the necessary attributes of fairness, openness, and inclusion. It would also incentivize standard-setting bodies to devote the resources needed to achieve these attributes by providing them with validation from the CFPB, which would encourage adoption of their standards. The CFPB requests comment on the procedures it should use to recognize standard-setting bodies. For example, the CFPB requests comment on whether it should recognize a given body before, after, or at about the same time as the body seeks to issue a qualified industry standard or whether the recognition procedures should be flexible enough to accommodate all of those possibilities.

The CFPB intends to subsequently provide guidance on the substance of the standards issued by the qualified industry standard-setting bodies recognized by the CFPB. The CFPB requests comment on how to provide guidance and, in particular, on how to ensure that the substance is consistent with the provisions of this proposed rule, as finalized.

### *B. Subpart B—Obligation To Make Covered Data Available*

#### 1. Overview

As discussed in part I.C, disagreements around the types of data that should be available to consumers and authorized third parties have limited consumers' ability to use their data and imposed costs on data providers and third parties. Proposed subpart B would seek to resolve these questions with respect to how CFPA section 1033(a) applies by establishing a

[56] SBREFA Panel Report at 44.

[57] *Id.* at 28.

[58] OMB Circular A–119 was originally published in 1996; *see https://www.govinfo.gov/content/pkg/FR-1996-12-27/html/96-32917.htm.* The current Circular, effective January 27, 2016, is available at *https://www.whitehouse.gov/wp-content/uploads/2020/07/revised_circular_a-119_as_of_1_22.pdf.*

[59] March 17, 2022 testimony of Dr. James Olthoff, Performing the Non-Exclusive Functions and Duties of the Under Secretary of Commerce for Standards and Technology & Director, of the Department of Commerce's NIST, before the United States House of Representatives Committee on Science, Space and Technology Subcommittee on Research and Technology, available at *https://www.nist.gov/speech-testimony/setting-standards-strengthening-us-leadership-technical-standards.*

framework for the general categories of data that would need to be made available, including specific data fields that have been significant sources of disagreement, and exceptions from these requirements. Proposed subpart B also restates the general requirement in CFPA section 1033(a) for data providers to make covered data available in an electronic form usable by consumers.

2. Obligation To Make Covered Data Available (§ 1033.201)

Consistent with the general obligation in section 1033(a) of the CFPA, proposed § 1033.201(a) would require a data provider to make available to a consumer and an authorized third party, upon request, covered data in the data provider's control or possession concerning a covered consumer financial product or service that the consumer obtained from the data provider. These covered data would need to be made available in an electronic form usable by consumers and authorized third parties. Compliance with the requirements in proposed §§ 1033.301 and 1033.311 also would be required.

The CFPB interprets CFPA section 1033(a) to set forth a general obligation to make available data in an electronic form usable by consumers and authorized third parties that is independent of other obligations proposed in subpart C. Even if a data provider fully complied with the requirements of proposed subpart C with respect to consumer and developer interfaces, they might attempt to circumvent the objectives of section 1033 by engaging in other conduct that effectively makes data unavailable or unusable to consumers and authorized third parties. The CFPB requests comment on whether it would be clearer to interpret CFPA section 1033(a) to set forth explicit prohibitions against (1) actions that a data provider knows or should know are likely to interfere with a consumer's or authorized third party's ability to request covered data, and (2) making available information in a form or manner that a data provider knows or should know is likely to render the covered data unusable. Such a provision would carry out the objectives of CFPA section 1033, and would prevent evasion, pursuant to the CFPB's authority under section 1022(b)(1), by ensuring data providers do not engage in conduct not specifically addressed by the proposal but that nonetheless could practically interfere with the exercise of rights under CFPA section 1033(a). The CFPB also requests comment on whether there are specific practices that the proposal should identify that might effectively make data unavailable or unusable to consumers and authorized third parties, other than those already identified in proposed subpart C, such as fees for data access, as discussed with respect to proposed § 1033.301(c), or unreasonable access caps, as discussed with respect to proposed § 1033.311(c)(2).

The CFPB requests comment on whether other language might be appropriate to achieve this objective. For example, section 3022(a) of the Public Health Service Act (PHSA) [60] and implementing regulations promulgated by HHS [61] address the practice of ''information blocking,'' defined, in part, as a practice that ''is likely to interfere with, prevent, or materially discourage access, exchange, or use of'' electronic health information, except as required by law or specified by HHS rule. The CFPB seeks comment on whether this language would be appropriate to include as a general prohibition implementing CFPA section 1033, considering that the market for electronic health information and the applicable legal framework are distinct from the context and authorities applicable to this proposal.

The CFPB also requests comment on whether, instead of proposing to restate CFPA section 1033(a) as setting forth an obligation independent of the specific provisions in proposed subpart C, it should instead interpret CFPA section 1033(a) to mean that a data provider's obligations under the statute are fully satisfied if the data provider complies with all of the requirements of proposed subpart C.

With respect to a data provider's obligation to make available data in its control or possession, proposed § 1033.201(a) would mean a data provider would have to make a consumer's data available in any language maintained in records under its control or possession. For example, a data provider would have to make Spanish and English language records available if account records were maintained in Spanish and English.

The CFPB received questions during the SBREFA process about how current the covered data must be, including whether data providers could simply provide the last monthly statement rather than being required to make available recent transactions and the current account balance. In the facilitation of payment transactions, data providers regularly refresh covered data, and such data are often necessary to enable common beneficial use cases, like transaction-based underwriting and personal financial management. Both depository and nondepository data providers typically make available recently updated transaction and account balance data through online or mobile banking applications. Proposed § 1033.201(b) would interpret section 1033(a) to require that, in complying with proposed § 1033.201(a), a data provider would need to make available the most recently updated covered data that it has in its control or possession at the time of a request. For example, a data provider would need to make available information concerning authorized but not yet settled debit card transactions. When consumers make a request for information concerning a consumer financial product or service, the most recently updated information in a data provider's control or possession is likely to be most usable. However, proposed § 1033.201(b) is not intended to limit a consumer's right to access historical covered data. The CFPB requests comment on whether the provision regarding current data would benefit from additional examples or other clarifications. The CFPB also requests input on issues in the market today with data providers making available only older information that is not fully responsive to a consumer's request.

3. Covered Data (§ 1033.211)

CFPA section 1033(a) generally requires data providers to make available ''information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from such covered person, including information relating to any transaction, series of transactions, or to the account including costs, charges and usage data.'' Proposed § 1033.211 would implement this broad language to define the information that a data provider would need to make available under the general obligation in proposed § 1033.201(a). Proposed § 1033.211 uses the term covered data instead of the statutory term ''information'' and defines covered data to mean several categories of information, as applicable: transaction information (including historical transaction information), account balance, information to initiate payment to or from a Regulation E account, terms and conditions, upcoming bill information, and basic account verification information.

Several small entity representatives and other stakeholders raised concerns during the SBREFA process with respect to a proposal the CFPB was considering to require a broader set of data than

[60] 42 U.S.C. 300jj–52.

[61] 45 CFR 171.103; 85 FR 25642 (May 1, 2020).

what would be included in this proposed rule, such as certain payment routing and demographic information that is not typically shared with consumers or third parties. Commenters stated that requiring that this information be made available could introduce new fraud and privacy risks to consumers that do not exist in the market today, would not support particularly beneficial use cases, and could impose significant new burden on data providers as some data are held across multiple information technology systems. Many data provider commenters supported an approach to require data that are already available through digital banking, or otherwise supported the inclusion of periodic statement information.

The SBREFA Panel recommended that the CFPB further consider whether the proposed rule should require data providers to make available all six categories of information set forth in the SBREFA Outline.[62] In considering the types of information that data providers would need to make available, the Panel recommended that the CFPB consider the small entity representatives' feedback on costs to small data providers with respect to the following: accessing data stored with multiple vendors or under the control of other third party service providers; restrictions on data providers' ability to share information; and whether sharing certain information could expose data providers and authorized third parties to legal liability or reputational risk.[63]

The proposed covered data definition would leverage existing operational and legal infrastructure: data providers generally make this covered data available through digital account management and existing laws require most of the proposed categories of information to be disclosed through periodic statement and account disclosure requirements. The CFPB preliminarily concludes that requiring data that is generally made available to consumers today would support most beneficial consumer use cases, including transaction-based underwriting, payment credential verification, comparison shopping, account switching, and personal financial management. The CFPB understands that certain of the proposed categories of information, such as upcoming bill information, historical transaction information, information to initiate a transfer to or from a Regulation E account, and basic account identity information can support account switching because it can ease the account opening process, identify recurring payments that need to be set up at the new account, and transfer funds out of the old account. The CFPB requests comment on the benefits and data needs for consumers who are in the process of switching accounts.

The proposed covered data definition also would address several issues in the consumer-authorized data sharing system today, including (1) maximizing consumer benefits by clarifying which types of data would be included in the consumer's CFPA section 1033 right; (2) addressing potential data provider anti-competitive conduct and incentives to withhold particular types of data; and (3) promoting conditions for standardization in the market. Currently, data providers have different interpretations of the categories of information that would be included in the proposed covered data definition and provide authorized third parties with inconsistent access to that data. Pricing terms, like APR, have been particularly contested. Inconsistent access to consumer-authorized data may prevent the development of new use cases and the improvement of existing use cases. In addition, inconsistent access to consumer-authorized data may be hindering standardization in the market, and therefore further hindering competition and innovation, as parties to data access agreements must negotiate individual categories of information that can be shared.

To address concerns about data providers restricting access to specific pieces of information, the proposed rule also would give examples of information that would fall within the covered data categories. These examples are illustrative and are not an exhaustive list of data that a data provider would be required to make available under the proposed rule. A data provider would only have an obligation to make available applicable covered data; for example, a Regulation E financial institution providing only a Regulation E account would not need to make available a credit card APR or billing statement. The CFPB requests comment on whether additional data fields should be specified to minimize disputes about whether the information would fall within the proposed covered data definition. In addition, the proposed rule would allow flexibility as industry standards develop while minimizing ambiguity over the types of information that must be made available. The CFPB also requests comment on whether the proposed categories of information provide sufficient flexibility to market participants to develop qualified industry standards.

These provisions would carry out the objectives of CFPA section 1033 of ensuring data are usable by consumers and authorized third parties by focusing on data that stakeholders report are valuable for third party use cases and that are generally under the control or possession of all covered persons. These provisions also would promote the use and development of standardized formats for carrying out the objectives of CFPA section 1033(d) by encouraging industry to focus format standardization efforts around these data categories.

Transaction Information

Transaction information under proposed § 1033.211(a) refers to information about individual transactions, such as the payment amount, date, payment type, pending or authorized status, payee or merchant name, rewards credits, and fees or finance charges. Some bank data providers have provided feedback suggesting that a rule not cover pending transactions. These stakeholders have cited concerns about how the information is subject to change and is not provided on monthly account statements. Some bank data providers have stated that pending transaction information is already provided through online or mobile banking applications today, or otherwise supported including that information. The CFPB preliminarily concludes that pending transaction information supports a variety of beneficial use cases, including fraud detection and personal financial management, and therefore should be included within the proposed covered data definition.

Transaction information also would include historical transaction information in the control or possession of the data provider. Proposed § 1033.211(a) explains that a data provider would be deemed to make available sufficient historical transaction information if it makes available at least 24 months of such information. The CFPB is aware that historical transaction data supports a variety of use cases, including transaction-based underwriting, account switching, and personal financial management. However, data providers do not make a consistent amount of historical transaction information available, so a consumer's ability to access historical data depends on their provider. For example, some nondepository data providers appear to make over five years of historical transaction data available, while some bank data providers limit historical

[62] SBREFA Panel Report at 43.

[63] *Id.*

transaction data to 3, 6, 12, 24, or 30 months.

Many stakeholders, including third party small entity representatives during the SBREFA process, have provided feedback that 24 months of historical transaction data would support the vast majority of consumer use cases. Some data provider and consumer advocate stakeholders have explained that 24 months would be consistent with the recordkeeping requirements in Regulation E and Regulation Z. The CFPB preliminarily concludes that setting a safe harbor at a minimum of 24 months would ensure that consumers have access to sufficient historical transaction data for common beneficial use cases, while providing compliance certainty to data providers. This amount would also be consistent with the existing recordkeeping timeframes in Regulation E, 12 CFR 1005.13, and Regulation Z, 12 CFR 1026.25. The CFPB also understands that data providers typically control or possess more than 24 months of historical transaction data and may continue to make more than 24 months available. In the SBREFA Outline, the CFPB considered a data parity approach to historical transaction data, where a data provider would only need to share as much historical transaction data as it makes available through a consumer interface.[64] However, the CFPB is concerned that, in practice, a data parity approach would be difficult to enforce and would leave some consumers without sufficient historical transaction data to support transaction-based underwriting, account switching, and other use cases.

The CFPB requests comment on whether the transaction information examples are sufficiently detailed and consistent with market practices. The CFPB also requests comment on whether to retain the safe harbor for historical transaction data and whether a different amount of historical transaction data would be more appropriate. The CFPB also requests comment on whether and how the rule should require that data providers make available historical data for other categories of information, such as account terms and conditions, whether such historical data are kept in the ordinary course of business today, and the use cases for such data.

Account Balance

The account balance category would include available funds in an asset account and any credit card balance. The CFPB requests comment on whether this term is sufficiently defined or whether additional examples of account balance, such as the remaining credit available on a credit card, are necessary.

Information To Initiate Payment To or From a Regulation E Account

This category of information would require a data provider to make available information to initiate a payment to or from the consumer's Regulation E account. The proposed rule explains that this category includes a tokenized account and routing number that can be used to initiate an ACH transaction. In complying with its obligation under proposed § 1033.201(a), a data provider would be permitted to make available a tokenized account and routing number instead of, or in addition to, a non-tokenized account and routing number.

Regulation E account numbers are typically shared through consumer interfaces and are required to be disclosed under existing Regulation E periodic statement provisions. Account numbers and routing numbers can be used to initiate a transfer of funds to or from a Regulation E account over the ACH network, enabling common use cases like initiating payments and depositing loan proceeds. Although data providers have recourse under private contracts, network rules, and commercial law to recover funds stolen by an unauthorized entity, many data providers have expressed concern about their Regulation E obligations and urged the CFPB to allow the sharing of TANs with authorized third parties. These TANs, which are in use today, may help mitigate fraud risks to consumers and data providers. TANs allow data providers to identify compromised points more easily and revoke payment credentials on a targeted basis (rather than issuing a new account number to the consumer). However, some third parties have argued that TANs do not support certain use cases, such as allowing third parties to print checks to pay vendors, initiating payments by check or wire, and detecting fraud.

The CFPB preliminarily concludes that TANs allow third parties to enable most beneficial payment use cases while mitigating fraud risks, and therefore data providers should have the option of making TANs available to authorized third parties in lieu of full account and routing numbers. The CFPB notes that a TAN would only meet this requirement if it contained sufficient information to initiate payment to or from a Regulation E account. The CFPB requests comment on whether to allow TANs in lieu of non-tokenized account and routing numbers, including whether TANs would mitigate fraud risks and, in contrast, whether TANs have any limitations that could interfere with beneficial consumer use cases, and whether and how adoption and use of TANs might be informed by qualified industry standards. The CFPB also requests comment on whether data providers should also be required to make available information to initiate payments from a Regulation Z credit card.

Terms and Conditions

Terms and conditions generally refer to the contractual terms under which a data provider provides a covered consumer financial product or service. The proposed rule would describe several non-exhaustive examples of information that would constitute terms and conditions.

Certain terms and conditions, such as pricing, reward programs terms, and whether an arbitration agreement applies to the product, support beneficial use cases, like comparison shopping and personal financial management. Authorized third parties could use this information to help consumers more easily understand and compare the terms applicable to a covered consumer financial product or service. Since pricing is a fundamental term that is provided in account opening disclosures and change in terms disclosures, the CFPB is proposing to include APR, annualized percentage yield, fees, and other pricing information in this category. In addition, this provision would benefit consumers because consumers today may not be able to easily find this information through their online or mobile banking applications, and some data providers may not be consistently sharing it with authorized third parties. The CFPB requests comment on whether the final rule should include more examples of information that must be made available under terms and conditions.

Upcoming Bill Information

Upcoming bill information would include bills facilitated through the data provider, such as payments scheduled through the data provider and payments due from the consumer to the data provider. For example, it would include the minimum amount due on the data provider's credit card billing statement, or a utility payment scheduled through a depository institution's online bill payment service. The CFPB preliminarily concludes that this information would be necessary to support personal financial management

[64] SBREFA Outline at 27.

and consumers who are switching accounts. The CFPB seeks comment on whether this category is sufficiently detailed to support situations where a consumer is trying to switch recurring bill payments to a new asset account, such as transferring a monthly credit card payment to a new bank.

Basic Account Verification Information

Basic account verification information would be limited to the name, address, email address, and phone number associated with the covered consumer financial product or service.

The CFPB is aware that certain pieces of identifying consumer information are commonly shared with third parties today for beneficial use cases. For example, a lender may seek to verify that loan funds are being deposited into an account that belongs to the consumer who is applying for the loan, or a mortgage underwriter may seek to verify that funds in a savings account belong to the mortgage applicant. On the other hand, third parties have raised concerns that data providers sometimes limit access to this information, and requested that the CFPB should clarify that account verification information must be shared. However, many small entity representatives and other stakeholders raised significant concerns about the proposed rule covering other identity information that is not typically shared today, such as demographic data, as the beneficial use cases for such information is limited compared to the significant privacy and discrimination risks.

The CFPB preliminarily concludes that requiring data providers to share basic account verification information is necessary to ensure the usability of the covered data. For example, confirming that funds in a savings account do, in fact, belong to the consumer applying for a mortgage loan is necessary to determine whether the mortgage underwriting can rely on that information. Similarly, a loan provider is mitigating fraud risks when it ensures that the name, address, email address, and phone number on a recipient account matches the information of the loan applicant; matching information helps ensure that the funds are going to the correct account, and that the account opening notifications are not going to someone who stole the consumer's identity. Email addresses and phone numbers are increasingly being used as substitutes for consumer and account identifiers, particularly in the payments market where such information can be used to send a person-to-person payment. Accordingly, the CFPB has preliminarily determined that limiting basic account verification information to the name, address, email address, and phone number associated with the covered consumer financial product or service would facilitate the most common use cases and is consistent with market practices today.

The CFPB considered whether to include SSNs, as SSNs are shared for some beneficial consumer use cases, like mortgage underwriting. However, the sharing of SSNs is not ubiquitous. The CFPB preliminarily concludes that SSNs may continue to be shared as appropriate but, given the risks to consumers, the proposed rule would not require data providers to make them available.

The CFPB requests comment on whether the proposed basic account verification information category would accommodate or unduly interfere with beneficial consumer use cases today. Given privacy and security concerns about unintentionally covering other kinds of information that are not typically shared today, the CFPB also requests comment on whether it is appropriate to limit this category to only a few specific pieces of information.

4. Exceptions (§ 1033.221)

The CFPB is proposing in § 1033.221 four exceptions to the requirement to make data available under the proposed rule, along with some clarifications of data that do not fall within these exceptions. These proposed exceptions would implement section 1033(b) of the CFPA by restating the statutory language and providing certain interpretations.

The first exception would cover any confidential commercial information, including an algorithm used to derive credit scores or other risk scores or predictors. The CFPB is aware that some data providers have argued that certain account information falls within this exception because such information is an input or output to a proprietary model. The CFPB is proposing to clarify that information would not qualify for this exception merely because it is an input to, or an output of, an algorithm, risk score, or predictor. For example, APR and other pricing information are sometimes determined by an internal algorithm or predictor, but such information would not fall within this exception.

The second exception would cover any information collected by a data provider for the purpose of preventing fraud or money laundering, or detecting, or making any report regarding other unlawful or potentially unlawful conduct. The CFPB received feedback during the SBREFA process that at least one data provider cited this exception to avoid including general account information, such as the name on the account.[65] To avoid misuse of this exception where information has multiple applications, the CFPB is proposing to clarify that information collected for other purposes does not fall within this exception. For example, name and other basic account verification information would not fall within this exception.

The third exception would cover information required to be kept confidential by any other provision of law. Information would not qualify for this exception merely because a data provider must protect it for the benefit of the consumer. For example, a data provider cannot restrict access to the consumer's own information merely because that information is subject to privacy protections.

The fourth exception would cover any information that a data provider cannot retrieve in the ordinary course of its business with respect to that information.

The proposed definition for covered data in proposed § 1033.211 would include information that is made available to consumers and authorized third parties today or is required to be disclosed under other existing laws. The exceptions proposed in § 1033.221 are narrow, and covered data would not typically qualify for any of these exceptions; note that proposed § 1033.351(b)(1) would require a data provider to create a record of what covered data are not made available pursuant to an exception in proposed § 1033.221 and explain why the exception applies.

During the SBREFA process, small entity representatives and other stakeholders provided examples of data that could fall within the exceptions, such as proprietary algorithms or underwriting models, but the examples would not be considered covered data and accordingly would not fall within the scope of the proposed rule. The SBREFA Panel recommended that the CFPB continue to seek feedback on how to interpret these exceptions, and further consider whether there are specific pieces of information that should be covered under any of these exceptions.[66] Consistent with the Panel recommendation, the CFPB requests comment on whether it should include additional examples of data that would or would not fall within the exceptions, and whether this provision sufficiently mitigates concerns that data providers may cite these exceptions on a

[65] SBREFA Panel Report at 25.

[66] *Id.* at 43.

pretextual basis. The CFPB intends to monitor the market for pretextual use of the CFPA section 1033 exceptions.

*C. Subpart C—Establishing and Maintaining Access*

1. Overview

The provisions in proposed subpart C would address some of the significant questions and challenges described in part I.C by clarifying the terms on which data are made available and the mechanics of data access, including basic operational, performance and security standards, and other policies and procedures. In particular, certain provisions would ensure that data providers make covered data available to third parties through a developer interface rather than through the screen scraping of a consumer interface. Other provisions would include procedures to facilitate the ability of third parties to request data and ensure data providers are accountable for their obligations in proposed subpart C. In addition, to prevent data providers from inhibiting consumers' exercise of this statutory right, the CFPB is proposing a bright-line prohibition against data providers charging fees for establishing and maintaining the required interfaces or for receiving requests and making available covered data in response to requests. Together, the provisions in proposed subpart C would contribute to a safe, reliable, secure, and competitive data access framework.

2. General Requirements (§ 1033.301)

Requirement To Establish and Maintain Interfaces (§ 1033.301(a))

The CFPB proposes in § 1033.301(a) to require a data provider subject to the requirements of proposed part 1033 to maintain a consumer interface and to establish and maintain a developer interface. A data provider's consumer interface and developer interface would be required to satisfy the requirements in proposed § 1033.301(b) and (c). The developer interface would be subject to additional requirements in proposed § 1033.311. Proposed § 1033.301(a) would carry out the objectives of CFPA section 1033 by ensuring consumers and authorized third parties can make requests and receive timely and reliable access to covered data in a usable electronic form, and would fulfill other objectives discussed below with respect to proposed §§ 1033.301 and 1033.311, including promoting the development and use of standardized formats.

The terms consumer interface and developer interface are defined in proposed § 1033.131 as interfaces through which a data provider receives requests for covered data and makes covered data available in an electronic form usable by consumers and authorized third parties in response to the requests. Proposed § 1033.111(d) would exclude data providers that do not have a consumer interface from the requirements of proposed part 1033. Thus, proposed § 1033.301(a) would not require a data provider to establish a consumer interface, but only to maintain a consumer interface that the data provider already has.

The CFPB is not aware of significant concerns regarding the ability of consumers to access covered data from consumer interfaces. The CFPB intends for the provisions in the proposed rule applicable to consumer interfaces generally to ensure the continuation of current data provider practices. Based on its market expertise, the CFPB expects that data providers' existing consumer interfaces will generally satisfy the data provider's obligation under proposed § 1033.301(a) to maintain an interface for making covered data available to consumers. The CFPB requests comment on the extent, if any, to which the provisions applicable to consumer interfaces in proposed subpart C would be inconsistent with current practices.

A consumer interface generally would not satisfy a data provider's obligation under proposed § 1033.301(a) to establish and maintain a developer interface, which must satisfy requirements in proposed § 1033.311. These provisions in proposed § 1033.311 are intended, in part, to ensure that data providers do not rely on the screen scraping of a consumer interface to satisfy their obligations under CFPA section 1033(a). As recommended by the SBREFA Panel, the CFPB considered whether screen scraping should be an alternative means of sharing data with third parties in some circumstances.[67] The CFPB is not proposing to require that data providers permit screen scraping as an alternative method of access, such as to address unavailability when the data provider's system interface is down for maintenance. As discussed in part I.C, screen scraping as a whole presents risks to consumers and the market and relying on credential-based screen scraping would complicate the mechanics of data access, particularly with respect to authentication and authorization procedures for data providers. The proposed requirements in subpart C, such as the performance specifications for developer interfaces in § 1033.311(c), would ensure that consumers and authorized third parties have reliable access to consumers' covered data.

As also recommended by the SBREFA Panel, the CFPB considered whether there are forms of screen scraping that would reduce the impact of developer interface service interruptions on third parties and minimize costs to data providers and third parties while ensuring data quality and security.[68] The CFPB has not identified any such forms of screen scraping. Tokenized screen scraping, in which third parties use a tokenized version of a consumer's account credentials, provides data security and consumer control benefits when compared with screen scraping that uses a consumer's account credentials. However, it does not mitigate screen scraping's inherent overcollection, accuracy, and consumer privacy risks, and it would impose costs on data providers in addition to the costs of a developer interface. Additionally, because it would inherently rely on the delivery of unstructured data, permitting data providers to comply with the proposed rule through tokenized screen scraping would not meaningfully advance the statutory mandate to promote the development and use of standardized formats.

In some cases, authorized third parties that are natural persons might have a need to access information in a human-readable form because they lack the means of accessing a developer interface. The CFPB requests comment on how a data provider would make covered data available in a usable electronic form to such authorized third parties.

The SBREFA Panel recommended that the CFPB clarify whether the online financial account management portal that the CFPB was considering with respect to direct access—*i.e.,* a consumer interface—would include a data provider's mobile banking portal in addition to its online banking portal.[69] While both online banking and mobile banking applications could serve as consumer interfaces, proposed § 1033.301(a) would not require that each of the applications satisfy all of the proposed requirements that would apply to consumer interfaces, as long as collectively the two applications satisfy the requirements. The CFPB requests comment on the extent to which data providers currently inform consumers using mobile banking applications that additional information about consumers' accounts may be available

[67] *Id.* at 44.

[68] *Id.*

[69] *Id.* at 43.

through the providers' online banking interfaces.

Machine-Readable Files (§ 1033.301(b))

The CFPB proposes in § 1033.301(b) to require a data provider upon specific request to make covered data available in a machine-readable file that a consumer or authorized third party can retain and transfer into a separate information system. This proposed requirement would apply both to data providers' consumer interfaces and to their developer interfaces. This proposed provision would implement the requirement of CFPA section 1033(a) that covered data be made available in a usable electronic form by ensuring that consumers and authorized third parties can retain electronic files. In addition, the proposed provision would directly implement CFPA section 1033(d).

The proposed provision would allow a data provider to offer additional consumer interfaces that do not satisfy § 1033.301(b) (for example, a smartphone application that does not provide information in a readily printable or downloadable format), as long as the data provider makes covered data available upon request in readily printable or downloadable formats through one of its other consumer interfaces, such as its digital banking interface.

The CFPB preliminarily understands that, as a general matter, existing consumer and developer interfaces typically already provide covered data in a form that would comply with this requirement and may be subject to similar requirements by other applicable laws.[70]

The CFPB therefore has preliminarily determined that the proposed requirement in § 1033.301(b) would impose little or no cost on data providers beyond the cost to establish and maintain a developer interface in the first place; *i.e.,* the proposed requirement would impose little or no cost beyond the cost that would be imposed by proposed § 1033.301(a) (discussed above). The CFPB has also preliminarily determined that proposed § 1033.301(b) would provide important consumer benefits, such as by enabling them to share their data with others, including providers of competing financial products and services.[71]

Fees Prohibited (§ 1033.301(c))

The CFPB proposes in § 1033.301(c) to prohibit a data provider from imposing any fees or charges for establishing or maintaining the interfaces required by proposed § 1033.301(a) or for receiving requests or making available covered data through the interfaces. This provision is proposed pursuant to the CFPB's authority under CFPA sections 1033(a) and 1022(b)(1). The CFPB has preliminarily determined that the prohibition would be necessary and appropriate to effectuate consumers' rights under CFPA section 1033 by ensuring that consumers and authorized third parties are not impeded from exercising consumers' statutory rights because of fees, which would be contrary to the objectives of the statute.

The CFPB notes that proposed § 1033.301(c) would not prohibit a data provider from charging a fee for specific services, other than access to covered data, through the consumer interface. For example, a data provider would not violate the proposed rule if the data provider were to impose a fee for sending an international remittance transfer, which a consumer authorizes and consents to through the consumer interface. Further, the proposed rule would not address account maintenance fees that a data provider might charge to consumers regardless of whether they use the interface.

A data provider that does not already have a developer interface would incur some upfront and ongoing costs to establish and maintain one, and data providers in general will incur some cost to maintain the interfaces as well as a marginal cost of providing covered data through the interfaces. The CFPB has therefore considered whether its proposed rule should permit a reasonable, cost-based fee to recover the upfront or fixed costs associated with establishing and maintaining the interfaces. There also may be some costs associated with providing covered data through the interfaces. The CFPB has preliminarily determined, however, that the marginal cost of providing covered data in response to a request is negligible.

Each data provider is the sole supplier of its customers' financial data and therefore able to exert market power over the prices or fees it charges for authorized access to consumers' data. Data providers have in the past restricted data access for third parties. These restrictions have anti-competitive effects and, by allowing data providers to charge prices for access that are in excess of marginal cost, may harm consumers and third parties. For example, data providers may have an incentive to charge fees in excess of their marginal cost to third parties to make certain competing third party products or services less profitable or less attractive to consumers. In addition, data providers charging different prices to different third parties may also result in competitive harm to consumers and third parties, especially in a market where some data providers have financial interests in third parties they are affiliated with, or act as third parties themselves. Even under circumstances where data providers would not directly gain, price discrimination of this type may distort competition among third parties and harm consumers. Further, prolonged negotiations about fees could delay or obstruct third parties being granted access expeditiously to data providers' developer interfaces, in turn undermining the core consumer data access right. The CFPB requests comment on the above analysis with respect to proposed § 1033.301(c). The CFPB also requests comment on whether any clear and unambiguous set of conditions, limitations, or other parameters exist or should be created such that, subject to such parameters, data providers could charge reasonable, standardized fees that neither obstruct the access right due to cost nor impede third parties' access to data provider interfaces due to negotiations over fee amounts or schedules.

During the SBREFA process, data provider small entity representatives provided feedback that data providers should be permitted to charge fees to third parties for access to covered data.[72] Further, the SBREFA Panel recommended that the CFPB consider how data providers would need to defray the costs associated with developing and maintaining a developer interface.[73] The CFPB will continue to consider this recommendation as it reviews comments on this NPRM and proceeds to develop a final rule. In this regard, the CFPB notes that the proposed rule differs in many respects from the CFPB's proposals under

[70] *See, e.g.,* Cal. Civ. Code sections 1798.100, 1798.130; Va. Consumer Data Prot. Act section 59.1–577 (2023); Colo. Priv. Act section 6–1–1306(1)(e); MRS tit. 10, ch. 1057, section 9607(1)(D); Mass. Info. Priv. & Sec. Act section 10. However, California exempts information subject to the GLBA, and Colorado and Virginia exempt financial institutions subject to the GLBA. Separately, the EU's GDPR requires data portability (Reg. (EU) 2016/679, art. 20, O.J. (L 119) 1 (Apr. 27, 2016)).

[71] *See, e.g.,* Michael S. Barr *et al., Consumer Autonomy and Pathways to Portability in Banking and Financial Services,* Univ. of Mich. Ctr. on Fin., L. & Policy Working Paper No. 1 (Nov. 1, 2019), *https://financelawpolicy.umich.edu/sites/cflp/files/2021-07/umich-cflp-working-paper-consumer-autonomy-and-data-portability-pathways-Nov-3.pdf.*

[72] SBREFA Panel Report at 30.

[73] *Id.* at 44.

consideration at the time the SBREFA Panel provided the above recommendation. Most importantly, the CFPB is now proposing to require data providers to make available a narrower set of covered data than the CFPB was considering at the SBREFA stage. Small data providers generally already make the proposed covered data available through their consumer interfaces. Accordingly, the CFPB expects that it will be relatively low cost for smaller data providers to make covered data available through developer interfaces.

3. Requirements Applicable To Developer Interfaces (§ 1033.311)

As discussed in part I.C, data providers' developer interfaces do not function according to a consistent set of terms, resulting in data that may not be readily usable. In addition, credential-based screen scraping presents security, privacy, and other risks. To foster a safe, reliable, secure, and competitive data access framework, the CFPB is proposing in § 1033.311 additional requirements that would apply specifically to the developer interface described in proposed § 1033.301(a). Proposed § 1033.311(a) would provide that a developer interface required by § 1033.301(a) must satisfy proposed provisions at § 1033.311(b) through (d). These provisions would interpret data providers' obligation to ''make available'' covered data in a ''usable'' electronic form, fulfill the mandate in CFPA section 1033(d) to prescribe by rule standards to promote the use and development of standardized formats, and otherwise carry out the objectives of CFPA section 1033.

Format of Covered Data (§ 1033.311(b))

The CFPB proposes in § 1033.311(b) to require a developer interface to make available covered data in a standardized format. This requirement would implement the mandate in CFPA section 1033(d) that the CFPB prescribe standards to promote the use and development of standardized formats. The interface would be deemed to satisfy this requirement if it makes covered data available in a format set forth in a qualified industry standard (as defined in proposed § 1033.131). In the absence of such a standard, a data provider's interface would be deemed to satisfy proposed § 1033.311(b) if it makes available covered data in a format that is widely used by the developer interfaces of other similarly situated data providers with respect to similar data and is readily usable by authorized third parties.

This proposed provision would be intended to ensure that developer interfaces make covered data available in a standardized format that is readily processable by the information systems of third parties across the market, including new entrants and small entities. This proposed provision also is intended to transition the market from relying on screen scraping unstructured data from consumer interfaces.

Consistent with the objectives discussed in part I.D, this provision would seek to foster a reliable and competitive data access framework. Small entity representatives during the SBREFA process indicated that consistent standards would reduce costs for small third parties and small data providers, and would promote competition by reducing integration costs across the market.[74] The SBREFA Panel recommended that the CFPB promote consistency in standards for the availability of information, including the format and transmission of information that data providers make available to third parties.[75] Consistent with that feedback, this provision would seek to ensure that the information systems of, in particular, new-entrant and small-entity third parties can process covered data from the full range of data providers across the market by reducing the extent of varied and idiosyncratic formats that impel reliance on intermediaries to provide data in a usable format.

The CFPB has not determined whether qualified industry standards for data formats presently exist. The proposed rule would seek to accommodate the potential absence of such standards by stating that, in their absence, a data provider could rely on proposed § 1033.311(b)(2) if its developer interface uses a format used by other similarly situated data providers. The CFPB has preliminarily determined that, consistent with CFPA section 1033(a) and (d), requiring covered data to be made available in a usable and standardized format would reduce variation across the market and promote greater consistency of data formats.

Because proposed § 1033.311(b)(2) would allow data providers across the market to rely on more than one formatting standard, the CFPB acknowledges it would not promote the use and development of a single formatting standard, such as what might be set forth within a qualified industry standard described under proposed § 1033.311(b)(1). The CFPB requests comment on the extent of variation in data formats used for consumer-authorized access today, and the usability of those formats by third parties. The CFPB also requests comment on whether the implementation timelines discussed in part IV.A.4 with respect to proposed § 1033.121 should be adjusted to enable data providers to rely on a standardized format that is set forth in a qualified industry standard as of the applicable compliance date. For example, the CFPB requests comment on whether it should allow for a separate, later compliance date for § 1033.311(b).

Proposed § 1033.311(b)(2) would apply only in the absence of a qualified industry standard. The CFPB requests comment on whether proposed § 1033.311(b)(2) should also be available if there is a qualified industry standard. Alternatively, the CFPB requests comment on whether it should omit proposed § 1033.311(b)(2), meaning that in the absence of a qualified standard only the general requirement under proposed § 1033.311(b) to make available covered data in a standardized format would apply. The CFPB further requests comment on whether there are other approaches that it should deem to comply with § 1033.311(b), instead of or in addition to proposed § 1033.311(b)(1) or (2). Separately, CFPA section 1033(d) does not define the term ''format'' and proposed § 1033.311(b) would not include a definition. The CFPB requests comment on whether a definition is needed and whether format should be defined to mean the specifications for data fields, status codes, communication protocols, or other elements to ensure third party systems can communicate with the developer interface.

Commercially Reasonable Performance for Data Providers' Developer Interfaces (§ 1033.311(c)(1))

The CFPB proposes in § 1033.311(c)(1) to require that a data provider's developer interface perform at a commercially reasonable level, and to include provisions regarding what commercially reasonable means. This provision would carry out the objectives of CFPA section 1033 by clarifying how a data provider would make available covered data in a usable form to authorized third parties under CFPA section 1033(a).

Information available to the CFPB indicates that the performance of data providers' developer interfaces is neither uniform nor always on par with what one would reasonably expect given the state of technology. Specifically, the state of technology enables consumer interfaces to operate at consistently high availability, performance, and data freshness levels,

[74] *Id.* at 28.

[75] *Id.* at 44.

which many data providers' developer interfaces do not meet. With respect to uniformity, data from the Provider Collection indicated that providers report widely varying uptime and response time or latency measurements. This non-uniformity persists both across similarly situated providers and across the various consumer or developer interfaces a data provider may make available. The CFPB has preliminarily determined that the performance of data providers' developer interfaces needs both to improve and to become more consistent and predictable from where that performance is today. In that regard, the CFPB has preliminarily determined that a quantitative minimum performance level would achieve a sufficient level of consistency and predictability.

The CFPB proposes the requirements for commercially reasonable performance of data providers' developer interfaces in proposed § 1033.311(c)(1) pursuant to its authority provided by CFPA section 1033(a) and the CFPB's interpretation of how data providers must make available covered data in an electronic form that is usable by consumers and authorized third parties. Specifically, the CFPB proposes the requirements for commercially reasonable performance in proposed § 1033.311(c)(1) to implement the statutory requirement that covered data be made available in an electronic form usable by authorized third parties. This proposed requirement would carry out the objectives of CFPA section 1033 by ensuring that data providers make available data on a basis that enables third parties to provide products and services, including those that compete with products and services offered by the data provider.

Quantitative Minimum Performance Specification (§ 1033.311(c)(1)(i))

The current performance of data providers' developer interfaces is not always adequate, and whether a developer interface's performance is commercially reasonable cannot only be based on the performance of a data provider's peers. Thus, the CFPB has preliminarily determined that it is necessary to propose a firm quantitative floor to ensure that the performance improves in the near term.

The quantitative minimum performance specification in proposed § 1033.331(c)(1)(i) would be a response rate of at least 99.5 percent. That is, the CFPB proposes that the performance of a developer interface cannot be commercially reasonable unless the interface has a response rate (defined below) of at least 99.5 percent. The CFPB has preliminarily determined that this level of response rate would be an appropriate floor for commercially reasonable performance for several reasons. The CFPB understands from the Provider Collection that a number of data providers' extant consumer interfaces generally meet or exceed this level of performance. Further, the level of performance data providers can achieve with their consumer interfaces, in which the amount and variety of data are generally broader than the set of data the CFPB proposes to define as covered data, suggests this level of performance should be achievable for developer interfaces. In general, ensuring parity between consumer interfaces and developer interfaces will ensure that data providers make available data in a manner that is usable to consumers. In addition, Australia and the United Kingdom set their thresholds at 99.5 percent.[76] Their thresholds are calibrated from existing endpoints of data providers in both countries and suggest that data providers generally are able to meet a 99.5 percent threshold.[77] Moreover, the substantial preponderance of the respondents to the Provider Collection meet or exceed that level of performance. Thus, the CFPB has preliminarily determined that data provider interfaces cannot perform to commercially reasonable standards below a quantitative minimum performance specification of 99.5 percent. The CFPB requests comment specifically on what role qualified industry standards should have, if any, regarding the quantitative minimum performance specification set forth in the final rule.

Defining Proper Response Rate

The CFPB proposes to specify in § 1033.311(c)(1)(i) how the proper response rate would be calculated within a given time period, such as a month: that rate would be the number of proper responses by the interface divided by the total number of queries to the interface.

A proper response would be a response, other than an error message during unscheduled downtime, that meets the following three criteria: (1) the response either fulfills the query or explains why the query was not fulfilled; (2) the response complies with the requirements of proposed part 1033; and (3) the response is provided by the interface within a commercially reasonable amount of time. With respect to the third criterion, the CFPB proposes that the amount of time cannot be commercially reasonable if it is more than 3,500 milliseconds. It is possible under the CFPB's proposed rule that the amount of time for the response would not be commercially reasonable even if it were less than 3,500 milliseconds. The CFPB requests comment on whether any generally applicable industry standard sets forth an amount of time that should be used in lieu of 3,500 milliseconds.

The CFPB proposes that any responses by and queries to the interface during scheduled downtime for the interface would be excluded from the calculation of the proper response rate. Further, the CFPB proposes that any downtime of the interface would qualify as scheduled downtime only if the data provider has provided reasonable notice of the downtime to all third parties to which the data provider has granted access to the interface. The CFPB also proposes that the total amount of scheduled downtime for the interface must be reasonable. Adherence to a qualified industry standard would be an indication that the notice of downtime and the total amount of downtime are reasonable. The CFPB requests comment on whether it should provide additional detail on the amount of scheduled downtime that would constitute a reasonable amount. The CFPB also requests comment on whether it should provide additional detail on when and how a data provider must provide notice of scheduled downtime to third parties for the notice to be reasonable. For example, the Australia Consumer Data Standards state that normal planned outages should be reported to third parties with at least one week of lead time, and the UK Open Banking Standards provide that notice for planned downtime should be given at least five business days in advance.[78]

[76] Australia Consumer Data Standards, *Availability Requirements, https://consumerdatastandardsaustralia.github.io/standards/#availability-requirements* (last visited Sept. 16, 2023); Open Banking Ltd., *Operational Guidelines—Availability, https://standards.openbanking.org.uk/operational-guidelines/availability-and-performance/key-indicators-for-availability-and-performance-availability/latest/* (last visited Sept. 16, 2023).

[77] In the period from July 2022 to July 2023, UK account providers had an average weighted Open Banking API availability of 99.66 percent. *See* Open Banking Ltd., *API Performance Stats, https://www.openbanking.org.uk/api-performance/* (last visited Sept. 16, 2023). From December 1, 2021, through September 1, 2023, Australian data holders maintained a platform availability of 96.28 percent. *See* Australian Consumer Data Right, *Performance, https://www.cdr.gov.au/performance* (last visited Sept. 16, 2023).

[78] *See* Consumer Data Standards, *Availability Requirements, https://consumerdatastandards australia.github.io/standards/#session-requirements* (last visited Oct. 2, 2023); Open Banking Ltd., *Change and Communication Management—Downtime, https://standards.openbanking.org.uk/*

Indicia of Commercially Reasonable Performance (§ 1033.311(c)(1)(ii))

Proposed § 1033.311(c)(1) would require that the performance of a data provider's developer interface be commercially reasonable. While satisfaction of the quantitative minimum of 99.5 percent in proposed § 1033.311(c)(1)(i) would be necessary for commercially reasonable performance, it would not be sufficient. That is, under the CFPB's proposed rule it is possible that the performance of a data provider's developer interface would not be commercially reasonable notwithstanding that it does satisfy the quantitative minimum.

To provide a regulatory mechanism and incentive through which the performance of data providers' developer interfaces would improve in the future beyond the quantitative minimum, the CFPB is proposing, in addition to that minimum, two indicia of commercially reasonable performance in § 1033.311(c)(1)(ii) that can be expected to evolve over time. The first would be whether the performance of the interface meets the applicable performance specifications set forth in a qualified industry standard, as defined in proposed § 1033.131. The CFPB has preliminarily determined that the recurring process of developing, adopting, and revising a standard that is a qualified industry standard under the CFPB's proposed definition of that term would be probative of whether performance of the developer interface is commercially reasonable because it would take into account the interests of a wide variety of stakeholders, as discussed more fully in proposed § 1033.141.

The second would be whether the performance meets the applicable performance specifications achieved by the developer interfaces established and maintained by similarly situated data providers. As the performance of similarly situated data providers' interfaces improves, the performance of a given data provider's developer interface also would have to improve to continue to meet this indicator of commercial reasonability. Conversely, as the performance of the given data provider's developer interface improves, that improvement would lead other similarly situated data providers to improve the performance of their interfaces to meet the performance of the given data provider.

The CFPB requests comment on whether additional indicia would be appropriate and what they should be. Currently, agreements and standards name and describe specifications, such as latency and uptime, for the performance of data providers' developer interfaces. The CFPB requests comment on whether the final rule, instead of referring broadly to ''applicable performance specifications,'' should name and describe certain specifications. For example, rather than providing that indicia of compliance include meeting the applicable performance specifications achieved by the developer interfaces of similarly situated data providers, the final rule could provide that indicia include meeting the latency and uptime specifications achieved by the interfaces of the other data providers.

The CFPB also notes that each data provider would have some information about the performance of other data providers' interfaces because (as discussed below) the CFPB is proposing in § 1033.341(c) to require all data providers to disclose publicly the quantitative proper response metric for their developer interfaces. The CFPB also seeks comment on what sources of market information data providers would use to evaluate the performance of their peers' developer interfaces.

Access Cap Prohibition for Data Providers' Interfaces (§ 1033.311(c)(2))

The CFPB proposes in § 1033.311(c)(2) to prohibit a data provider from unreasonably restricting the frequency with which it receives and responds to requests for covered data from an authorized third party through the data provider's developer interface. Such restrictions are commonly known as ''access caps'' or ''rate limits.'' CFPA section 1033(a) requires that data providers make available covered data upon request. The CFPB has preliminarily determined that this proposed provision would be necessary and appropriate to effectuate consumers' statutory rights under CFPA section 1033 by ensuring that consumers and their authorized third parties are not impeded from exercising consumers' statutory rights, including through unreasonably frequent data requests by other authorized third parties.

Under proposed § 1033.311(c)(2), a data provider would be prohibited from unreasonably restricting the frequency with which it receives and responds to requests for covered data from an authorized third party through its developer interface, except as set forth in certain sections. Those sections are proposed § 1033.221, which restates the statutory exceptions in CFPA section 1033(b); proposed § 1033.321, which describes the risk management reasons applicable to denying a third party's access to an interface; proposed § 1033.331(b), which identifies the conditions for when a data provider must respond to an information request; and proposed § 1033.331(c), which identifies other reasons a response would not be required.

The CFPB does not intend that proposed § 1033.311(c)(2) would allow a data provider to impose restrictions that would override a consumer's authorization, including the frequency with which an authorized third party requests data. Instead, the proposed provision would allow restrictions only if they reasonably target a limited set of circumstances in which a third party requests information in a manner that poses an unreasonable burden on the data provider's developer interface and impacts the interface's availability to other authorized third party requests. To prevent abuse of this provision, proposed § 1033.311(c)(2) provides that any frequency restrictions must be applied in a manner that is non-discriminatory and consistent with the reasonable written policies and procedures that the data provider establishes pursuant to proposed § 1033.351(a). Indicia that any frequency restrictions applied are reasonable would include that they adhere to a qualified industry standard.

The CFPB proposes in § 1033.311(c)(2) to prohibit unreasonable access caps for developer interfaces pursuant to both its authority under CFPA sections 1033(a) and 1022(b)(1). A data provider that imposes an access cap for which it has no reasonable basis would not be making available covered data upon request by authorized third parties. Prohibiting unreasonable access caps would ensure consumers and third parties are not impeded from exercising consumers' rights under the statute based on unreasonable limits imposed by the data provider.

The CFPB requests comment on whether the proposed provision should be defined more narrowly to prevent data providers from interfering with a consumer's authorization or whether additional guidance is needed to prevent abuse. For example, the CFPB requests comment on whether the final rule should include a presumption that access caps are unreasonable unless undertaken for a period only as long as necessary to ensure a third party request does not interfere with the receipt of and response to requests from other third parties accessing the interface.

*operational-guidelines/change-and-communication-management/downtime/latest/* (last visited Oct. 2, 2023).

The CFPB also requests comment on whether data providers should be permitted to restrict the total amount of covered data that third parties request over a given period of time and on whether proposed part 1033 should treat small versus large data providers differently in this regard. The CFPB also requests comment on whether there should be different restrictions on data providers' access caps in cases where the consumer is actively online with a third party requesting data access, as opposed to when data are being automatically refreshed without a consumer present.

Security Specifications (§ 1033.311(d))

The CFPB is proposing to require data providers to implement several data security features in their consumer and developer interfaces. This provision would implement CFPA section 1033(a) by clarifying how a data provider would ensure it is making data available to a consumer, including an authorized third party, in a manner that would carry out the objectives of CFPA section 1033. Certain provisions also would promote the use and development of standardized formats, consistent with CFPA section 1033(d).

Access Credentials

As discussed throughout part I, third parties' credential handling practices—typically resulting from their reliance on credential-based screen scraping—can raise significant security, risk management, privacy, and accuracy risks to the system as a whole. Proposed § 1033.311(d)(1) would seek to prevent data providers from relying on a third party's use of consumer credentials to access the developer interface.

When they employ screen scraping, third parties generally must store consumer account credentials they obtain so they can be reused to collect data as necessary to support the product or service a consumer is using. Because third parties collect data from many consumers at once, they must collect and store many sets of consumer credentials. This creates security and fraud risks: bad actors might target third parties and attempt to cause a data breach because these third parties store large quantities of sensitive consumer information. The longer a third party stores consumer credentials before deleting them, and the less rigorous a third party is in employing cybersecurity practices to protect those credentials, the more likely such a breach will occur. If a breach occurs—whether because of inadequate cybersecurity or credential storage practices, or for any other reason—the consumers to whom the leaked credentials correspond may suffer invasions of privacy or financial harms. This is especially the case for the kinds of funds-storing and payment accounts that would be covered by this proposed rule; a breach which results in the theft of credentials could cause unauthorized transactions or fraudulent use of consumers' personal financial data. For data providers, designing developer interfaces that operate using consumers' access credentials would heighten the risks described in part I.C and create specific risks to data providers. For example, a data provider may face greater difficulty ensuring legitimate access by third parties using a consumer's credentials, impairing its efforts to prevent truly unauthorized access by criminals or other bad actors. The widespread use of consumers' access credentials in a developer interface could also raise risk management concerns.[79]

To avoid these problems from arising because of how a data provider's developer interface is designed, proposed § 1033.311(d)(1) would prohibit a data provider from allowing a third party to access the data provider's interface by using any credentials that a consumer uses to access the consumer interface.

The CFPB understands that in current arrangements between data providers and third parties for use of data providers' developer interfaces, the data provider often authenticates the consumer using that consumer's digital banking credentials. In such cases, the CFPB understands that the third party itself does not request, access, use, or retain the consumer's credentials; instead, after procuring a consumer's authority to access data, the third party 'passes' the consumer directly to the data provider, who authenticates the consumer using the consumer's digital banking credentials, and then provides the third party with a secure access token. The CFPB seeks comment on whether and, if so, how the proposed rule should address this practice.

The CFPB also understands that, in some cases, entities that act as service providers to data providers may develop, deploy, and maintain developer interfaces on behalf of those data providers whose technical specifications and requirements entail those service providers retaining and using consumers' credentials. Such arrangements can provide lower-cost routes for smaller data providers to offer developer interfaces, which benefits all participants in the open banking system and, ultimately, consumers. The CFPB does not intend for proposed § 1033.311(d)(1) to interfere with such arrangements but seeks comment on situations where an entity acts as both such a service provider and a third party.

Security Program

Proposed § 1033.311(d)(2) would address general data security requirements for the data provider's developer interface. Because the proposed definition of covered data includes transaction information, information for initiating payments to or from a consumer's account, and other sensitive financial information, poor data security measures would expose consumers to significant harm, such as fraud or identity theft. As the CFPB noted in a recent circular, information security weaknesses can result in data breaches, cyberattacks, exploits, ransomware attacks, and other exposure of consumer data.[80] To prevent these harms, the proposed rule would require data providers to apply to their developer interfaces a data security program that satisfies the GLBA Safeguards Framework. The proposed rule would require a data provider that is not a GLBA financial institution to apply the information security program required by the FTC's Safeguards Rule.[81]

The CFPB has preliminarily determined that the GLBA Safeguards Framework appropriately addresses data security risks for developer interfaces in the market for consumer-authorized financial data. The GLBA Safeguards Framework generally requires each financial institution to develop, implement, and maintain a comprehensive written information security program that contains safeguards that are appropriate to the institution's size and complexity, the nature and scope of the institutions' activities, and the sensitivity of the customer information at issue. These safeguards must address specific elements set forth in the rule. The framework provides a process for ensuring that such a program is commensurate with the risks faced by the financial institution rather than a rigid list of prescriptions. This flexible,

[79] *See generally* Fed. Rsrv. Sys., FDIC, OCC, *Interagency Guidance on Third-Party Relationships: Risk Management* (June 6, 2023), *https://occ.gov/news-issuances/news-releases/2023/nr-ia-2023-53a.pdf.*

[80] Consumer Fin. Prot. Bureau, *Consumer Financial Protection Circular 2022–04* (Aug. 11, 2022), *https://www.consumerfinance.gov/compliance/circulars/circular-2022-04-insufficient-data-protection-or-security-for-sensitive-consumer-information/.*

[81] 16 CFR part 314.

risk-based approach allows it to adapt to changing technology and emerging data security threats.

Requiring data providers to apply the GLBA Safeguards Framework would also reduce burden by avoiding duplicative or inconsistent data security requirements. The CFPB understands that all or nearly all data providers are already subject to the GLBA Safeguards Framework, and therefore would be able to adapt their information security programs to the risks created by the developer interface. For example, a State member bank would apply the information security program that it had developed pursuant to the Interagency Guidelines Establishing Information Security Standards issued by the Board of Governors of the Federal Reserve System.[82]

The CFPB considered proposing to require data providers to adopt additional reasonable policies and procedures regarding the data security of the interfaces for third parties. Such a requirement would share the GLBA Safeguards Framework's flexibility to accommodate changing technology and emerging threats while avoiding the potential uncertainty of applying the GLBA Safeguards Framework's existing requirements to the open banking system. But a general policies and procedures requirement would lack the additional detail of the GLBA Safeguards Framework. Data providers already face a general obligation to avoid inadequate data security measures under the CFPA's prohibition on unfair, deceptive, and abusive acts and practices.[83] Supplying additional detail to a general policies and procedures requirement has several potential drawbacks. For example, the CFPB may end up adopting substantially similar requirements to the GLBA Safeguards Framework, thus subjecting data providers to duplicative data security regulations. Or the CFPB might adopt additional clarifications that are inconsistent with the Federal functional regulators' interpretation of the GLBA Safeguards Framework. For these reasons, the CFPB declines to propose a general policies-and-procedures requirement for data security but seeks comment on such a requirement.

Although the CFPB understands that the data security of data providers' interfaces for third parties is generally regulated by existing law, the proposed definition of data provider is broad enough to encompass a diverse array of entities. While the CFPB understands that all or virtually all data providers are GLBA-covered financial institutions, the proposed rule would remove any uncertainty by making compliance with the GLBA Safeguards Framework a requirement for any developer interface. For data providers not subject to the Interagency Guidelines issued by the Federal functional regulators,[84] the proposed rule would require compliance with the FTC's Safeguards Rule. As the FTC explained in its recent amendments to the Safeguards Rule, the Safeguards Rule is designed to operate without the benefit of direct guidance by an examining agency.[85] For this reason, the CFPB has preliminarily determined that the FTC's Safeguards Rule is appropriate for data providers that might not have the direct supervision of one of the Federal functional regulators that implement the Interagency Guidelines.

This proposed rule would implement CFPA section 1033(a) by clarifying how a data provider must make available data upon request to a consumer, which would include an authorized third party. Establishing a consistent set of data security requirements to developer interfaces will help ensure that developer interfaces are only making data available to consumers and authorized third parties consistent with the scope of a consumer's request and do not present unreasonable risks to the security, confidentiality, and integrity of covered data.

4. Interface Access (§ 1033.321)

Proposed § 1033.321 would clarify the circumstances under which a data provider would be permitted to block a consumer's or third party's access to its consumer or developer interface without violating the general obligation of CFPA section 1033(a). In particular, a data provider would not be required to make available covered data to a person or entity that presents significant risks to the data provider's data security or risk management program. It would be inconsistent with CFPA section 1033(a) for a data provider to make available covered data to persons or entities that present unreasonable risks to the security of the data provider's safety and soundness, information systems, or consumers, or where a data provider could not take steps to ensure they are making available covered data to an actual consumer or authorized third party.

Risk Management (§ 1033.321(a) Through (c))

The CFPB recognizes that data providers have legitimate interests in making data available only to authenticated consumers and authenticated authorized third parties and in a way that avoids unreasonable risks to consumers and protects covered data. CFPA section 1033(a) does not expressly address how a data provider must take risk management concerns into account when making data available. However, as discussed in this section below, the CFPB has preliminarily determined that CFPA section 1033(a) authorizes procedures to clarify the circumstances under which a data provider must make available covered data upon request. The CFPB is proposing to clarify that a data provider can reasonably deny a consumer or third party access to an interface described in proposed § 1033.301(a) based on risk management concerns.

Depository institutions have legal obligations to operate in a safe and sound manner, and both depository and nondepository institutions have other security-related obligations.[86] The prudential regulators have issued guidance explaining that, to operate in a safe and sound manner, banking organizations must establish practices to manage the risks arising from third party relationships.[87] The guidance explains that ''[c]onducting due diligence on third parties before selecting and entering into third party relationships is an important part of sound risk management.'' [88] The guidance further explains that ''[n]ot all relationships present the same level of risk, and therefore not all relationships require the same level or type of oversight or risk management.'' [89] Additionally, data security guidelines issued by the prudential regulators and

[82] 12 CFR part 208, app. D–2.

[83] Consumer Fin. Prot. Bureau, *Consumer Financial Protection Circular 2022–04* (Aug. 11, 2022), *https://www.consumerfinance.gov/compliance/circulars/circular-2022-04-insufficient-data-protection-or-security-for-sensitive-consumer-information/*.

[84] *See* 12 CFR 1016.3(k) (defining ''Federal functional regulator'' as the Board of Governors of the Federal Reserve System, the OCC, the Board of Directors of the FDIC, the NCUA Board, and the Securities and Exchange Commission).

[85] 86 FR 70272, 70287 (Dec. 9, 2021).

[86] *See, e.g.,* 12 U.S.C. 1831p–1; *Interagency Guidelines Establishing Standards for Safety and Soundness,* 12 CFR part 30, app. A (OCC), 12 CFR part 208, app. D–1 (Bd. of Governors of the Fed. Rsrv. Sys.); and 12 CFR part 364, app. A (FDIC); the GLBA; the FTC's Safeguards Rule; Fed. Fin. Insts. Examination Council, *Authentication and Access to Financial Institution Services and Systems* (Aug. 11, 2021), *https://www.ffiec.gov/guidance/Authentication-and-Access-to-Financial-Institution-Services-and-Systems.pdf* (Security Guidelines).

[87] Bd. of Governors of the Fed. Rsrv. Sys., Fed. Deposit Ins. Corp., Off. of the Comptroller of the Currency, Dep't of the Treas., *Interagency Guidance on Third-Party Relationships: Risk Management,* 88 FR 37920, 37927 (June 9, 2023) (Interagency TPRM Guidance).

[88] *Id.* at 37929.

[89] *Id.* at 37927.

the FTC also address risk management. For example, the prudential regulators' data security guidance states that banks should implement controls to identify reasonably foreseeable internal and external threats that could result in unauthorized disclosure, misuse, alteration, or destruction of customer information.[90]

The SBREFA Panel recommended that the CFPB clarify the circumstances under which data providers would be required to make data available to third parties.[91] The Panel also recommended that the CFPB evaluate options that would allow data providers to take reasonable steps to reduce security and fraud risks, while still ensuring that consumers are able to exercise their rights under the eventual rule.[92] Further, various stakeholders have asked the CFPB to clarify whether a data provider would violate the proposed rule if it were to deny access to a third party based on a legitimate risk management concern. The CFPB has developed proposed § 1033.321(a) through (c) to address this feedback.

Consumers could be harmed if a final rule did not allow data providers to deny a third party access to the data provider's developer interface where the data provider has legitimate risk management concerns. For example, if a data provider had legitimate concerns about a third party's ability to safeguard the consumer's data, requiring that data provider to nevertheless grant access to the third party could result in a data breach that could have been avoided. At the same time, if denials of access are not narrowly tailored to a specific risk management concern, they may frustrate a consumer's right to access data under CFPA section 1033. As discussed in part I.C, the CFPB is concerned that data providers may have incentives to deny access, particularly where third parties are offering a competing product or service, which may result in denials that are not tailored to a legitimate risk.

To address this possibility, proposed § 1033.321(a) states that a data provider can reasonably deny a consumer or third party access to its interface based on risk management concerns, as clarified by proposed § 1033.321(b) and (c). Subject to proposed § 1033.321(b), discussed below, a denial would not be unreasonable if it is necessary to comply with the safety and soundness requirements or data security requirements in Federal law.

Proposed § 1033.321(b) explains that to be reasonable under proposed § 1033.321(a) a denial must, at a minimum, be directly related to a specific risk of which the data provider is aware, such as a failure of the third party to maintain adequate data security, and must be applied in a consistent and non-discriminatory manner. The CFPB notes that the term ''non-discriminatory'' in this paragraph carries its ordinary meaning and is not intended to refer to discrimination on a prohibited basis under Federal fair lending law.[93] For example, if a denial were to be based on a concern about consumer-authorized data access generally, rather than a specific risk related to the operations or practices of the third party requesting data, it would not be reasonable. In addition, if a data provider were to deny access to one third party based on a certain risk but were to grant access to another third party where the same risk is present, and all other factors were equal, the denial would not be considered reasonable.

Proposed § 1033.321(c) explains that indicia that a denial is reasonable include whether access is denied pursuant to the terms of a qualified industry standard related to data security or third party risk management. If a data provider were to deny access to comply with these requirements, the denial may be reasonable because it reflects compliance with standards developed with the participation of a variety of stakeholders in the open banking system, consistent with the proposed rule's objective discussed in part I.D to develop a data access framework that is safe and competitive. However, conformance with an industry standard alone would not necessarily settle the question of reasonableness.

The CFPB requests comment on additional ways to harmonize the risk management obligations of data providers with CFPA section 1033's data access right for consumers and authorized third parties. Risk management may entail a variety of practices and risk management standards could be defined through several sources, including prudential guidance, other Federal government standards, or qualified industry standards. The CFPB requests comment on the extent to which CFPB rule or guidance, or other sources, should address whether a data provider's denial of third party access to a developer interface under § 1033.321(a) would be reasonable with respect to any particular risk management practices.

Proposed § 1033.321(a) through (c) would implement CFPA section 1033 by clarifying what steps are necessary to make data available to a consumer or authorized third party upon request. These provisions would seek to ensure that data providers are making data available only to authenticated consumers and authenticated authorized third parties, and that data access does not present unreasonable risks to the security and integrity of covered data. Depending on the facts, certain exceptions under CFPA section 1033, set forth in proposed § 1033.221, might allow a data provider to not make data available.[94] However, the CFPB has preliminarily determined that, in most cases, it would not be appropriate for data providers to rely on the exceptions to address risk management concerns. The identification of risk management concerns might involve the exercise of substantial discretion by the data provider, and the CFPB is concerned that data providers' strong competing incentives discussed in part I.C might undermine the objectives of CFPA section 1033 to allow consumers to share data with authorized third parties, in particular third parties offering competing products or services.

Denials Related to Lack of Information—Evidence of Data Security Practices (§ 1033.321(d)(1))

The CFPB is proposing that a data provider would have a reasonable basis for denying a third party access to a developer interface under proposed § 1033.321(a) if a third party does not present evidence that its data security practices are adequate to safeguard the covered data.

As noted in the discussion of proposed § 1033.321(a) through (c), data providers are subject to various legal obligations related to data security, and safety and soundness. Consistent with these obligations, data providers in the market today typically conduct due diligence of a third party before granting the third party access to the data provider's interface. This diligence is typically either performed by the data provider itself or by another entity, such as a data aggregator, a core banking provider, or a third party assessment firm.

[90] *See, e.g.,* Security Guidelines at III.B.1.

[91] SBREFA Panel Report at 44.

[92] *Id.*

[93] A similar requirement is found in the information blocking provision of HHS's rule implementing the 21st Century Cures Act, Public Law 114–255, 130 Stat. 1033 (2016). *See* 85 FR 25642, 25862 (May 1, 2020).

[94] *See, e.g.,* 12 U.S.C. 5533(b)(2) (exception for any information collected by the covered person for the purpose of preventing fraud or money laundering, or detecting, or making any report regarding other unlawful or potentially unlawful conduct), 5533(b)(3) (exception for any information required to be kept confidential by any other provision of law).

If the CFPB finalizes the rule as proposed, data providers that currently have developer interfaces could experience an increased volume of requests. In addition, some data providers will be establishing interfaces for the first time. The CFPB is concerned that, particularly for smaller data providers, the volume of requests from third parties to access these data providers' interfaces could outstrip these data providers' resources for vetting third parties. In addition to being burdensome for individual data providers, the CFPB is also concerned that duplicative vetting—*i.e.,* several different data providers conducting similar due diligence of a particular third party—could be a source of inefficiency in the open banking system.

In some other open banking regimes, a governmental or quasi-governmental body addresses these potential problems by serving an accreditation function. The governmental or quasi-governmental body independently evaluates third parties and issues credentials endorsing the third party's fitness to receive consumer-authorized data.[95] The CFPB is proposing a different approach to standard-setting. Although a private accreditation system does not yet exist in the United States, there are various certifications in existence today that represent compliance with certain data security standards.

Proposed § 1033.321(d)(1) would seek to alleviate the concerns described above related to the potential burden of vetting on smaller data providers and the potential inefficiency resulting from duplicative vetting. Proposed § 1033.321(d)(1) states that a data provider has a reasonable basis for denying access to a third party under proposed § 1033.321(a) if the third party does not present evidence that its data security practices are adequate to safeguard the covered data. Where the third party does not present such evidence, the data provider may deny access under proposed § 1033.321(a) without vetting the third party. Where the third party does present such evidence, the data provider may either grant access or perform additional due diligence on the third party as appropriate.

The CFPB requests comment on whether to specify the types of evidence a third party would need to present about its data security practices that would give a data provider a reasonable basis to deny access under proposed § 1033.321(d)(1), and what types of evidence might provide such a basis. For example, the CFPB requests comment on whether such evidence could consist of certifications or other credentials representing compliance with data security standards, or evidence of vetting by a third party risk assessment firm.

As the text of proposed § 1033.321(d)(1) explains, any denials of access under this provision would still be subject to the reasonability requirement in proposed § 1033.321(a). For example, proposed § 1033.321(b) states in part that, to be reasonable, a denial on risk management grounds must be applied in a consistent and non-discriminatory manner. Thus, a data provider could not deny access to a third party for failing to present evidence that its data security practices are adequate to safeguard the covered data, where it grants access to another third party that presents similar evidence, assuming all other factors are equal.

The CFPB encourages stakeholders in the open banking system to engage in a fair, open, and inclusive process to develop an accreditation system for third parties. For example, data providers, third parties, consumer advocacy groups, and other stakeholders could establish an independent body that performs an accreditation role, or an existing open banking standards body could expand its remit to include such a role. The CFPB requests comment on whether developing such a credential could reduce diligence costs for both data providers and third parties and increase compliance certainty for data providers with respect to the proposed rule. The CFPB also requests comment on the steps necessary to develop such a credential and how the CFPB or other regulators could support such efforts.

Denials Related to Lack of Information—Certain Information About the Third Party (§ 1033.321(d)(2))

The CFPB is proposing that a data provider would have a reasonable basis for denying access under proposed § 1033.321(a) if a third party does not make public certain information about itself. The CFPB has preliminarily determined that this provision would enable the open banking system to function more efficiently, in two respects.

First, the information would help data providers authenticate the identities of third parties (*i.e.,* help data providers confirm the third party is who they say they are). After a data provider establishes an interface, it may receive a request from a third party to access that interface, but it may not know who the third party is. The identity information described in proposed § 1033.321(d)(2)(i) through (iii)—the third party's legal name and any assumed name they are using when doing business with the consumer, a link to their website, and their LEI—would help the data provider confirm the third party's identity. Second, the information described in proposed § 1033.321(d)(2)(iv)—contact information a data provider can use to inquire about the third party's data security practices—would facilitate any outreach to the third party that may be required as part of a data provider's diligence. Furthermore, the identity information described in proposed § 1033.321(d)(2)(i) through (iii) may help the data provider conduct research in connection with its due diligence.

The SBREFA Panel recommended that the CFPB evaluate options that would reduce additional costs on data providers and third parties in authenticating a third party or verifying a third party's authorization, such as providing data providers with a list of third parties that make available information relevant to their authentication.[96] By assisting data providers with third party authentication and due diligence, the CFPB has preliminarily determined that proposed § 1033.321(d)(2) would help further the recommendations of the SBREFA Panel related to third party authentication.[97]

Proposed § 1033.321(d)(2) would permit the data provider to deny access if the information is not available in human-readable and machine-readable formats. Making the data available in machine-readable format could enable data providers and other stakeholders to use automated processes to ingest the relevant information into their systems for processing and review, which would make the process of obtaining this information more efficient. Proposed § 1033.321(d)(2) would also permit the data provider to deny access if the information is not readily identifiable to members of the public, meaning the information must be at least as available as it would be on a public website. The CFPB seeks comment on whether it should indicate that conformance to a specific standard or a qualified industry standard would be relevant indicia for a third party's machine-readability compliance.

[95] *See, e.g.,* Australian Gov't, *Become an Accredited Data Recipient, https://www.cdr.gov.au/for-providers/become-accredited-data-recipient* (noting that the Australian Competition and Consumer Commission ''manages the accreditation process'') (last visited Aug. 19, 2023).

[96] SBREFA Panel Report at 44.

[97] *Id.* at 43.

The CFPB seeks comment on whether it should issue regulations or guidance that would make it easier for data providers and other members of the public to identify a particular third party's information. For example, the CFPB could provide that a data provider is permitted to deny access if the third party's information is not available on public websites and the URL does not contain specified text in accordance with the ''well-known Uniform Resource Identifier'' protocol. This approach could make it easy for a person to identify the website where a particular third party's information is available or all websites where third parties are making such information available, which could facilitate the creation of a directory of third parties.

Additionally, the CFPB seeks comment on whether it should provide that a data provider is permitted to deny access if the third party does not submit to the CFPB the link to the website on which this information is disclosed. This would enable the CFPB to publish a directory of links that data providers and other members of the public could use. The CFPB also seeks comment on whether data providers should have to provide information or notice to the CFPB regarding their procedures and decisions to approve or deny third parties for access to their developer interfaces. For example, data providers could be required to regularly provide the CFPB a list of all third parties that they have approved to access their interface. As a further example, data providers could be required to notify the CFPB if and when they deny a third party access to their developer interface, including reasons for denying access (records of which proposed § 1033.351(d)(2)(i) would require data providers to retain). Such information may allow the CFPB to better monitor the data access system and ensure that denials of access are compliant.

Under proposed § 1033.321(d)(2), the information the third party makes available would be disclosed publicly. Public disclosure of this information—along with public disclosure of similar information by data providers pursuant to proposed § 1033.341—would facilitate market monitoring by the CFPB and members of the public. It would also enable standard-setting bodies to identify the data providers and third parties that are participating in the open banking system, which could aid efforts by standard-setting bodies to develop industry standards related to consumer-authorized data access.

The CFPB proposes in § 1033.321(d)(2) that a data provider would have a reasonable basis for denying a third party's access to covered data in certain situations pursuant to the CFPB's authority under CFPA sections 1033(a) and 1022(b)(1). By requiring a third party to make public certain identifying information about itself, the disclosures proposed in § 1033.321(d)(2) serve as a component of the statutory requirement of CFPA section 1033(a) to make data available. The disclosures facilitate CFPA section 1033's data availability requirement by giving data providers an authentication tool over third parties, while also facilitating any outreach required by data providers to a third party as a result of the data provider's due diligence obligations under proposed § 1033.321(a) through (c). Additionally, these disclosures would be authorized under CFPA section 1022(b)(1), which authorizes the CFPB to prescribe rules as may be necessary or appropriate to enable the CFPB to prevent evasion of the purposes and objectives of the Federal consumer financial laws—including carrying out the objectives of CFPA section 1033.

The SBREFA Panel recommended that the CFPB consult with other Federal agencies responsible for administering data security requirements applicable to data providers to discuss the feasibility of developing a safe harbor for authenticating third parties.[98] Due to the lack of an accreditation system in the United States related to open banking—as described above in the discussion of proposed § 1033.321(d)(1)—the CFPB has preliminarily determined that such a safe harbor for the proposed rule is not feasible at this time. The CFPB plans to engage in further coordination with the Federal agencies responsible for administering data security requirements.

While the CFPB is not proposing a safe harbor, proposed § 1033.321(a) through (c) would seek to reduce a data provider's uncertainty about when they may deny access to an interface based on risk management concerns. Further, proposed § 1033.321(d)(1) and (2) would seek to alleviate the potential burden of vetting on data providers. Last, proposed § 1033.321(d)(2) would help data providers authenticate the identities of third parties. The CFPB seeks comment on how the proposed rule could further facilitate compliance and reduce due diligence costs for both data providers and third parties while adequately ensuring the security of consumer data.

[98] *Id.* at 44.

5. Responding to Requests for Information (§ 1033.331)

Proposed § 1033.331 would prescribe basic conditions to implement data providers' obligation to make data available ''upon request'' under CFPA section 1033(a) and would clarify data providers' ability to authenticate and manage the authorization process for third parties. In general, under proposed § 1033.331, a data provider would need to make covered data available to the third party in accordance with the terms of the authorization provided by the consumer to the third party if the conditions in proposed § 1033.331(b) were satisfied, as discussed below. A data provider would not be required to make data available if one of the exceptions listed in proposed § 1033.221 applied, if the data provider reasonably denied access pursuant to proposed § 1033.321(a), if the data provider's interface were unavailable, or if a third party's authorization was no longer valid.

Responding to Requests—Access by Consumers (§ 1033.331(a))

Proposed § 1033.331(a) would prescribe the conditions that apply where consumers are seeking covered data (as opposed to where a third party requests access to a consumer's data on the consumer's behalf). Under proposed § 1033.331(a), a data provider would be required to make available covered data upon request to a consumer when it receives information sufficient to (1) authenticate the consumer's identity and (2) identify the scope of the data requested. Under proposed § 1033.331(a), the CFPB expects that these conditions would be satisfied through procedures in use by most consumer interfaces that automatically authenticate consumers and allow consumers to identify covered data.

Responding to Requests—Access by Third Parties (§ 1033.331(b))

Proposed § 1033.331(b)(1) would list four conditions that must be satisfied to clarify when a data provider must make available covered data to a requesting third party acting on behalf of a consumer. Under proposed § 1033.331(b)(2), data providers would be permitted to engage in limited steps to confirm conditions are satisfied with respect to a third party's authorization.

Stakeholders have expressed different views about whether and the extent to which data providers, third parties, or both, should manage the process of obtaining a consumer's authorization to grant a third party access to the

consumer's data.[99] In response to the SBREFA Outline, the CFPB received feedback from several stakeholders expressing concern that reliance on an authorization generated by a third party would present risk management concerns and that they should be able to obtain the consumer's authorization from the consumer. Stakeholders have also suggested that this approach is necessary to protect consumer privacy and data security. Other stakeholders have suggested that the data provider should be able to confirm the consumer's authorization before making data available to the third party.[100]

As discussed in part III, the CFPB interprets CFPA section 1033 to authorize rules that require data providers upon request to readily make available usable data to consumers and authorized third parties, including third parties offering competing products and services. The CFPB has preliminarily determined that third parties are in the best position to determine what covered data are reasonably necessary to provide the requested product or service. And as discussed in part I.C, data providers may have strong incentives to limit the scope of data available to third parties, especially those providing a competing product or service.

The CFPB recognizes that data providers have legitimate interests in protecting their data security and other risk management priorities. Accordingly, the CFPB has preliminarily determined that data providers should confirm the third party's authorization with the consumer, as discussed below with respect to proposed § 1033.331(b)(2), as well as other provisions designed to protect legitimate security and other risk management interests, such as those discussed with respect to proposed § 1033.321. While the CFPB is proposing to allow data providers to reasonably deny access requests due to a risk management concern described in proposed § 1033.321(a), the CFPB does not intend for data providers to rely on this provision to limit the scope of a consumer's authorization. Proposed § 1033.321(a) would only allow a data provider to deny a third party access entirely to its developer interface, and a data provider likely would not have a reasonable basis to deny a third party access to an interface entirely due to concerns specifically about the scope of data requested.

The CFPB also acknowledges third parties may present security and privacy risks to consumers, as discussed in part I.C. However, the CFPB is proposing procedures discussed in part IV.D to ensure third parties are acting on behalf of consumers. The CFPB does not believe primary enforcement responsibility for ensuring third parties are acting on behalf of consumers should reside with data providers that may be driven by their own commercial interests. For the reasons above, the CFPB has preliminarily determined that it would best carry out the objectives of CFPA section 1033 for data providers to confirm that the third party has followed the authorization procedures described further below with respect to proposed § 1033.401. These procedures are discussed in greater detail below with respect to proposed § 1033.331(b)(1)(iii).

### Conditions That Apply to Requests From Third Parties (§ 1033.331(b)(1))

Among the four conditions that would trigger a response to a third party under proposed § 1033(b)(1), a data provider would need to receive information sufficient to authenticate the consumer's identity. The CFPB is proposing to include this condition to mitigate the potential for fraudulent data requests.[101] In the market today, before a data provider grants a third party access to covered data, the consumer is typically redirected to the data provider's interface to authenticate the consumer's identity, usually by providing account credentials. Where consumers provide their credentials directly to the data provider through such an interface, the data provider would generally receive information sufficient to authenticate the consumer's identity for purposes of proposed § 1033.331(b)(1)(i). The CFPB seeks comment on the potential for technology to evolve such that a data provider could satisfy appropriate data security and other risk management standards without receiving a consumer's account credentials directly from the consumer.

In addition to authenticating the consumer's identity, under proposed § 1033.331(b)(1)(ii), the data provider would need to receive information sufficient to authenticate the third party's identity. An example of such information would include an access token obtained by the third party that has been approved to access the data provider's interface. As discussed with respect to proposed § 1033.321(a), the proposed rule would not require data providers to make data available to third parties that present legitimate risk management concerns. The CFPB expects that, prior to responding to data requests, most data providers would engage in some reasonable risk management diligence in accordance with proposed § 1033.321(a) as part of approving third parties to access a developer interface. And as discussed below with respect to proposed § 1033.331(c)(2), a data provider would not need to respond to a request from a third party if the data provider has a proper basis to deny access pursuant to risk management concerns described in proposed § 1033.321(a).

Further, under proposed § 1033.331(b)(1)(iii), a data provider would need to receive information sufficient to confirm the third party has followed the authorization procedures in proposed § 1033.401, discussed in greater detail in part IV.D. This step would generally be satisfied where the data provider receives a copy of the authorization disclosure the third party provided to the consumer and that the consumer has signed. The CFPB requests comment on whether clarifications are needed regarding what information would be sufficient to confirm the third party has followed the authorization procedures in the context of automated requests received through a developer interface.

Finally, under proposed § 1033.331(b)(1)(iv), a data provider would need to receive information sufficient to identify the scope of the data requested. Under proposed § 1033.301(a), in response to a request (that satisfies the conditions of proposed § 1033.331(b)(1)), a data provider would be required to make available the requested covered data. In some circumstances, however, the scope of information requested by an authorized third party might be ambiguous. To clarify the scope of covered data to be made available in response to a request, a data provider could seek to clarify the scope of an authorized third party's request with a consumer. For example, there might be circumstances in which a data provider could seek to clarify whether a consumer intended to consent to share information from particular accounts or particular types of information not specified in the consumer's third party authorization.

The CFPB requests comment on whether additional clarifications or procedures are needed to ensure a data provider does not design its developer interface to receive information sufficient to satisfy the conditions set

[99] *See, e.g., id.* at 30.

[100] *See, e.g., id.* at 54.

[101] This can include cases where the initial query under a request is being given by a fraudster or another person not actually authorized by the consumer, or cases where queries pursuant to an earlier-given authorization are pursuant to the actions of a fraudster or other unauthorized party that has illicitly gained control of a consumer's account or identity.

forth in proposed § 1033.331(b)(1) in a way that frustrates the ability of authorized third parties to receive timely responses to requests for covered data.

Confirmation of Third Party Authorization (§ 1033.331(b)(2))

Proposed § 1033.331(b)(2) provides that a data provider is permitted to confirm the scope of the third party's authorization to access the consumer's data by asking the consumer to confirm (1) the account(s) to which the third party is seeking access and (2) the categories of covered data that will be accessed, by presenting that information—as it is disclosed on the authorization disclosure—back to the consumer. This confirmation step would enable the data provider to confirm the account(s) to which the third party is seeking access, which may not be clear from the authorization disclosure. For example, a consumer might have multiple accounts with a data provider, and it may be unclear from the authorization disclosure which account (or accounts) the request pertains to, because the third party would not necessarily know the names and account numbers of the consumer's accounts. This step also would give the consumer an opportunity to review information about what data they would be authorizing the third party to access, and it would give data providers greater certainty that the consumer has authorized the request. The CFPB seeks comment on whether the final rule should instead permit data providers to confirm this information with the consumer only where reasonably necessary. Under this alternative approach, if technology were to evolve such that data providers could reasonably confirm this information without asking the consumer to confirm it, the rule might no longer permit data providers to ask consumers to confirm this information.

Response Not Required (§ 1033.331(c))

Proposed § 1033.331(c) would list the four circumstances under which a data provider would not be required to make covered data available in response to a request. For ease of reference, proposed § 1033.331(c)(1) and (2) would restate exceptions that exist elsewhere in the proposed rule: the exceptions in proposed § 1033.221, which are derived from section 1033(b) of the CFPA, and the exception in proposed § 1033.321(a) related to risk management.

Proposed § 1033.331(c)(3) explains that a data provider would not be required to make covered data available if its interface is not available when the data provider receives a request. Under proposed § 1033.331(c)(3), if a data provider receives a request, and the data provider's interface is unavailable, the data provider would not violate its obligation to make covered data available where it does not respond to the request. Proposed § 1033.331(c)(3) explains, however, that the data provider would be subject to the performance specifications in proposed § 1033.311(c). The CFPB requests comment on any additional clarification that would reduce the opportunity for data providers to deny requests without justification under this provision. For example, the CFPB could clarify the meaning of ''unavailable'' in a manner similar to the ''infeasibility'' or ''health IT'' exceptions in the Information Blocking Rule issued by HHS.[102]

Finally, proposed § 1033.331(c)(4) explains that a data provider would not be required to make covered data available if the request is for access by a third party but the consumer's authorization is not valid for one of three reasons: (1) the consumer has revoked the third party's authorization pursuant to proposed § 1033.331(e); (2) the data provider has received notice that the consumer has revoked the third party's authorization pursuant to proposed § 1033.421(h)(2); or (3) the consumer has not provided a new authorization to the third party after the maximum duration period, as described in proposed § 1033.421(b)(2).

Jointly Held Accounts (§ 1033.331(d))

The CFPB is proposing to identify a data provider's obligation to make covered data available upon request where a consumer jointly holds an account. Proposed § 1033.331(d) would require a data provider that receives a request for covered data from a consumer that jointly holds an account or from an authorized third party acting on behalf of such a consumer to provide covered data to that consumer or authorized third party. This provision would not affect data providers' existing obligations to provide information directly to consumers under other Federal consumer financial laws, such as EFTA, the Truth in Savings Act (TISA),[103] and TILA, and their implementing regulations. Those regulations generally permit data providers to satisfy the relevant information disclosure requirements by providing the information to any one of the consumers on the account.[104] The CFPB seeks comment on whether other account holders should receive authorization disclosures or otherwise be notified, or should have an opportunity to object, when an account holder authorizes access to consumer information. The CFPB also seeks comment on whether the rule should specifically address whether authorized users of credit cards should have similar access, even if they are not a joint holder of the credit card account.

Data Provider Revocation (§ 1033.331(e))

The CFPB is proposing to permit a data provider to make available to the consumer a reasonable method by which the consumer may revoke any third party's authorization to access all of the consumer's covered data. Under proposed § 1033.331(e), to be reasonable, the revocation method must, at a minimum, be unlikely to interfere with, prevent, or materially discourage consumers' access to or use of the data, including access to and use of the data by an authorized third party. Indicia that the data provider's revocation method is reasonable would include its conformance to a qualified industry standard. Finally, a data provider that receives a revocation request from consumers through a revocation method it makes available must notify the authorized third party of the request.

This proposed provision—along with proposed § 1033.421(h), under which third parties must make available to consumers a mechanism by which consumers may revoke third party authorization—is intended to ensure consumers have multiple outlets and methods by which they may revoke third party authorization to access their data. The CFPB has preliminarily determined that requiring data providers to make available a revocation method may create a burden on smaller entities. The CFPB seeks to balance these competing considerations through a proposed rule that allows, but does not require, data providers to make available a revocation method.

The SBREFA Panel recommended the CFPB consider options that would allow consumers to revoke third party authorizations through both the third party and data providers.[105] The SBREFA Panel also recommended the CFPB continue to consider how revocation requirements could be designed to reduce impacts on third parties and data providers.[106]

Additionally, various stakeholders expressed concerns about anticompetitive activities related to data providers making a revocation method

[102] *See* 45 CFR 171.204; 171.205.

[103] 12 U.S.C. 4301 *et seq.*

[104] *See* 12 CFR 1005.4(c), 1030.3(d), 1026.5(d).

[105] SBREFA Panel Report at 44.

[106] *Id.* at 45.

available to consumers. As such, proposed § 1033.331(e) would permit data providers to make available a method for revoking a third party's access to ''all of the consumer's covered data.'' Proposed § 1033.331(e) would not permit a data provider to make available a method through which the consumer could partially revoke a third party's access to the consumer's data, *i.e.,* revoke access to some of the data the consumer had authorized the third party to access, but not other data it had authorized under the terms of the same authorization. For example, if the consumer consented in the initial authorization to share their deposit account and credit card data with a third party, the data provider could not make available a revocation method through which the consumer could revoke access to the deposit account but not the credit card account. Such a revocation method would be inconsistent with proposed § 1033.201(a), which would require data providers to make covered data available upon request based on the terms of the consumer's authorization. In addition, consumers who partially revoke access to their data could unintentionally disrupt the utility of data access for certain use cases.

To further account for anticompetitive concerns related to data providers making available a revocation method, proposed § 1033.331(e) includes a list of non-exhaustive requirements to ensure the optional revocation method is reasonable, including the extent to which it is unlikely to interfere with, prevent, or materially discourage consumers' access to or use of the data, including access to and use of the data by an authorized third party. As noted in part IV.B.2, this language is drawn from the definition of ''information blocking'' set forth in section 3022(a) of the Public Health Service Act.[107] The CFPB preliminarily has determined that this language would promote consumers' ability to access and share their data by ensuring data providers do not impose obstacles that evade their obligations to make available covered data under section 1033.

Proposed § 1033.331(e) also states that one indication that a data provider's revocation method is reasonable is that it adheres to a qualified industry standard. The CFPB seeks comment on whether the final rule should impose any additional requirements to ensure the optional revocation method is reasonable and does not result in anticompetitive outcomes. The CFPB also seeks comment on types of conduct that could interfere with, prevent, or materially discourage access to or use of data, and whether the CFPB would need to provide guidance related to that conduct.

The CFPB is also proposing to require a data provider that receives a revocation request from a consumer to notify the authorized third party of the request. A third party whose authorization to access data is revoked by a consumer would need to understand that the consumer has chosen to end their authorization, and that the data provider did not terminate the access for another permitted reason. The CFPB seeks comment on the implementation of this notification requirement, including, in cases where an authorized third party uses a data aggregator to access the authorized third party's access, to which party or parties the data provider must provide the notice.

This proposed provision would implement CFPA section 1033(a) by clarifying that a data provider does not violate its general obligations to make data available if it provides to consumers a reasonable revocation request. Materially interfering with a consumer's, and therefore an authorized third party's, ability to access the consumer's data would not carry out the objectives of CFPA section 1033(a)'s requirement that data providers make covered data available to a consumer upon request.

6. Public Disclosure Requirements (§ 1033.341)

To facilitate the ability of third parties to request covered data through a developer interface, the CFPB is proposing procedures under CFPA section 1033(a) and, for certain provisions discussed below, CFPA section 1032, to require data providers to publish in a readily identifiable manner certain information about themselves, including identifying information, contact information, and information about their developer interfaces. These provisions would carry out the objectives of CFPA section 1033 by ensuring that consumers and authorized third parties have information necessary to make requests and use a developer interface, which would also promote the use and development of standardized formats available through the developer interface.

Public disclosure of this information would reduce search costs for third parties by giving third parties a low-cost way of identifying how to access a data provider's interface and would facilitate market monitoring by the CFPB and members of the public. The public disclosure of this information would also enable standard-setting bodies to identify the data providers and third parties that are participating in the open banking system, which could aid efforts by standard-setting bodies to develop qualified industry standards related to consumer-authorized access. The CFPB seeks comment on whether data providers should have to disclose additional information beyond the information outlined in proposed § 1033.341. The CFPB also seeks comment on whether data providers should have to periodically provide information exclusively to the CFPB beyond the information it must make public, to support the CFPB's mandate to monitor consumer financial markets for risks to consumers; for example, the CFPB seeks comment on whether data providers should be required to provide the CFPB with annual reports listing the third parties that accessed their systems, the volume of requests they received from such third parties, and copies of certain records retained pursuant to proposed § 1033.351(d), which contains record retention obligations for data providers.

Public Disclosure and Human- and Machine-Readability Requirements (§ 1033.341(a))

Proposed § 1033.341(a) would require data providers to make the information described in proposed § 1033.341(b) through (d) readily identifiable to members of the public, meaning the information must be at least as available as it would be on a public website. A data provider would comply with proposed § 1033.341(a)(1) by making the information available on a public website. A data provider would also be permitted to make the information readily identifiable through some other means, as long as the information is no less available than it would be on a public website. Under proposed § 1033.341(a)(2), this information must be available in both human- and machine-readable formats.

Making the data available in a machine-readable format could enable third parties and other stakeholders to use automated processes to ingest the relevant information into their systems for processing and review, which would make the process of obtaining this information more efficient. The CFPB seeks comment on whether it should indicate that conformance to a specific standard or a qualified industry standard would be relevant indicia for a data provider's compliance with the machine-readability requirement in proposed § 1033.341(a)(2). Additionally,

[107] *See* 42 U.S.C. 300jj–52(a).

the CFPB seeks comment on whether it should issue rules or guidance that would make it easier for third parties and other members of the public to identify a particular data provider's information. For example, the CFPB could require that the information set forth in proposed § 1033.341(b) through (d) be made available on a public website and could require the URL to contain specified text in accordance with the ''well-known Uniform Resource Identifier'' protocol.

Disclosure of Identity Information and Contact Information (§ 1033.341(b))

Proposed § 1033.341(b) would require data providers to disclose certain identifying information in the manner described in proposed § 1033.341(a). Specifically, proposed § 1033.341(b)(1) through (3) would require data providers to publicly disclose certain identifying information: their legal name and, if applicable, any assumed name they are using when doing business with the consumer; a link to their website; the State in which they are incorporated; and their LEI. This information would help third parties confirm the identity of a particular data provider whose interface it seeks to access. It would also help third parties link the information disclosed by data providers pursuant to proposed § 1033.341 to a particular data provider, particularly where data providers have similar names.

Proposed § 1033.341(b)(4) would require data providers to disclose contact information that enables a consumer or third party to receive answers to questions about accessing covered data under this proposed rule. The CFPB understands that, in the market today, third parties sometimes encounter challenges with accessing data providers' interfaces for consumer-authorized data access. Requiring data providers to disclose this kind of contact information would make it easier for third parties and data providers to resolve such challenges.

Disclosure of Developer Interface Documentation and Access Location (§ 1033.341(c))

The CFPB proposes to require in § 1033.341(c) that a data provider disclose for its developer interface, in the public and readily identifiable manner described in proposed § 1033.341(a), documentation, including metadata describing all covered data and their corresponding data fields, and other documentation sufficient for a third party to access and use the interface. It is common practice today for data providers that have built developer interfaces to disclose such metadata and documentation for the interfaces. Where a data provider would need to build (or enhance) its developer interface to comply with the CFPB's proposed rule, a requirement to publicly disclose the associated documentation and metadata would not materially increase the data provider's cost. At the same time, public disclosure of the information would substantially enhance the usability of the interface.

The CFPB proposes to keep simple and high-level the proposed requirement that data providers disclose their interfaces' metadata and documentation, because, as noted, the industry practice of publishing metadata and documentation for data providers' interfaces for third parties is already common. Moreover, the specific formats of the data fields that data providers make available through their interfaces for third parties may continue to evolve, including through qualified industry standards, such that a more detailed requirement could become outdated.

Disclosure of Developer Interface Performance Metrics (§ 1033.341(d))

The CFPB proposes to require in § 1033.341(d) that a data provider disclose, in the public and readily identifiable manner described in proposed § 1033.341(a), the performance of its developer interface for each month. Specifically, the CFPB proposes that on or before the tenth calendar day of each month, the data provider would disclose the percent of requests for covered data received by its developer interface in the preceding calendar month for which the interface provided a proper response, as defined in proposed § 1033.311(c)(1)(i). For example, the data provider would disclose by September 10, 2025, the percent of requests for covered data received by its developer interface in August 2025 for which the interface provided a proper response.

Proposed § 1033.311(c)(1)(i) would set forth the method for calculating the response rate, which would be used for both the substantive requirement and the disclosure requirement.

The CFPB proposes this requirement that a data provider publicly disclose the monthly performance of its developer interface pursuant to section 1032 of the CFPA, which authorizes the CFPB to prescribe disclosures regarding the features of any consumer financial product or service. Because CFPA section 1033(a) requires a data provider to make data available to a consumer when the data ''concern[s] the consumer financial product or service that the consumer obtained from [the data provider],'' the CFPA section 1033(a) requirement that a data provider make the data available to the consumer is itself a feature of the consumer financial product or service that the data provider provided to the consumer. Moreover, the CFPB's section 1032 authority under the CFPA is not limited to disclosures to consumers individually; instead, the section authorizes the CFPB to require disclosures to consumers generally, as well as to potential consumers. Thus, pursuant to its authority provided by CFPA section 1032, the CFPB is proposing in § 1033.341(d) to require a data provider to disclose, in a public and readily identifiable manner, the performance of its interface. The CFPB seeks comment on whether it should require data providers to disclose additional performance metrics, including those required to be disclosed in other jurisdictions' open banking systems, such as the volume of requests, the number of accounts and/or consumers with active authorizations, uptime, planned and unplanned downtime, and response time.[108]

7. Policies and Procedures (§ 1033.351)

Reasonable Written Policies and Procedures (§ 1033.351(a))

Proposed § 1033.351(a) would set forth the general obligation that data providers establish and maintain written policies and procedures that are reasonably designed to achieve the objectives set forth in proposed subparts B and C, including proposed § 1033.351(b) through (d). The CFPB proposes § 1033.351(a) pursuant to its authority provided by CFPA sections 1033(a) and 1022(b)(1). The proposed policies and procedures in § 1033.351(b) would carry out the objectives of CFPA section 1033(a) to make available information upon request by ensuring data providers are accountable for their decisions to make available covered data in response to requests, and in granting third parties access to the developer interface. The proposed policies and procedures in § 1033.351(c) would carry out the objectives of CFPA section 1033(a) that data be made available in a usable electronic form by ensuring developer interfaces accurately

[108] *See, e.g.,* Australia Consumer Data Standards, *Reporting Requirements, https://consumerdatastandardsaustralia.github.io/standards/#reporting-requirements* (last visited Oct. 11, 2023); Open Fin. Brazil, *Dashboards—Registration and transactional data, https://dashboard.openfinancebrasil.org.br/transactional-data/api-requests/evolution* (last updated Sept. 15, 2023); Open Banking Ltd., *MI Reporting Data API Specification, https://openbankinguk.github.io/mi-docs-pub/v3.1.10-aspsp/specification/mi-data-reporting-api-specification.html#_3-7-daily-volumes-obie* (last visited Oct. 11, 2023).

transmit covered data. In addition, the CFPB is proposing recordkeeping requirements under CFPA section 1022(b)(1) to facilitate supervision and enforcement of the rule and to prevent evasion.

Proposed § 1033.351(a) would further carry out these purposes by requiring that data providers periodically review these policies and procedures and update them as appropriate to ensure their continued effectiveness. To minimize impacts on data providers, including avoiding conflicts with any overlapping compliance obligations, proposed § 1033.351(a) would allow data providers to tailor these policies and procedures to the size, nature, and complexity of their activities.

Policies and Procedures for Making Covered Data Available and Responding to Requests (§ 1033.351(b))

Proposed § 1033.351(b) would require that the policies and procedures required by proposed § 1033.351(a) be reasonably designed to create a record of the data fields made available according to the covered data definition, ensure certain standards are met when not making covered data available, ensure that the data provider communicates certain information to the consumer or third party when declining to provide certain covered data and to ensure reasonably timely communication by the data provider to the consumer when declining to provide certain information.

Making Covered Data Available (§ 1033.351(b)(1))

Proposed § 1033.351(b)(1) would require a data provider to create a record of the data fields that are covered data in the data provider's control or possession. It would also require a data provider to record what covered data are not made available through a consumer or developer interface pursuant to an exception in § 1033.221, and the reason(s) the exception applies. A data provider is permitted to comply with this requirement by incorporating the data fields defined by a qualified industry standard, but exclusive reliance on data fields defined by such a standard would not be appropriate if such data fields failed to identify all the covered data in the data provider's control or possession.

The CFPB is proposing these requirements to facilitate compliance with and enforcement of the general obligation in proposed § 1033.201. Documentation of the fields that are made available in accordance with the covered data definition could help the CFPB identify compliance gaps in what the data provider makes available, streamline negotiations between data providers and third parties by establishing the available data fields, and encourage the market to adopt more consistent data sharing practices. Documentation of use of the exceptions can help identify noncompliant use of the statutory exceptions, while ensuring that data providers can continue to comply with their risk management obligations by giving data providers flexibility to design their own reasonable policies and procedures that comply with the general framework outlined in the proposed rule. The CFPB preliminarily concludes that allowing a data provider to cite data fields defined by a qualified industry standard, to the extent that standard identifies covered data in the data provider's control or possession, could ease the compliance burden on data providers and promote market standardization according to CFPA section 1033(d).

Denials of Requests for Developer Interface Access and Requests for Information (§ 1033.351(b)(2) and (3))

Proposed § 1033.351(b)(2) would require a data provider to design its policies and procedures reasonably to ensure that any decision to deny a third party's request for access to a developer interface pursuant to proposed § 1033.321 is substantiated in a record and communicated to the third party, as quickly as practicable, in an electronic or written form with the basis for denial. Proposed § 1033.351(b)(3) would require a data provider to design its policies and procedures reasonably to ensure that any decision to deny a consumer or third party's request for information is substantiated in a record and communicated to the consumer or authorized third party in a written or electronic form with the type(s) of information denied and the basis for the denial, and communicated as quickly as practicable. These provisions generally would enable consumers and third parties to understand reasons for denials in a timely manner, and reduce the potential for pretextual denials. These provisions would carry out the objectives of CFPA section 1033 by enabling consumers and prospective authorized third parties to understand and satisfy data provider conditions necessary to make requests. And, as authorized under section 1022(b)(1) of the CFPA, these provisions also would prevent evasion by ensuring data providers do not avoid their obligations under CFPA section 1033 by denying developer interface access or information requests for unstated impermissible reasons.

Under the proposed rule, permissible bases for a decision to deny access to an interface would include the following: the information requested is not covered data, the information requested is not in the data provider's control or possession, the information requested falls into one of the exceptions outlined in proposed § 1033.221, the request does not satisfy the conditions for access under proposed § 1033.331, the data provider is reasonably denying access based on risk management concerns for reasons described in proposed § 1033.321, or the data provider's interface is not available when received a request, as described in proposed § 1033.331(c)(3).

The provisions would give data providers flexibility to comply with their data security or risk management obligations—a concern identified by small entity representatives during the SBREFA process. For example, in some cases a data provider might deny a third party's request for interface access because of a specific risk management issue under § 1033.321. The CFPB understands that in limited cases, the disclosure of the specific reason for a denial might present additional risk management concerns. The proposed rule would give data providers flexibility to design policies and procedures to reasonably account for such issues. The CFPB requests comment on whether the final rule should provide examples or further clarify how data providers could reasonably design policies and procedures to account for data security or risk management concerns.

Policies and Procedures for Ensuring Accuracy (§ 1033.351(c))

Proposed § 1033.351(c) would require data providers to establish and maintain policies and procedures reasonably designed to ensure the accuracy of covered data made available through the data provider's developer interface. The proposed rule also lists elements that data providers would need to consider when designing their policies and procedures. Proposed § 1033.351(c) would be authorized under CFPA section 1033(a) for the reasons stated above in the discussion of proposed § 1033.351(a) as well as under CFPA section 1033(d). Policies and procedures for accuracy would promote the use and development of standardized formats by ensuring data providers are taking reasonable measures to share covered data in standardized formats.

As discussed in part I.D, one of the goals of the proposed rule is to foster a data access framework that operates reliably. The accurate transfer of

consumer financial data is important to the operation of an open banking system and to consumers' ability to benefit from the data access right in CFPA section 1033. If data providers fail to reliably transfer data that accurately reflects the information they possess in their systems, then third parties will struggle to develop innovative, or even functional, financial products and services. And consumers will face difficulty finding any benefit from sharing their data with competing financial service providers. For these reasons, proposed § 1033.351(c)(1) would require data providers to establish and maintain written policies and procedures that are reasonably designed to ensure that covered data are accurately made available through the data provider's developer interface.

The CFPB has preliminarily determined that a data provider's policies and procedures should focus on the accuracy of transmission rather than the underlying accuracy of the information in the data provider's systems. That is, the policies and procedures should be designed to ensure that the covered data that a data provider makes available through its developer interface matches the information that it possesses in its systems. The information stored in data providers' existing systems is likely subject to several legal requirements regarding accuracy. For example, Regulation E protects consumers against errors, and Regulation Z protects consumers against billing errors.[109] In addition, the Interagency Guidelines Establishing Standards for Safety and Soundness require operational and managerial standards for information systems.[110] Additionally, many small entity representatives and other stakeholders commenting on the SBREFA Outline cited the transfer of data from data providers to third parties as a source of inaccuracies. Many transfer issues will be addressed by the performance specifications for a data provider's developer interface in proposed § 1033.311(c), but policies and procedures specifically concerning accuracy would help prevent errors not addressed by the other proposed performance standards, as discussed below.

The flexible standard proposed would allow data providers to design systems that are better adapted to the context of their developer interface, including changes in technology and the size, nature, and complexity of the data provider's activities. It would also allow data providers to leverage any knowledge developed through designing or administering systems for ensuring the accuracy of financial information under existing accuracy standards. Many of the other regulations governing the accuracy of similar financial information on data providers' systems incorporate flexible standards.

Proposed § 1033.351(c)(2) provides two elements for data providers to consider when developing their policies and procedures regarding accuracy: (1) implementing the format requirements of proposed § 1033.311(b); and (2) addressing information provided by a consumer or a third party regarding inaccuracies in the covered data made available through its developer interface. Although reasonable policies and procedures would address many elements, the two identified in the proposed rule seem especially relevant to an assessment of whether a data provider's policies and procedures are reasonable. Implementing the proposed formatting requirements would help prevent inaccuracies that might be introduced by translating covered data between various unstandardized formats. And addressing information from a consumer or third party is relevant to the reasonableness of a data provider's policies and procedures because these parties are likely to know whether information has been accurately transferred to the products or services they are using or providing. These elements should help data providers design their policies and procedures without negating the flexibility described above, because the implementation of each element will depend on context. For example, in considering information submitted by a consumer or third party, a data provider might create certain policies regarding irrelevant or duplicative requests, or certain policies regarding which requests require further communication with the consumer or third party.

Proposed § 1033.351(c)(3) states that indicia that a data provider's policies and procedures regarding accuracy are reasonable include whether they conform to a qualified industry standard regarding accuracy. A qualified industry standard regarding accuracy is relevant to the reasonableness of a data provider's policies and procedures because it reflects the openness, balance, consensus, transparency, and other requirements of proposed § 1033.141.

The CFPB seeks comment on whether the final rule should include additional elements bearing on the reasonableness of a third party's policies and procedures regarding accuracy.

Policies and Procedures for Record Retention (§ 1033.351(d))

Proposed § 1033.351(d) would require that data providers establish and maintain policies and procedures reasonably designed to ensure retention of records that evidence compliance with their obligations under proposed subparts B and C. This provision would clarify the policies and procedures data providers must maintain to ensure the CFPB and other enforcers can verify compliance with the proposed rule. The specific requirements proposed in § 1033.351(d) would facilitate supervision and enforcement of the proposed rule by the CFPB, Federal and State banking regulators, State attorneys general, and other government agencies that supervise data providers.

The CFPB has preliminarily determined the proposed retention periods in § 1033.351(d)(1), beginning once the data provider makes the data available to the consumer or third party under CFPA section 1033(a), will provide a sufficient amount of time to supervise whether the data was made available while not unduly burdening data providers. Additionally, the proposed requirement to retain records for a minimum of three years after a data provider has responded to a consumer's or third party's request for information or a third party's request to access a developer interface would provide sufficient time to administer enforcement of proposed subparts B and C. All other records that are evidence of compliance with the proposed rule would need to be retained for a reasonable period of time. The CFPB requests comment on proposed § 1033.351(d) regarding the length of the retention period and the date from which the retention obligation should be measured.

Proposed § 1033.351(d) would provide flexibility to data providers by establishing a minimum retention period and by not exhaustively specifying categories of records. The proposed requirements are unique to CFPA section 1033 and provide data providers with flexibility to craft policies and procedures that are appropriate to the ''size, nature, and complexity'' of the individual data provider's activities, as required by proposed § 1033.351(a), rather than the policies and procedures that are appropriate to the industry at large. Further, this flexibility would help data providers avoid conflicts with other legal obligations (including record retention and data security obligations), manage data security risks, and minimize unnecessary impacts. To

[109] *See* 12 CFR part 1005; 12 CFR 1026.13.

[110] *See, e.g.,* 12 CFR part 208, app. D–1.

mitigate the risk that this flexibility might result in the absence of critical evidence of compliance, proposed § 1033.351(d)(2) would identify particular examples records that would need to be retained. The CFPB requests comment as to the types of records that should be retained to evidence compliance. This approach would be consistent with the SBREFA Panel's recommendation that the CFPB evaluate record retention requirements for consistency with other requirements and the avoidance of unnecessary data security risks.[111]

CFPA section 1022(b)(1) authorizes the CFPB to prescribe rules as may be necessary or appropriate to enable the CFPB to administer and carry out the purposes and objectives of the Federal consumer financial laws, including carrying out the objectives of CFPA section 1033, and to prevent evasions thereof. Proposed § 1033.351(d) would assist the CFPB with administering CFPA section 1033 by ensuring records are available to evaluate compliance with data providers' obligations under the proposed rule. Additionally, such requirements will also help data providers in assessing their own compliance with the requirements of CFPA section 1033. Further, the requirement proposed in § 1033.351(d) for data providers to establish and maintain policies and procedures to retain records of all evidence of compliance with the applicable requirements in the proposed rule would make it more difficult for data providers to evade the requirements of CFPA section 1033. Consequently, proposed § 1033.351(d) would both allow the CFPB and other entities with CFPA enforcement authority to enforce CFPA section 1033, and discourage evasion by data providers, thus meeting both requirements for CFPA section 1022(b)(1) authorization.

CFPA section 1033(c) provides that ''[n]othing in [CFPA section 1033] shall be construed to impose any duty on a covered person to maintain or keep any information about a consumer.'' The CFPB has preliminarily determined that proposed § 1033.351(d) is consistent with CFPA section 1033(c) because CFPA section 1033(c) merely provides that a covered person is not required to maintain or keep additional information on a consumer and is silent as to record retention relating to compliance with CFPA section 1033 itself. Thus, the statute neither precludes the CFPB from adopting retention requirements nor overrides other authorities at the CFPB's disposal to impose reasonable record retention obligations. Accordingly, because the authority for proposed § 1033.351(d) arises from CFPA section 1022(b)(1) and is necessary for the CFPB and others with enforcement authority to verify data provider's compliance with CFPA section 1033, the CFPB is authorized to require data providers to establish and maintain policies and procedures to ensure the retention of records that evidence compliance with their obligations under proposed subparts B and C.

*D. Subpart D—Authorized Third Parties*

1. Overview

The CFPB is proposing authorization procedures for third parties seeking to access covered data on consumers' behalf. Section 1033(a) of the CFPA generally requires data providers to make information available to a consumer and agents, trustees, or representatives acting on their behalf. The proposed authorization procedures are designed to ensure that third parties accessing covered data are acting on behalf of the consumer. Specifically, the proposed authorization procedures would include requirements to provide an authorization disclosure to inform the consumer of key terms of access, certify to the consumer that the third party will abide by certain obligations regarding the consumer's data, and obtain the consumer's express informed consent to the key terms of access contained in the authorization disclosure. The CFPB is proposing specific requirements that would apply when the third party is using a data aggregator. Proposed subpart D would also contain requirements relating to retention of evidence of compliance with proposed subpart D.

2. Third Party Authorization Procedures (§ 1033.401)

The CFPB is proposing that a third party acting on behalf of a consumer would be able to access covered data. Proposed § 1033.201(a) provides that a data provider must make covered data available to a consumer and an authorized third party, and proposed § 1033.401 specifies what requirements a third party must satisfy to become an authorized third party that is entitled to access covered data on behalf of a consumer. These requirements would, among other things, help ensure that a consumer understands and would be able to exercise control over what covered data the third party would collect and how it would be used. They would also help ensure that the third party will take appropriate steps to protect the consumer's data and that the consumer will provide express informed consent for the third party to collect, use, and retain the covered data. These requirements would help ensure that a third party accessing covered data is doing so on behalf of a consumer and not for the third party's own benefit, consistent with the definition of consumer in CFPA section 1002(4) and used in section 1033.

The CFPB is proposing in § 1033.401 that, to become an authorized third party, the third party must seek access to covered data from a data provider on behalf of a consumer to provide a product or service the consumer requested. This requirement is intended to ensure that the third party is acting on behalf of the consumer—by accessing covered data to provide the product or service requested by the consumer—and is not seeking access to covered data for its own purposes.

The CFPB is also proposing in § 1033.401 that a third party would have to satisfy the prescribed authorization procedures to become an authorized third party. Under proposed § 1033.401, the three-part authorization procedures would require a third party to: (1) provide the consumer with an authorization disclosure as described in proposed § 1033.411; (2) provide a statement to the consumer in the authorization disclosure certifying that the third party agrees to certain obligations described in proposed § 1033.421; and (3) obtain the consumer's express informed consent to access covered data on behalf of the consumer by obtaining an authorization disclosure that is signed by the consumer electronically or in writing.

The proposed requirement in § 1033.401(a) that a third party provide an authorization disclosure to the consumer would help ensure that the consumer understands the key terms of access and can make an informed decision about whether to grant the third party access to the consumer's financial data. The proposed authorization disclosure is discussed in more detail below.

The proposed requirement in § 1033.401(b) that a third party provide a statement to the consumer certifying that the third party will comply with certain obligations would help ensure that the third party is acting on behalf of the consumer in accessing the covered data. As noted below, proposed § 1033.411(b)(5) would require the third party to include the certification statement in the authorization disclosure. Among other things, the third party would agree that it will comply with limitations on collection, use, and retention of the consumer's

[111] SBREFA Panel Report at 45.

data; comply with certain data privacy restrictions; take certain steps to ensure data accuracy and security; and take certain steps to ensure consumers are informed about the third party's access to covered data and the consumer's ability to revoke that access. These proposed third party obligations are set forth in proposed § 1033.421 and are discussed in more detail below.

The proposed requirement in § 1033.401(c) that the third party obtain the consumer's express informed consent to access covered data would ensure that the consumer has agreed to allow the third party to access that data on the consumer's behalf. Proposed § 1033.401(c) specifies that, to obtain express informed consent, the third party must obtain an authorization disclosure that is signed by the consumer electronically or in writing. Proposed § 1033.421(g)(1) would require the third party to provide the consumer with a copy of the signed authorization disclosure.

The SBREFA Panel recommended that the CFPB consider how to design authorization procedures that minimize costs on third parties while still achieving the CFPB's objective of helping to ensure that consumers provide express informed consent when authorizing third parties to access their information.[112] In the proposed rule, the CFPB has attempted to balance these considerations in developing the proposed authorization procedures. The SBREFA Panel also recommended that the CFPB consider how the third party authorization procedures interact with data providers' obligations to make information available.[113] As explained above, proposed § 1033.331(b) provides the circumstances in which a data provider would be required to make available covered data to a third party, including when it has received information sufficient to, among other things, confirm that the third party has followed the authorization procedures in proposed § 1033.401.

In addition, the SBREFA Panel recommended that the CFPB consider how the third party authorization procedures would work in the context of accounts with multiple owners. As discussed above in connection with proposed § 1033.331(d), the CFPB is proposing that a data provider that receives a request for covered data from a consumer that jointly holds an account or from an authorized third party acting on behalf of such a consumer must provide covered data to that consumer or authorized third party. Consistent with that proposed approach, for a jointly held account, a third party would have to comply with the third party authorization procedures in proposed § 1033.401 for the joint account holder on whose behalf the third party is requesting access. The CFPB requests comment on whether other account holders should receive authorization disclosures or otherwise be notified, or should have an opportunity to object, when an account holder authorizes a third party to access covered data from a jointly held account.

The CFPB requests comment on whether the authorization procedures in proposed § 1033.401 would be sufficient to ensure that a third party is acting on behalf of a consumer in obtaining access to covered data or whether the CFPB should consider alternative procedures. The CFPB also requests comment on whether the authorization disclosure, including the statement that the third party will comply with certain third party obligations, is sufficient to ensure that the consumer would be able provide express informed consent for the third party to access covered data on behalf of the consumer. The CFPB requests comment on whether the rule should include other protections or clarifications, such as express prohibitions on false or misleading representations or omissions to induce the consumer to consent to the third party's access to covered data.

Additionally, proposed § 1033.401 would apply a consistent set of procedures to all third parties attempting to access covered data. The CFPB understands, however, that the proposed authorization procedures might not be appropriate for some third parties, particularly smaller or non-commercial parties, that might need access to a consumer's covered data. The CFPB requests comment about whether there are certain third parties for whom proposed § 1033.401 would not be appropriate. Additionally, the CFPB requests comment about whether the proposed authorization procedures described in proposed § 1033.401 should be streamlined for certain third parties. The CFPB also requests comment on whether there are certain circumstances involving the transmission of data to third parties for which proposed § 1033.401 would not be appropriate. Finally, to help the CFPB assess the need for potential exemptions to proposed § 1033.401, the CFPB requests comment on how individuals who are not account owners currently use existing legal mechanisms to directly access covered data.

3. Authorization Disclosure (§ 1033.411)

The CFPB is proposing that third parties would be required to provide consumers with authorization disclosures, as described in proposed § 1033.401, to be authorized to access covered data on behalf of consumers. The purpose of the authorization disclosure is to provide consumers with key terms of access so they can make informed decisions about granting third party access to covered data and to therefore ensure that third parties are acting on behalf of consumers. Consistent with the SBREFA Panel recommendation that the CFPB consider how it can reduce compliance costs for third parties in providing the authorization disclosure by further specifying the content and formatting principles of the disclosure, proposed § 1033.411 specifies format and content requirements for the authorization disclosure.[114]

General Requirements (§ 1033.411(a))

Proposed § 1033.411(a) would require the third party to provide the consumer with an authorization disclosure electronically or in writing. Proposed § 1033.411(a) also sets forth the general format requirements for the authorization disclosure. Specifically, the CFPB is proposing that the authorization disclosure must be clear, conspicuous, and segregated from other material. The proposed provisions would help ensure the authorization disclosure is provided in a format that facilitates consumer understanding of the key terms of access. The CFPB has preliminarily determined that these requirements, which are consistent with standards used in other consumer financial services laws and their implementing regulations,[115] would facilitate consumer understanding of the authorization disclosure. The CFPB considered how to facilitate compliance with existing disclosure requirements, such as disclosures required by Regulation P of the GLBA, as recommended by the SBREFA Panel.[116] The CFPB has preliminarily determined that requiring the authorization

[112] *Id.* at 44.

[113] *Id.* at 43.

[114] *Id.*

[115] For example, Regulation F requires notices for validation of debts to be clear and conspicuous, which it defines as ''readily understandable'' and ''[i]n the case of written and electronic disclosures, the location and type size also must be readily noticeable and legible to consumers, although no minimum type size is mandated.'' 12 CFR 1006.34(b)(1); Regulation Z requires both open-end credit and closed-end credit disclosures to be clear and conspicuous, and it requires closed-end credit disclosures to grouped together and segregated from everything else. 12 CFR 1026.5(a)(1)(i), 1026.17(a)(1).

[116] SBREFA Panel Report at 43.

disclosure to appear segregated from other required disclosures would help ensure consumers read and understand the authorization disclosure by avoiding overwhelming consumers with extraneous information and diluting the informational value of the authorization disclosure.

The CFPB seeks comment on whether these formatting requirements would aid consumer understanding and whether additional requirements should be included in the rule. Specifically, the CFPB seeks comment on whether the rule should contain more prescriptive requirements, such as a word count or reading level, and whether additional requirements are needed to ensure that the authorization disclosure content is provided in a standalone format. The CFPB also seeks comment on whether the rule should include a timing requirement, such as a requirement that the authorization disclosure be provided close in time to when the third party would need consumer data to provide the product or service. Additionally, the CFPB seeks comment on whether indicia that the authorization disclosure is clear, conspicuous, and segregated from other material should include utilizing a format or sample form that is set forth in a qualified industry standard.

The CFPB considered proposing specific guidance for accessibility of the authorization disclosure for individuals with disabilities but preliminarily determined that the Americans with Disabilities Act (ADA) and its implementing regulations would already require that the authorization disclosure be provided in an accessible format.[117] The CFPB seeks comment on whether the rule should contain requirements relating to the accessibility of the authorization disclosure.

Authorization Disclosure Content (§ 1033.411(b))

Proposed § 1033.411(b) would require inclusion of the following key terms of access in the authorization disclosure: (1) the name of the third party that will be authorized to access covered data pursuant to the third party authorization procedures in proposed § 1033.401; (2) the name of the data provider that controls or possesses the covered data that the third party seeks to access on the consumer's behalf; (3) a brief description of the product or service that the consumer has requested the third party provide and a statement that the third party will collect, use, and retain the consumer's data only for the purpose of providing that product or service to the consumer; (4) the categories of covered data that will be accessed; (5) the certification statement described in proposed § 1033.401(b); and (6) a description of the revocation mechanism described in proposed § 1033.421(h)(1). In addition to the authorization disclosure content requirements in proposed § 1033.411(b), proposed § 1033.431(b) would require the authorization disclosure to include the name of any data aggregator that will assist the third party with accessing covered data and a brief description of the services the data aggregator will provide.

In proposing content requirements for the authorization disclosure, the CFPB aims to strike a balance between providing consumers with sufficient information to enable informed consent to data access and keeping the disclosure short to increase the likelihood that consumers will read and understand it. The CFPB preliminarily concludes that the proposed requirements would be important for consumers to understand the terms of data access and would help ensure that third parties accessing covered data are acting on behalf of consumers by enabling informed consent.

The CFPB seeks comment on any obstacles to including the proposed authorization disclosure content and on whether additional content is needed to ensure consumers have enough information to provide informed consent. Specifically, the CFPB seeks comment on whether the rule should include any additional requirements to ensure: (1) the consumer can identify the third party and data aggregator, such as by requiring inclusion of legal names, trade names, or both; (2) the description of the consumer's requested product or service is narrowly tailored and specific such that it accurately describes the particular product or service that the consumer has requested; (3) the consumer can locate the third party obligations, such as by requiring a link to the text of proposed § 1033.421; and (4) the consumer can readily understand what types of data will be accessed, such as by requiring third parties to refer to the covered data they will access using the categories in proposed § 1033.211. The CFPB also seeks comment on alternative disclosures that would achieve the CFPB's objective, and on whether the authorization disclosure should include additional content such as the names of other parties with whom data may be shared, the third party's contact information, or how frequently data will be collected from the consumer's account(s).

Language Access (§ 1033.411(c))

Proposed § 1033.411(c)(1) would require the authorization disclosure to be in the same language as the communication in which the third party conveys the authorization disclosure to the consumer and would require any translation of the authorization disclosure to be complete and accurate. Under proposed § 1033.411(c)(2), if the authorization disclosure is in a language other than English, it would be required to include a link to an English-language translation and would be permitted to include links to translations in other languages. Additionally, if the authorization disclosure is in English, it would be permitted to include links to translations in other languages.

Consumers with limited English proficiency may benefit from receiving a complete and accurate translation of the authorization disclosure, and some third parties may want to respond to the needs of consumers with limited English proficiency using translated disclosures. At the same time, the CFPB has preliminarily determined that requiring third parties to identify such consumers and provide complete and accurate translations in the myriad languages that consumers speak may impose a significant burden on third parties. Accordingly, proposed § 1033.411(c)(1) would require the authorization disclosure to be in the same language as the communication in which the third party conveys the authorization disclosure to the consumer, and proposed § 1033.411(c)(2) would permit, but not require, the authorization disclosure to include links to translations of the authorization disclosure in languages other than English.

Some consumers who receive translated disclosures may also want to receive English-language disclosures, either because they are fluent in English, or because they wish to share the disclosures with an English-speaking family member or assistance provider. English-language disclosures may also allow consumers to confirm the accuracy of the translation. For these reasons, proposed § 1033.411(c)(2) would require that an authorization disclosure in a language other than English include a link to an English-language translation.

The CFPB seeks comment on whether the proposed language access provisions would adequately decrease the risk that consumers with limited English proficiency may be given information in a manner that impedes informed consent while not imposing unduly burdensome requirements on third

[117] *See* 42 U.S.C. 12132, 12182(a); 28 CFR 35.130, 35.160(a), 36.201, 36.303(c).

parties. The CFPB also seeks comment on whether the rule should include any requirements regarding consistency of the language of the authorization disclosure and other communications related to the product or service provided by the third party, and whether the rule should clarify how language access requirements apply if the consumer has not engaged with the third party electronically.

4. Third Party Obligations (§ 1033.421)

Proposed § 1033.421 would describe the obligations to which third parties must certify to be authorized to access covered data. The CFPB is proposing these certification requirements to ensure that third parties accessing covered data are acting on behalf of the consumer. The proposal would require third parties to certify to limit their collection, use, and retention of covered data, including limiting the duration and frequency of collection and the provision of data to other third parties, to what is reasonably necessary to provide the consumer's requested product or service. Under proposed § 1033.421, third parties would certify to a maximum duration of collection of one year after the consumer's authorization unless the consumer reauthorizes the third party's access. Third parties would also be required to certify to provide consumers a simple way to revoke access, to maintain certain accuracy and data security obligations, and to ensure consumers have access to information about the third party's authorization to access data. Proposed § 1033.421 would also require a certification related to providing covered data to another third party and would provide requirements that apply when the third party is using a data aggregator.

General Standard To Limit Collection, Use, and Retention (§ 1033.421(a))

Under proposed § 1033.421(a)(1), third parties would be required to limit collection, use, and retention of covered data to what is reasonably necessary to provide the consumer's requested product or service. Proposed § 1033.421(a)(2) would provide that, for purposes of the limitation in § 1033.421(a)(1), certain activities are not part of, or reasonably necessary to provide, any other product or service. Under the proposal, third parties would seek and obtain consumer authorization to access covered data only as reasonably necessary for the provision of the product or service that the consumer requested, and not for uses that are secondary to that purpose.

In the SBREFA Outline, the CFPB stated that it was considering proposing that third parties limit collection, use, and retention of covered data to what is reasonably necessary to provide the consumer's requested product or service.[118] The SBREFA Panel recommended the CFPB consider options for collection, use, and retention that do not unnecessarily restrict third parties' ability to provide consumers with requested products or services.[119] The SBREFA Outline also requested feedback on potential approaches to specifically limit third parties' use of covered data.[120] One option would not have permitted third parties to use covered data for purposes not reasonably necessary to provide the consumer's requested product or service (secondary use).[121] Other options would have allowed third parties to ask consumers to opt in to or opt out of secondary uses, including an approach that would not have permitted third parties to ask consumers to opt in to certain ''high-risk'' secondary uses.[122] The SBREFA Panel recommended that the CFPB consider where it can give flexibility to third parties while still achieving its consumer protection objectives.[123]

The proposed limit on collection, use, and retention in § 1033.421(a) is designed to ensure that, consistent with carrying out the objectives of CFPA section 1033, third parties accessing covered data are acting on behalf of consumers, thereby ensuring that their collection, use, and retention of covered data proceeds in alignment with consumer control and truly informed consent. Specifically, the proposal is aimed at ensuring that third parties access covered data for the consumer's benefit, that consumers retain meaningful control over their data when authorizing third party access to that data, and that consumers are best-positioned to understand the scope of that authorization and not reluctantly acquiescing to data collection, use, and retention that they do not want. Further, the CFPB notes that covered data that third parties would collect, use, and retain pursuant to consumer authorization includes sensitive financial data that might expose consumers to fraud or identity theft if it were exposed.[124] The proposed limitation in § 1033.421(a) is designed to ensure that third parties act on behalf of consumers when accessing that sensitive data. For the reasons described below, the CFPB preliminarily concludes that proposed § 1033.421(a), including the proposal to prohibit secondary uses of covered data, would appropriately ensure that third parties accessing covered data are acting on behalf of consumers, while providing sufficient flexibility to third parties to provide consumers with their requested products or services.

The CFPB seeks comment on whether there are technology-based solutions that could apply the appropriate proposed third party requirements automatically. For example, the CFPB seeks comment on whether such solutions are available that could assist third parties with automatically terminating access after the third party's authorization has ended or with limiting the use of covered data consistent with the limitation described in proposed § 1033.421(a). If such solutions are available, the CFPB requests comment on whether to require third parties to integrate these capabilities.

Reasonably Necessary

Proposed § 1033.421(a)(1) would provide that third parties must limit collection, use, and retention of covered data to what is reasonably necessary to provide the consumer's requested product or service. The ''reasonably necessary'' standard in proposed § 1033.421(a)(1) is similar to standards in several data privacy frameworks that minimize third parties' collection, use, and retention of data.[125] The proposed ''reasonably necessary'' standard is designed to ensure that the consumer is the primary beneficiary of any authorized data access, and that accordingly the resulting collection, use and retention of data proceeds in alignment with true consumer control and informed consent.

Congress intended that, through CFPA section 1033, the consumer would have the right to access their covered data for their own benefit. As a representative acting on behalf of the consumer, a third

[118] SBREFA Outline at 41.

[119] SBREFA Panel Report at 44.

[120] SBREFA Outline at 43.

[121] *Id.*

[122] *Id.*

[123] SBREFA Panel Report at 45.

[124] These sensitive data also could impact persons or entities besides the consumer from whom they are sourced, especially when collected, used, and retained in large amounts, such as where the data are matched with other consumer data sets.

[125] *See, e.g., Competition and Consumer (Consumer Data Right) Rules 2020* div. 1.3 (Austl.) (minimizing consumer data requests to what is ''reasonably needed''); Reg. 2016/679, art. 5(1)(c), 2016 O.J. (L 119) 7 (EU) (''Personal data shall be . . . limited to what is necessary in relation to the purposes for which they are processed.''); Colo. Rev. Stat. section 6–1–1308(4) (2021) (''A controller shall not process personal data for purposes that are not reasonably necessary to or compatible with the specified purposes for which the personal data are processed, unless the controller first obtains the consumer's consent.'')

party authorized to access the consumer's covered data must ensure that the consumer is the primary beneficiary of such access. Third parties can benefit from access as well, but only by collecting, using and retaining data as reasonably necessary for the primary purpose for which the consumer entered the market. The CFPB preliminarily concludes that collection, use, or retention of covered data beyond what is reasonably necessary to provide the consumer's requested product or service risks positioning the third party as the primary beneficiary of data access and, generally, will not be consistent with meaningful consumer control over data collection, use and retention.

Further, as a representative acting on behalf of the consumer, third parties accessing covered data should ensure consumers are best positioned to understand the scope of their authorizations and their effect on third party collection, use, and retention. The CFPB preliminarily concludes that collection, use, and retention of covered data beyond what is reasonably necessary for the product or service the consumer requested would undermine the consumer's understanding of the authorizations they provided. The CFPB also preliminarily concludes that collection, use, and retention of covered data under these circumstances would undermine a consumer's ability to control their data.

The CFPB considered a number of alternatives to the ''reasonably necessary'' standard, including by evaluating data collection, use, and retention limitations in other data privacy regimes. For example, the CFPB considered whether data collection, use, and retention should be limited to what is ''strictly necessary,'' ''adequate,'' ''relevant,'' or ''legitimate.'' The CFPB has preliminarily determined that, among other standards the CFPB considered, a ''reasonable necessity'' standard would be flexible enough that third parties could use data for a variety of purposes to provide the product or service the consumer requested, but would still sufficiently minimize third party collection, use, and retention to ensure third parties accessing covered data are acting on behalf of the consumer.

### Consumer's Requested Product or Service

Proposed § 1033.421(a)(1) is also designed to carry out the objectives of CFPA section 1033 by limiting collection, use, and retention of covered data to the product or service the consumer requested.

Consumers generally go into the market seeking the core function of a product or service and, when authorizing data access, intend for their data to be accessed for that purpose. However, third parties can significantly benefit from accessing consumers' covered data, and consumers often do not know about various data uses,[126] do not want companies to use their data broadly,[127] and also generally lack bargaining power to engage in the market while protecting their data privacy.[128] As a result, third parties often broadly collect, use, and retain covered data in ways that are for their own benefit. To ensure that entities only collect, use, and retain data on consumers' behalf, pursuant to informed consent, the CFPB is limiting data collection, use, and retention to what is reasonably necessary to provide a requested product or service. To avoid circumvention of that standard, the CFPB will treat the product or service as the core function that the consumer sought in the market and that accrues to the consumer's benefit. For example, the scope of the product or service is not defined by disclosures, which could be used to create technical loopholes by expanding the scope of the product or service the consumer requested to include any activity the company chooses that would often benefit the third party and not the consumer. The CFPB preliminarily determines that the proposed approach would help ensure that third parties act for the benefit of consumers, that consumers retain control over their authorizations for data access, and that consumers are best positioned to provide meaningfully informed consent to third party collection, use, and retention of their covered data.[129]

### Targeted Advertising, Cross-Selling, and Data Sales

To further ensure that third parties accessing covered data are collecting, using, and retaining that data only to provide the product or service the consumer requested, proposed § 1033.421(a)(2) provides that, for purposes of proposed § 1033.421(a)(1), certain activities—targeted advertising, cross-selling of other products or services, or the sale of covered data—are not part of, or reasonably necessary to provide, any other product or service. The CFPB has preliminarily determined that when the consumer goes into the market seeking such other products or services—such as a loan, a checking account, or a personal financial management tool—the use of data for the purposes identified in proposed § 1033.421(a)(2) is, as a general matter, not for the primary benefit of the consumer.[130] Therefore, the CFPB

[126] *See* April Falcon Doss, *Cyber Privacy,* at 61 (BenBella Books, Inc. 2020) (explaining that it is difficult for consumers to understand what they are consenting to, how their data might be collected and used, how it might be sold to others, what the impacts of aggregation are, etc.); Ramy El-Dardiry *et al., Brave New Data: Policy Pathways for the Data Economy in an Imperfect World,* CPB Netherlands Bureau for Econ. Policy Analysis at 10 (2021), *https://www.cpb.nl/sites/default/files/omnidownload/CPB-uk-Policy-Brief-Brave-new-data.pdf* (''Consumers cannot see what companies are doing with their data, nor can they read all of the data terms of use or oversee the consequences. Companies are able to exploit their strong informational position by manipulating the preferences of consumers and enticing them to . . . sell more data.'')

[127] *See generally* Brooke Auxier *et al., Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information,* Pew Rsch. Ctr. (Nov. 15, 2019), *https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/* (stating that 81 percent of consumers feel the risks outweigh the benefits of companies collecting data about them and that 79 percent of consumers are very or somewhat concerned about how companies use data).

[128] *See* Yosuke Uno *et al., The Economics of Privacy: A Primer Especially for Policymakers,* at 16, Bank of Japan Working Paper No. 21–E–11 (Aug. 2021), *https://www.boj.or.jp/en/research/wps_rev/wps_2021/data/wp21e11.pdf* (stating that consumers cannot ''truthfully express the degree of privacy protection they desire,'' because companies put consumers ''in a situation where it becomes optimal for them not to choose stronger privacy protection, even though they prefer it''); Ramy El-Dardiry *et al., Brave New Data: Policy Pathways for the Data Economy in an Imperfect World,* at 10, CPB Netherlands Bureau for Econ. Policy Analysis (2021), *https://www.cpb.nl/sites/default/files/omnidownload/CPB-uk-Policy-Brief-Brave-new-data.pdf* (''People are consciously, and unconsciously, providing data, *e.g.,* when they consume a digital service . . . but often have limited control over or insight into how their data are used by data processors. This unequal balance of power has several causes: market power, information asymmetry and behavioural biases. As a result, mainly the data processors determine, within the legal framework, which personal data are collected and how they are used, rather than the party supplying the data.'')

[129] *See generally* Brooke Auxier *et al., Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information,* Pew Rsch. Ctr. (Nov. 15, 2019), *https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/* (describing findings that only ''one-in-five adults overall say they always (9%) or often (13%) read a company's privacy policy before agreeing to it,'' and that 59 percent say ''they understand very little or nothing about'' what companies do with consumer data they collect''); Neil Richards & Woodrow Hartzog, *The Pathologies of Digital Consent,* 96 Wash. U. L. Rev. 1461, 1479 (2019), *https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6460&context=law_lawreview* (''[F]ar too often, far too many people in the digital environment have little to no idea about what data practices or exposure that they are consenting to.'')

[130] Accordingly, the proposed rule would not prevent third parties from engaging in an activity

Continued

preliminarily determines that it would not be consistent with carrying out the objectives of CFPA section 1033 for a third party to consider collection, use, or retention of data for these purposes to be within the scope of the consumer's requested product or service for purposes of proposed § 1033.421(a).

Specifically, the CFPB understands from stakeholder feedback and research that targeted advertising, cross-selling, and data sales do not primarily benefit consumers in most cases for various reasons.[131] The CFPB understands that these activities are pervasive in the market,[132] and that consumers often lack choices about whether their data will be used for these purposes.[133] Stakeholder feedback suggests that consumers often do not expect targeted advertising, cross-selling, and data sales to be part of the product or service they receive or understand these activities' potential for harm. In contrast, third parties can greatly benefit from these activities. Therefore, the CFPB has preliminarily determined that when a third party combines targeted advertising, cross-selling, and data sales with any other consumer-requested products or services, it is generally doing so for its own benefit. Combining these activities with other features of a product or service may also interfere with consumers' ability to sufficiently control their data and understand the scope of their authorizations.

Proposed § 1033.421(a)(2) is designed to impose a bright-line rule with respect to targeted advertising, cross-selling of other products or services, and the sale of covered data. However, proposed § 1033.421(a)(2) is not meant to be an exhaustive list of activities that should not be considered part of any other requested product or service, such as data activities described in terms and conditions that are neither the core function that the consumer went into the market to obtain or reasonably necessary to achieve that function. The CFPB also seeks comment on whether activities other than those identified in proposed § 1033.421(a)(2) should be included in the activities listed in proposed § 1033.421(a)(2).

### Limitations on Collection of Covered Data (§ 1033.421(b))

Proposed § 1033.421(b) contains third party obligations related to collection of covered data. As described below, as a condition of being authorized to access covered data on a consumer's behalf, the third party would be required to (1) limit its collection of covered data, including the scope of covered data, to what is reasonably necessary to provide the consumer's requested product or service; (2) limit the duration of collection of covered data to the maximum durational period; (3) obtain a new authorization from the consumer, in a reasonable manner, to collect covered data beyond the maximum durational period; and (4) abide by certain limitations on collection, use, and retention of covered data beyond the maximum durational period if the third party does not obtain a new authorization from the consumer.

Specifically, proposed § 1033.421(b)(1) would provide that, consistent with proposed § 1033.421(a)(1), third parties must limit their collection—including the scope of covered data collected and the duration and frequency of collection of covered data—to what is reasonably necessary to provide the consumer's requested product or service. The SBREFA Panel recommended that the CFPB consider options to limit duration and frequency of third party collection of consumer data that do not unnecessarily restrict third parties' ability to provide products or services requested by consumers. The Panel also recommended that the CFPB consider the option of limiting third party collection to the duration and frequency necessary based on the product or service requested by consumers. Third parties often obtain significantly more consumer data, for longer periods, than is necessary to provide requested products and services to consumers.[134] The CFPB understands that ongoing data collection can undermine consumer expectations or understanding, and in some cases, can go beyond the consumer's informed consent.[135] The CFPB has preliminarily determined that limiting the scope of data collected, and duration and frequency of data collection, to what is reasonably necessary to provide the consumer's requested product or service would reduce the potential for harm associated with ongoing data collection.

Proposed § 1033.421(b)(1) is responsive to the SBREFA Panel recommendations that the CFPB consider options to limit duration and frequency of third party collection of consumer data that do not unnecessarily restrict third parties' ability to provide products or services requested by consumers, and consider the option of

described in proposed § 1033.421(a)(2) as a stand-alone product. To the extent that the core function that the consumer seeks out in the market is such an activity, a third party could potentially provide that core function to the consumer consistent with, and subject to, the terms of the proposed rule. Any such offering, of course, would also be subject to all other applicable laws, including the CFPA's prohibition on unfair, deceptive and abusive practices.

[131] *See, e.g.,* Rodney John Garratt & Michael Junho Lee, *Monetizing Privacy,* at 4, Fed. Rsrv. Bank of N.Y. Staff Rep. No. 958 (Jan. 2021), *https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr958.pdf* (''Most of the gains from consumer data do not go to consumers.''); Raheel A. Chaudhry & Paul D. Berger, *Ethics in Data Collection and Advertising,* at 1, 5–6, 2 GPH Int'l J. of Bus. Mgmt. (2019), *http://www.gphjournal.org/index.php/bm/article/view/240/110* (stating that targeted advertising and data monetization allow companies to collect, use, and retain ''consumer data without the user being any the wiser,'' and that targeted advertising and data monetization elevate risk the data will be breached or that malicious parties will purchase the data on the secondary market).

[132] *See* Rishbah Kirpalani & Thomas Philippon, *Data Sharing and Market Power With Two-Sided Platforms,* at 2, Nat'l Bureau of Econ. Rsch. Working Paper No. 28023 (Dec. 2020), *http://www.nber.org/papers/w28023* (''Large internet platforms have changed the way market participants interact. One reason for this is the extraordinary ability of platforms . . . to gather and analyze large amounts of data. Platforms use this data to enable better matching between participants as well as for commercial purposes, including sale to third parties.''); Daron Acemoglu *et al., Too Much Data: Prices and Inefficiencies in Data Markets,* at 1, Nat'l Bureau of Econ. Rsch. Working Paper No. 26296 (Sept. 2019), *https://www.nber.org/papers/w26296* (''The data of billions of individuals are currently being utilized for personalized advertising or other online services. The use and transaction of individual data are set to grow exponentially in the coming years with more extensive data collection from new online apps and integrated technologies such as Internet of Things and with the more widespread applications of artificial intelligence (AI) and machine learning techniques.'')

[133] *See, e.g.,* Yan Lau, *Economic Issues: A Brief Primer on the Economics of Targeted Advertising,* at 9–10, Bureau of Econ., Fed. Trade Comm'n (2020), *https://www.ftc.gov/system/files/documents/reports/brief-primer-economics-targeted-advertising/economic_issues_paper_-_economics_of_targeted_advertising.pdf* (describing that, while consumers can benefit from targeted advertising, there are multiple consumer harms that result from targeted advertising, such as: consumers underestimating the ''degree and consequence of the personal data collection websites carry out in exchange for providing free digital goods and services;'' consumers might feel the benefits of targeted advertising do not outweigh the ''perceived intrusiveness of the advertising''; and consumers might experience harms related to data breaches or misuse of their data).

[134] *See generally* Itay P. Fainmesser *et al., Digital Privacy,* 96 Mgmt. Sci. 3157, 3158 (2022), *https://pubsonline.informs.org/doi/10.1287/mnsc.2022.4513* (describing broad collection and use of consumer data to improve digital businesses and extract increased profits); Daron Acemoglu *et al., Too Much Data: Prices and Inefficiencies in Data Markets,* at 3, Nat'l Bureau of Econ. Rsch. Working Paper No. 26296 (2019), *https://www.nber.org/papers/w26296* (describing a lack of balance in the market between what consumers authorize and what data are collected and how data are used).

[135] *See generally* April Falcon Doss, *Cyber Privacy,* at 50 (BenBella Books, Inc. 2020) (''First, data asymmetry is endemic. Data subjects rarely know as much as data holders do about what's being collected and how it's being used. Second, data subjects seldom have complete visibility into, or a full appreciation of, the complex interactions among the many ways that data can be used. Third, even with that information and appreciation, consumers find their choices are limited.'')

limiting third party collection to the duration and frequency necessary based on the product or service requested by consumers.[136]

Maximum Duration

Proposed § 1033.421(b)(2) would provide that third parties must limit the duration of collection of covered data to a maximum period of one year after the consumer's most recent reauthorization.

In the SBREFA Outline, the CFPB stated that it was considering proposing that third party authorization to access covered data would be limited to a maximum period.[137] The CFPB also asked whether it should consider other provisions related to a maximum durational period, including a proposal that would require all authorized third parties to obtain reauthorization on the same day or during the same month each year, for all consumers.[138] The CFPB received a range of feedback related to limiting third party authorization to a maximum durational period. Many commenters were generally supportive of the approach but suggested variations, such as not allowing third parties to collect consumer data longer than necessary to satisfy a legitimate purpose, or requiring third parties to end their collection of consumer data after a period of consumer inactivity, *i.e.,* ''dormancy.'' Other commenters supported a maximum duration on collection, citing concern that limiting collection of consumer data to what is reasonably necessary for the product or service, on its own, would not go far enough to ensure that third parties adhere to consumer preferences related to privacy, because third parties could wrongfully extend collection without sufficient bases. Other commenters stated that a maximum limitation on duration would result in undesired loss of services for consumers or might otherwise frustrate consumer intent.

The CFPB recognizes that some products or services, like bill pay, overdraft prevention, or personal financial management, require long term access. For products or services that require ongoing data collection, the general limitation standard may not be sufficient to ensure that third parties act on behalf of consumers when collecting data over the longer term. For example, consumer needs or expectations may change in ways that may not be apparent to the third party, as could happen when a consumer stops using a product or service and forgets that they authorized third party data access. In other cases, consumers may have attempted to end third party access without actually doing so, such as when a consumer deletes an application from a device with the intent of stopping data collection, use and retention. At the same time, there will be other cases where consumers request products or services that require long-term data collection and want to authorize ongoing third party data access. In those cases, it would frustrate consumer intent and burden third parties to terminate third party access or require frequent reauthorizations.

The CFPB has preliminarily determined that requiring third parties to limit data collection to a maximum durational period would effectively account for the concern that long-term data collection may not align with consumer expectations in some cases. Under proposed § 1033.421(b)(2), even if consumers do not request revocation as described in proposed § 1033.421(h), third party authorization would end after the maximum period ends and the consumer does not reauthorize. The CFPB has also preliminarily determined that one year is an appropriate period for the maximum duration of collection. This approach could provide an effective check against data collection that consumers no longer need or want, while avoiding burdens associated with shorter maximum durational periods, such as frequent requests for reauthorization.

The CFPB considered whether to propose an explicit limit on duration related to dormancy, as suggested by some commenters. The CFPB has preliminarily determined that a dormancy approach could be burdensome for third parties to operationalize as they may not have a clear view into a consumer's activity, and that some of the benefits of a dormancy period could be achieved by a maximum durational period. The CFPB seeks comment on dormancy, including about how a dormancy limitation might work in comparison to a uniform maximum duration, and how dormancy might be operationalized.

Reauthorization

Proposed § 1033.421(b)(3) would require that, to collect covered data beyond the one-year maximum period, the third party will obtain a new authorization from the consumer pursuant to proposed § 1033.401 no later than the anniversary of the most recent authorization from the consumer. Under that proposal, the third party would be permitted to ask the consumer for a new authorization pursuant to proposed § 1033.401 in a reasonable manner. Under the proposal, indicia that the new authorization request is reasonable include its conformance to a qualified industry standard.

In the SBREFA Outline, the CFPB described an approach in which, after the maximum durational period ends, third parties would need to seek reauthorization for continued access, and many commenters supported that approach.[139] The SBREFA Panel recommended the CFPB consider options for reauthorization requirements after the expiration of any durational limitations.[140]

The CFPB has preliminarily determined that consumers would benefit from the ability to provide annual authorizations for third party data access. Annual authorizations would provide a yearly check-in for consumers to take or leave third party data access for products or services they have previously authorized. As such, proposed § 1033.421(b)(3) would allow third parties to seek from consumers new authorizations before the maximum durational period ends to avoid service interruptions or added friction in consumers' user experience with the third party.

Further, the CFPB has preliminarily determined that third parties might need to seek new authorizations multiple times or otherwise explain to consumers why they are seeking new authorizations. The CFPB understands, however, that third parties might unnecessarily burden consumers with many requests for authorization or otherwise attempt to obtain consumer authorizations for third party data access that consumers no longer want. To account for both of these concerns, proposed § 1033.421(b)(3) would allow third parties to seek new authorizations, in a reasonable manner, no later than the anniversary of the consumer's initial authorization. The CFPB has also preliminarily determined that additional guidelines related to reauthorization requests may facilitate compliance for third parties. As such, proposed § 1033.421(b)(3) would provide that indicia that a new authorization request is reasonable include conformance with a qualified industry standard on the subject.

Effects of Maximum Duration (§ 1033.421(b)(4))

Finally, proposed § 1033.421(b)(4) provides that, if the consumer does not provide a new authorization before the maximum durational period ends, third

[136] SBREFA Panel Report at 44.

[137] SBREFA Outline at 41.

[138] *Id.* at 42.

[139] *Id.* at 41.

[140] SBREFA Panel Report at 44.

parties will (1) no longer collect covered data pursuant to the most recent authorization and (2) no longer use or retain covered data that was previously collected pursuant to the most recent authorization unless use or retention of that covered data remains reasonably necessary to provide the consumer's requested product or service. As noted above, proposed § 1033.421(b)(2) would impose a maximum durational period of one year as a check against data collection that consumers no longer need or want. Consistent with proposed § 1033.421(b)(2), proposed § 1033.421(b)(4)(i) specifies that, once the maximum durational period ends and the consumer does not provide a new authorization, the third party may no longer collect covered data pursuant to the consumer's authorization.

Proposed § 1033.421(b)(4)(ii) specifies, consistent with the general limitation in proposed § 1033.421(a), that when the maximum durational period ends and the consumer does not provide a new authorization, the third party may no longer use or retain covered data that was previously collected unless use or retention remains reasonably necessary to provide the consumer's requested product or service under proposed § 1033.421(a). In the current market, third parties use and retain consumer data for reasons unrelated to providing a consumer-requested product or service, including after a consumer no longer receives the product or service from the third party. Such residual use and retention, which seldom occurs with consumer awareness, can result in significant privacy and security risks to consumers and can undermine the consumer's ability to control access to their covered data. Proposed § 1033.421(b)(4)(ii) would address this concern by making clear that the general limitation on use and retention contained in proposed § 1033.421(a) applies to use and retention of covered data after a one-year maximum durational period ends and the consumer does not provide a new authorization.

Proposed § 1033.421(b)(4)(ii) recognizes that, while use and retention of covered data will not be reasonably necessary for most purposes after the maximum durational period ends and the consumer does not provide a new authorization, it may continue in some circumstances. The consumer's failure to reauthorize access beyond the maximum period of one year, all other things being equal, indicates that the existing authorization, without more, no longer supports use or retention of data collected under its terms. In the normal course, therefore, application of the general standard in proposed § 1033.421(a) will call for the third party, after its failure to secure reauthorization, to stop using and retaining data collected pursuant to the earlier authorization. However, specific circumstances may justify continued use and or retention of some or all such data under that standard, even as new collection, use and retention stops. For example, a subpoena could require the retention, beyond the maximum period, of specific data collected in that period; meeting such legal requirements can continue to remain reasonably necessary even if only in connection with providing the product prior to the expiration of the maximum period. Similarly, the consumer could provide a clear, affirmative indication that they want to continue to use the product beyond the maximum period in a manner supported by the use and retention of data collected prior to expiration of that period. In that context, use and retention of some or all of the data could meet the general standard in proposed § 1033.421(b)(4)(ii) even as the consumer no longer makes use of the product in any manner that would require continued data collection.

The CFPB has preliminarily determined that proposed § 1033.421(b)(4)(ii) provides third parties with sufficient flexibility to address circumstances in which continued use or retention of previously collected data might be justified under the general standard in proposed § 1033.421(a), while ensuring that consumer data are not used and retained, beyond the expiration of the maximum period without reauthorization, in a manner that does not properly reflect the control afforded the consumer under that same general standard. The CFPB seeks comment about these circumstances and whether, following the end of a maximum durational period, additional protections for consumers or flexibilities for third parties are warranted.

### Limitations on Use of Covered Data (§ 1033.421(c))

Under proposed § 1033.421(a), use of covered data that is not reasonably necessary to provide the consumer's requested product or service—*i.e.,* secondary uses—would not be permitted as part of the third party's authorization to access the consumer's covered data. Proposed § 1033.421(c) specifies that, in addition to limiting the third party's own use of covered data, third parties would not be able to provide covered data to other third parties unless doing so is reasonably necessary to provide the consumer's requested product or service. For clarity, proposed § 1033.421(c) would include the following examples of uses of covered data that would be permitted as reasonably necessary: (1) uses that are specifically required under other provisions of law, including to comply with a properly authorized subpoena or summons or to respond to a judicial process or government regulatory authority; (2) uses that are reasonably necessary to protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability; and (3) servicing or processing the product or service the consumer requested.

As described above, the SBREFA Panel recommended that the CFPB consider how the secondary use limitation would apply in certain use cases and with respect to certain business activities.[141] For example, the Panel recommended that the CFPB consider options that would permit uses of data (including de-identified or anonymized data, as discussed below) for product maintenance or improvement, if appropriate consumer protections can be put in place.[142] The SBREFA Panel also recommended that the CFPB consider where it can give flexibility to third parties while still achieving its consumer protection objectives.[143]

The CFPB is proposing the examples in § 1033.421(c) to provide third parties with additional clarity on how the limitation standard would apply with respect to certain business activities. The CFPB requests feedback on whether the final rule should include other examples of business activities that are reasonably necessary to provide consumer requested products and services.

The CFPB also requests feedback on whether the final rule should permit third parties to solicit consumers' opt-in consent to some secondary uses of consumer data to provide flexibility to third parties while maintaining important consumer protections. For example, the CFPB requests feedback on whether the final rule should permit third parties to solicit consumers' opt-in consent to secondary uses as part of a third party's authorization to access data, while requiring third parties to certify not to use covered data for certain higher-risk secondary uses. In addition, the CFPB requests feedback on whether the final rule should permit third parties to solicit a consumer's opt-

[141] *Id.* at 44–45.

[142] *Id.* at 44.

[143] *Id.* at 44–45.

in consent to engage in secondary uses with de-identified data, and if so, what de-identification standard the rule should provide.[144] The CFPB also requests feedback on how any opt-in approach could be structured to ensure that consumers are providing express informed consent to any secondary data uses, and whether the CFPB's proposed authorization disclosure is an appropriate vehicle for soliciting granular consumer choices about data use, such as through a secondary use opt-in mechanism. Finally, the CFPB requests feedback on how opt-in mechanisms could be implemented to prevent third parties from using ''dark patterns'' or deceptive practices aimed at soliciting consumer consent.

Accuracy (§ 1033.421(d))

Proposed § 1033.421(d) would require third parties to establish and maintain written policies and procedures that are reasonably designed to ensure that covered data are accurately received from a data provider and accurately provided to another third party, if applicable. Under proposed § 1033.421(d), a third party would have flexibility to determine its policies and procedures in light of the size, nature, and complexity of its activities, but the third party would be required to commit to periodically reviewing its policies and procedures and updating them as appropriate to ensure their continued effectiveness. Proposed § 1033.421(d)(3) provides two elements that third parties should consider when developing their policies and procedures: (1) accepting covered data in the format required by § 1033.311(b), and (2) addressing information provided by a consumer, data provider, or another third party regarding inaccuracies in the covered data. Finally, proposed § 1033.421(d)(4) states that indicia that a third party's policies and procedures are reasonable include whether the policies and procedures conform to a qualified industry standard regarding accuracy.

The CFPB has preliminarily determined that consumers would benefit from accuracy requirements for third parties. Third parties that fail to accurately receive data from a data provider, or fail to accurately provide data to another third party, would limit the effectiveness of the data access right fundamental to CFPA section 1033. Such inaccuracies would also impair the development of an innovative, competitive market for alternative consumer financial products and services. Third party accuracy requirements would also benefit third parties that rely on intermediaries to facilitate consumer-authorized access.

Proposed § 1033.421(d) would limit the scope of a third party's required policies and procedures to the accuracy of transmission—receiving covered data from a data provider and, if applicable, subsequently providing it to another third party. The CFPB has several reasons for proposing this scope. First, existing Federal law already protects consumers against some of the most harmful inaccuracies in the use of financial data. For example, FCRA imposes accuracy requirements on the information provided by consumer reporting agencies; Regulation E protects consumers against unauthorized electronic fund transfers and other errors; and Regulation Z protects consumers against certain billing and servicing errors.[145] Second, most SBREFA comments addressing accuracy focused on transmission of data from data providers to third parties as the source of accuracy issues. In adopting a similar focus, proposed § 1033.421(d) would reflect this feedback. Finally, the CFPB understands that many third parties are small entities, and accuracy requirements covering all aspects of the collection, use, and provision of consumer data might be overly burdensome.

By requiring flexible standards rather than prescriptive rules, proposed § 1033.421(d) is designed to adapt to changing conditions and minimize the burden on third parties. Proposed § 1033.421(d)(1) would provide that a third party has flexibility to determine its policies and procedures in light of the size, nature, and complexity of its activities. Proposed § 1033.421(d)(3) would offer elements that a third party should consider when designing its policies and procedures. Although reasonable policies and procedures would address many elements, the two identified in the proposal are especially relevant to an assessment of whether a third party's policies and procedures are reasonable. First, given the SBREFA feedback identifying transfer of data from a data provider as the primary source of inaccuracies, policies and procedures would likely be unreasonable if they failed to ensure that a third party could accept data in the format in which data providers made it available. And addressing information, such a dispute or notice of inaccuracy, from a consumer, data provider, or another third party is relevant to the reasonableness of a third party's policies and procedures because these other parties are likely to have information about whether data has been accurately transferred to or from the products or services they are using or providing. The implementation of these elements would vary according to a third party's size or market environment. For example, a data aggregator that supports a large number of additional third parties might require more extensive policies and procedures to reasonably ensure accuracy than a third party that acts only as a data recipient.

Proposed § 1033.421(d)(4) states that indicia that a third party's policies and procedures are reasonable include whether the policies and procedures conform to a qualified industry standard regarding accuracy. A qualified industry standard regarding accuracy is relevant to the reasonableness of a third party's policies and procedures because it reflects the openness, balance, consensus, transparency, and other requirements of proposed § 1033.141.

Flexible standards also facilitate consistency with existing accuracy requirements. For example, third parties might have obligations under existing law for investigating and responding to consumer disputes. By forgoing prescriptive dispute requirements, the proposal avoids conflicting with the format, substance, and timing requirements of the dispute provisions in other laws. The proposal's policies-and-procedures requirement would also allow third parties to leverage existing systems for addressing disputes to the extent that such disputes also relate to the transfer of covered data.

The CFPB seeks comment on proposed § 1033.421(d), including on whether any additional elements bearing on the reasonableness of a third party's policies and procedures regarding accuracy should be included.

Data Security (§ 1033.421(e))

Proposed § 1033.421(e)(1) would require third parties to certify to consumers that they will apply an information security program that

[144] For example, one standard suggested by SBREFA commenters, articulated in a 2012 FTC privacy report, and codified in several State laws describes de-identified information as data for which a business has (1) taken reasonable measures to ensure that the information cannot be linked to an individual; (2) publicly committed not to attempt to re-identify the information; and (3) contractually obligated any recipients not to attempt to re-identify the information. *See* Fed. Trade Comm'n, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers,* at 20–21 (2012), *https://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businesses-policymakers;* Cal. Civ. Code section 1798.140(m); Colo. Rev. Stat. section 6–1–1303(11); Va. Code sections 59.1–575, 59.1–581; Utah Code Ann. 13–61–101(14).

[145] *See* 12 CFR part 1022; 12 CFR part 1005; 12 CFR part 1026.

satisfies the applicable rules issued pursuant to the GLBA (GLBA Safeguards Framework) to their systems for the collection, use, and retention of covered data. Proposed § 1033.421(e)(2) would require a third party that is not a GLBA financial institution to apply the information security program required by the FTC's GLBA Safeguards Rule (16 CFR part 314).

As explained in part IV.C above, covered data includes sensitive financial data that might expose consumers to fraud or identity theft if it were exposed. The GLBA Safeguards Framework provides a familiar risk-based process for addressing data security that allows for adaptation to changing technology and emerging threats. Therefore, the CFPB has preliminarily determined that the GLBA Safeguards Framework can be used by third parties to appropriately protect consumer-authorized financial data.

The SBREFA Panel recommended that the CFPB consider options for ensuring that consistent minimum data security standards apply to third parties and data providers, and several commenters echoed this recommendation.[146] Requiring third parties to certify that they follow the GLBA Safeguards Framework helps ensure consistency in protection as a covered data moves from a data provider to one or more third parties because all or substantially all data providers are already subject to the GLBA Safeguards Framework, most likely the Interagency Guidelines Establishing Information Security Standards issued by the Federal functional regulators. However, a few commenters asserted that the FTC's Safeguards Rule may be insufficient because, unlike the Interagency Guidelines, it was not supported by regulator supervision. The CFPB understands this point but notes that the FTC has designed its rule to account for a different supervisory context. The FTC's Safeguards Rule includes slightly more prescriptive requirements, such as encryption, for certain elements, because the Safeguards Rule must be usable by a financial institution to determine appropriate data security measures without regular interaction with an examiner from a supervising agency.[147]

Proposed § 1033.421(e)(1) would also limit burden on third parties and avoid duplicative regulation. As with data providers, third parties are already subject to data security requirements. The CFPB understands that all or most third parties that would access covered data through a developer interface are regulated by the GLBA Safeguards Framework, most commonly the FTC's Safeguards Rule.[148] As the CFPB discussed in a recent circular, inadequate data security can also constitute an unfair practice in violation of the CFPA.[149] However, the CFPA's unfairness prohibition articulates a general standard that is not specific to data security, and gaps in GLBA coverage might exist given the diversity of third parties that the proposal would cover. A few SBREFA commenters stated that they had observed third parties either denying or expressing uncertainty over their status as GLBA financial institutions. Requiring third parties that are not GLBA financial institutions to certify that they comply with the FTC's Safeguards Rule would remove any uncertainty and prevent any attempts to evade coverage.

### Provision of Covered Data to Other Third Parties (§ 1033.421(f))

The CFPB is proposing in § 1033.421(f) to require the third party to certify that, before providing covered data to another third party, it will require the other third party by contract to comply with certain obligations.

In some circumstances, third parties that are authorized to access covered data from a data provider on behalf of a consumer may need to share that data with another third party. The authorized third party's ability to share covered data would be limited by the conditions in proposed § 1033.421(a) and (c), under which the authorized third party would limit its use of covered data, including sharing data with other third parties, to what is reasonably necessary to provide the consumer's requested product or service. Subject to that limitation, the authorized third party would be permitted to provide the data to another third party.

The CFPB has preliminarily determined that the consumer protections provided by the third party obligations in proposed § 1033.421 generally should continue to apply when the covered data are provided by the authorized third party to another third party. Otherwise, the third party that receives the data from the authorized third party would not be subject to, for example, the limitations on use or the requirements for data privacy and data security that apply to the authorized third party, and the consumer would lose these important protections for the covered data.

For this reason, proposed § 1033.421(f) would obligate the third party to certify that, before providing the covered data to another third party, it will require the other third party by contract to comply with certain third party obligations in proposed § 1033.421. Proposed § 1033.421(f) states that any provision of covered data to another third party would be subject to the restriction in proposed § 1033.421(c), which specifies that provision of data is a type of use of covered data that would be limited by proposed § 1033.421(a) to what is reasonably necessary to provide the consumer's requested product or service requested.

Proposed § 1033.421(f) would not require the authorized third party to bind the other third party by contract to comply with all of the third party obligations in proposed § 1033.421. The CFPB has preliminarily determined that certain of the third party obligations would be of limited applicability to the other third party, including the obligation to provide certain information to the consumer in proposed § 1033.421(g) and the revocation obligation in proposed § 1033.421(h).

The CFPB requests comment on whether the approach in proposed § 1033.421(f) would provide sufficient protection to consumers and their covered data when an authorized third party provides that data to another third party. The CFPB also requests comment on which third party obligations in proposed § 1033.421 should be included in this approach.

### Ensuring Consumers Are Informed (§ 1033.421(g))

The CFPB is proposing in § 1033.421(g) to require a third party to certify that it agrees to certain obligations designed to ensure that consumers are able to obtain information about the third party's access to their data.

As described above, to be authorized to access covered data on behalf of the consumer, a third party would be required to provide the consumer with an authorization disclosure.[150] The authorization disclosure would include, among other things, a brief description of the product or service that the

[146] SBREFA Panel Report at 44.

[147] 86 FR 70272, 70287 (Dec. 9, 2021).

[148] The CFPB is seeking comment in part IV.D about whether certain third parties, such as natural person third parties not covered by GLBA, should not be subject to the authorization procedures under proposed § 1033.401.

[149] Consumer Fin. Prot. Bureau, *Consumer Financial Protection Circular 2022–04* (Aug. 11, 2022), *https://www.consumerfinance.gov/compliance/circulars/circular-2022-04-insufficient-data-protection-or-security-for-sensitive-consumer-information/*.

[150] *See* proposed § 1033.401(a).

consumer requested and the categories of covered data the third party would access.[151] The CFPB has preliminarily determined that consumers would benefit from being able to access authorization disclosures they have previously signed. For example, the consumer may not recall which third parties are accessing their data, what data are being accessed, and for what reasons. Without this information, it would be difficult for a consumer to decide whether to continue authorizing data access.

For this reason, under proposed § 1033.421(g)(1), a third party would be required to certify that it will provide the consumer with a copy of the consumer's authorization disclosure by delivering a copy to the consumer or making it available in a location that is readily accessible to the consumer, such as the third party's interface. The proposed rule specifies that, if the third party makes the authorization disclosure available in such a location, the third party also certifies that it will ensure it is accessible to the consumer until the third party's access to the consumer's data terminates. The CFPB seeks comment on whether this is the right time period.

In addition, the CFPB has preliminarily determined that the consumer should be able to contact the third party to receive answers to questions about the third party's access to the consumer's covered data. The authorization disclosure would contain a limited amount of information pursuant to proposed § 1033.411(b), so it may not address every question the consumer has about the third party's data access.

For this reason, under proposed § 1033.421(g)(2), a third party would be required to certify that it will provide readily identifiable contact information that enables a consumer to receive answers to questions about the third party's access to the consumer's covered data. A third party could satisfy proposed § 1033.421(g)(2) through its existing customer service functions, provided that this function is equipped to handle the relevant questions. The CFPB seeks comment on additional requirements regarding the nature of the contact that the consumer can access through the contact information provided by the third party, such as whether the consumer must be able to access a human contact or whether the consumer must receive a response within a specified timeframe.

The CFPB also has preliminarily determined that, at any time during the third party's access to the consumer's data, the consumer should be able to obtain certain information from the third party. For this reason, under proposed § 1033.421(g)(3), third parties would be required to certify that they will establish policies and procedures designed to ensure that, upon the consumer's request, the third party will provide certain information to the consumer.

Under this provision, the consumer would be able to obtain information about additional parties with which the covered data was shared and reasons for sharing the covered data.[152] The CFPB has preliminarily determined that this information would be valuable for consumers to know to protect their privacy, exercise control over which parties are accessing their covered data, and evaluate whether to continue sharing data with the third party.

The consumer would also be able to obtain information about the status of the third party's authorization.[153] Under the proposed rule, the third party would certify that it will limit its collection of data to what is reasonably necessary to provide the consumer's requested product or service. However, it may not be apparent to the consumer whether the third party's authorization is still active or whether the third party is currently collecting data. The CFPB's proposal would enable consumers to obtain this information.

The consumer would also be able to obtain certain information that is similar to the information listed on the authorization disclosure: the categories of covered data the third party is collecting; the reasons for collecting the covered data; and information about how the consumer can revoke the third party's access to the consumer's data.[154] Some consumers may want to obtain this information, but rather than seeking out a copy of their authorization disclosure, they may simply contact the third party. These provisions would enable consumers to obtain this information in this manner. The CFPB has preliminarily determined that it would be appropriate to require the third party to certify that it will provide this information on request given that the third party originally provided this information on the authorization disclosure.

The CFPB seeks comment on whether the list in proposed § 1033.421(g)(3) should be modified, including whether additional categories of information should be added.

Revocation of Authorization (§ 1033.421(h))

Proposed § 1033.421(h) would contain third party obligations related to consumers' revocation of authorization for third parties to access their covered data. As described below, as a condition of being authorized to access covered data on a consumer's behalf, the third party must certify to: (1) provide the consumer with an easily accessible and operable revocation mechanism; (2) notify the data provider, data aggregator, and certain other third parties when a consumer revokes the third party's authorization; and (3) abide by certain limitations on collection, use, and retention of covered data when a consumer revokes the third party's authorization.

Proposed § 1033.421(h)(1) would require third parties to certify to provide the consumer with a mechanism to revoke the third party's authorization to access the consumer's covered data. Under proposed § 1033.421(h)(1), the third party would be required to certify that such revocation mechanism will be as easy to access and operate as the initial authorization. Proposed § 1033.421(h)(1) would also require the third party to certify that the consumer will not be subject to costs or penalties for revoking the third party's authorization.

In the SBREFA Outline, the CFPB described an approach in which third parties would certify to providing consumers with a simple way to revoke third party authorization to access data at any point.[155] In the SBREFA Outline, the CFPB defined revocation as a consumer withdrawing consent to third party data access that they previously authorized under the rule.[156] Commenters supported giving consumers the right to revoke third party consent at any time and made varying suggestions about the appropriate method for revocation. The following are some specific comments related to revocation: consumers should have the right to revoke consent in a manner that is consistent with initial consent; and revocation should be easy, readily accessible, clear, accessible via toggle on dashboard, free of cost/penalties, and/or salient. Many commenters supported the idea that third parties that receive revocation requests should notify the other parties of the request. The SBREFA Panel recommended that the CFPB explore

[151] *See id.* § 1033.411(b)(1) through (6) (content of the authorization disclosure).

[152] *See id.* § 1033.421(g)(3)(iii) and (iv).

[153] *See id.* § 1033.421(g)(3)(v).

[154] *See id.* § 1033.421(g)(3)(i), (ii), and (vi).

[155] SBREFA Outline at 42.

[156] *Id.*

options that enable consumers to revoke third party access and clarify the kind of revocation mechanisms third parties would be required to provide to consumers.[157] The SBREFA Panel also recommended that the CFPB continue to consider how revocation requirements could be designed to reduce impacts on third parties.[158]

The CFPB has preliminarily determined that for the consumer's authorization for third party data access to be meaningful, consumers need to be able revoke that authorization at any time. For this reason, the CFPB has preliminarily determined that consumers need sufficient, clear opportunities to revoke their consents to third party access to covered data under this proposed rule. As such, proposed § 1033.421(h)(3) is designed to achieve the goal of ensuring consumers can provide meaningful authorization to third party data access and easily and effectively revoke that authorization whenever they choose. The CFPB has preliminarily determined that revocation should be as easy as the initial authorization to ensure third parties do not bury the revocation mechanism or otherwise obfuscate consumers' ability to utilize it.

Additionally, for revocation of authorization to be free of cost or penalties to the consumer, the CFPB has preliminarily determined that consumers should be able to revoke their authorization to data access for purposes of one product or service but maintain that same third party's data access for purposes of another product or service. Third parties conditioning the provision of one product or service on the consumer providing consent to data access for another product or service is a cost or penalty on the consumer. Therefore, as part of proposed § 1033.421(h)(1), third parties must allow consumers to revoke consent to data access for a particular product or service and maintain consent to data access for any others.

Further, proposed § 1033.421(h)(2) would require the third party to certify that it will notify the data provider, any data aggregator, and other third parties to whom the third party has provided the consumer's covered data when the third party receives a revocation request from the consumer. As noted above, in some circumstances, third parties that are authorized to access covered data from a data provider on behalf of a consumer may want to share that data with another third party. The CFPB is proposing in § 1033.421(f) to obligate the third party to certify that, before providing covered data to another third party, it will require the other third party by contract to comply with certain third party obligations in proposed § 1033.421. In addition, proposed § 1033.431(c), discussed below, would require that, when a third party uses a data aggregator to assist with accessing covered data on behalf of a consumer, the data aggregator certify to the consumer that it agrees to the conditions on accessing the consumer's data in proposed § 1033.421(a) through (f) and (h)(3). The CFPB is proposing in § 1033.421(h)(2) to require authorized third parties to notify other third parties of the consumer's revocation to ensure that those third parties that receive covered data from the authorized third party are aware of the status of the consumer's authorization and can, accordingly, meet applicable certifications related to use and retention of that data. The CFPB is also proposing in § 1033.421(h)(2) to require authorized third parties to notify data providers of the consumer's revocation to ensure data providers are aware of the status of the consumer's authorization.

Finally, proposed § 1033.421(h)(3) would require the third party to certify that, upon receipt of a consumer's revocation request or notice of a revocation request pursuant to proposed § 1033.321(3), the third party will (1) no longer collect covered data pursuant to the most recent authorization, and (2) no longer user or retain covered data that was previously collected pursuant to the most recent authorization unless use or retention of that covered data remains reasonably necessary to provide the consumer's requested product or service under proposed § 1033.421(a).

Proposed § 1033.421(h)(3)(i) specifies the effect of a consumer's revocation request on the third party's collection of covered data. As noted above, the CFPB is proposing in § 1033.421(h)(1) to require third parties to certify to provide consumers with a mechanism by which they can revoke the third party's authorization. Consistent with that provision, proposed § 1033.421(h)(3)(i) specifies that, once a consumer requests revocation, the third party may no longer collect covered data pursuant to the consumer's authorization.

Proposed § 1033.421(h)(3)(ii) specifies the effect of a consumer's revocation request on the third party's use and retention of covered data collected prior to that request. Consistent with the general limitation in proposed 1033.421(a), proposed § 1033.421(h)(3)(ii) specifies that, when a consumer requests revocation of third party authorization, the third party may no longer use or retain covered data that was previously collected unless use or retention remains reasonably necessary to provide the consumer's requested product or service.

This provision mirrors proposed § 1033.421(b)(4)(ii), which addresses the effects of the maximum durational period on use and retention of previously collected data. As where a consumer does not reauthorize third party access before the maximum durational period expires, revocation of the consumer's existing authorization to access, all other things being equal, covered data indicates that such authorization no longer supports use or retention of data collected under its terms. In the normal course, therefore, application of the general standard in proposed § 1033.421(a) will call for the third party to stop using and retaining data collected pursuant to that authorization. However, as noted above with respect to proposed § 1033.421(b)(4)(ii), exceptional circumstances may justify continued use and or retention of some or all such data under that standard, even as new collection, use, and retention stops. For example, a subpoena could require the retention, post-revocation, of specific data collected pre-revocation; meeting such legal requirements can continue to remain reasonably necessary even if only in connection with providing the product prior to revocation. Similarly, the consumer could provide a clear, affirmative indication that they want to continue to use the product, post-revocation, in a manner supported by the use and retention of data collected prior to revocation. In that context, use and retention of some or all of the data could meet the general standard in proposed § 1033.421(b)(4)(ii) even as the consumer no longer makes use of the product in any manner that would require continued data collection.

The CFPB has preliminarily determined that proposed § 1033.403(h)(3)(ii), like proposed § 1033.421(b)(4)(ii), provides third parties with sufficient flexibility to address circumstances in which continued use or retention of previously collected data might be justified under the general standard in proposed § 1033.421(a), while ensuring that consumer data are not used and retained, post-revocation, in a manner that does not properly reflect the control afforded the consumer under that same general standard. The CFPB seeks comment about these circumstances and whether, following revocation, additional protections for consumers or flexibilities for third parties are warranted.

[157] SBREFA Panel Report at 45.

[158] *Id.*

5. Use of Data Aggregator (§ 1033.431)

The CFPB is proposing to adopt certain requirements for the third party authorization procedures when a third party will use a data aggregator to assist with accessing covered data on behalf of a consumer. Currently, many third parties rely on data aggregators to assist with accessing and processing consumer financial data. Proposed § 1033.431 would assign certain responsibilities for the authorization procedures and impose certain conditions on the third party and the data aggregator.

Responsibility for Authorization Procedures

Proposed § 1033.431(a) would allow, but not require, a data aggregator to perform the third party authorization procedures on behalf of the third party. Proposed § 1033.431(a) also provides that the third party remains responsible for compliance with the third party authorization procedures and that data aggregators must comply with the data aggregator certification requirements in proposed § 1033.431(c).

The CFPB has preliminarily determined that the third party should be responsible for compliance with the third party authorization procedures. The third party is providing a product or service to the consumer and is likely to have the primary relationship with the consumer, so the consumer may be more comfortable receiving and responding to communications from the third party. The third party also likely would be more involved in using and retaining covered data and therefore may play a greater role than the data aggregator. Moreover, the data aggregator is assisting the third party in accessing covered data, so the CFPB has preliminarily determined that it is appropriate for the third party to have responsibility for compliance with the third party authorization procedures.

The CFPB recognizes, however, that some third parties may want to rely on data aggregators to perform the authorization procedures on their behalf and that, in some circumstances, it may be more efficient for data aggregators to do so. Therefore, the CFPB is proposing to allow, but not require, a data aggregator to perform the authorization procedures on behalf of a third party. If a data aggregator performs the authorization procedures on behalf of the third party, the consumer's authorization would grant authority to the third party to access covered data on behalf of the consumer. The third party would retain the flexibility to discontinue using the data aggregator or switch to a different aggregator.

The CFPB considered proposing a requirement that the data aggregator be responsible for the authorization procedures. However, a consumer may not be familiar with the data aggregator or the role that the data aggregator may play in accessing covered data. The CFPB also considered allowing data aggregators or third parties to decide which party would be responsible for compliance with the authorization procedures or allowing or requiring both third parties and data aggregators to perform the authorization procedures but has preliminarily determined that the clearest and least confusing approach for consumers would be to have the third party seeking access to covered data be responsible for compliance with the authorization procedures.

Disclosure of the Name of the Aggregator

Proposed § 1033.431(b) would require that the authorization disclosure include the name of any data aggregator that will assist the third party seeking authorization under proposed § 1033.401 with accessing covered data and a brief description of the services the data aggregator will provide. Unlike other downstream parties that may access a consumer's covered data after they have completed the authorization procedures, a data aggregator is typically known to the third party at the time of authorization and a consumer may directly interact with a data aggregator when a data aggregator performs the authorization procedures on behalf of a third party. Therefore, the CFPB has preliminarily determined that identifying and describing the services of a data aggregator would reduce consumer confusion and better equip consumers to provide informed consent when authorizing data access. The CFPB seeks comment on any obstacles to including a data aggregator's name in the authorization disclosure.

Aggregator Certification

Proposed § 1033.431(c) would require that, when a third party uses a data aggregator to assist with accessing covered data on behalf of a consumer, the data aggregator must certify to the consumer that it agrees to the conditions on accessing the consumer's data in proposed § 1033.421(a) through (f) and the condition in § 1033.421(h)(3) upon receipt of the notice described in § 1033.421(h)(2) before accessing the consumer's data.

The CFPB is proposing to require data aggregators to certify that they agree to these conditions because, when a third party uses a data aggregator, the aggregator may play a significant role in accessing the consumer's data. Data aggregators may, among other things, process the consumer's login credentials, obtain the consumer's data from the data provider, and transmit the consumer's data to the third party. If data aggregators were not required to agree to the conditions in proposed § 1033.421, there could be a significant gap in the protections afforded to consumers under the proposed rule. In addition, as with the third party's certification statement,[159] the CFPB wants the consumer to receive a clear statement of the conditions that the data aggregator must follow, and this certification would be helpful in allowing a consumer and the CFPB and other regulators to enforce these obligations if the data aggregator breaches these obligations. These considerations are equally applicable to data aggregators that are retained by the authorized third party after the consumer has completed the authorization procedures, so proposed § 1033.431(c) would require those data aggregators to also provide a certification.

Proposed § 1033.431(c) provides that, for this aggregator certification requirement to be satisfied, either (1) the third party must include this aggregator certification in the authorization disclosure it provides the consumer, or (2) the data aggregator must provide to the consumer a separate certification. For example, the aggregator certification requirement in proposed § 1033.431(c) would be satisfied where the authorization disclosure includes a statement that both the third party and the data aggregator agree to the third party obligations described in proposed § 1033.421. The requirement would also be satisfied where the data aggregator provides the certification to the consumer in a separate communication. When a data aggregator is retained by the authorized third party after the consumer has completed the authorization procedures, proposed § 1033.431(c) would not require the consumer to receive a new authorization disclosure or provide consent. The CFPB seeks comment on whether to include formatting or language access requirements for an aggregator certification that is provided in a separate communication from the authorization disclosure.

6. Policies and Procedures for Third Party Record Retention (§ 1033.441)

The CFPB is proposing in § 1033.441, generally, to require a third party that is

[159] *See* discussion of proposed § 1033.401(b).

a covered person or service provider, as defined in 12 U.S.C. 5481(6) and (26), to establish and maintain policies and procedures reasonably designed to ensure retention of records that evidence compliance with proposed subpart D. Proposed § 1033.441 would be authorized under CFPA section 1022(b)(1) because it would enable the CFPB and others to evaluate a third party's compliance with proposed subpart D and would prevent evasion. To the extent that proposed § 1033.441 would apply to CFPB-supervised nondepository covered persons, it would additionally be authorized by CFPA section 1024(b)(7) because it would facilitate supervision of such persons and enable the CFPB to assess and detect risks to consumers.

Proposed § 1033.441 generally would require third parties to establish and maintain policies and procedures to retain records for a reasonable period, not less than three years after a third party obtains the consumer's most recent authorization under § 1033.401(a). Proposed § 1033.441(b) bases the retention period on the date of the consumer's most recent authorization because that event would determine when compliance with proposed subpart D would begin to be required. The minimum three-year period should be sufficient for the CFPB and others to evaluate compliance with respect to any given authorization because proposed § 1033.421(b)(3) would require third parties to obtain a new authorization each year. The CFPB requests comment on the proposed length of the retention period and whether it should be based on another event, such as the termination of a third party's authorization or a third party's request for information from a data provider. Proposed § 1033.441 sets forth a flexible approach by establishing a minimum retention period and by not exhaustively specifying categories of records, which likely would be infeasible given the wide range of activities subject to proposed subpart D. Under proposed § 1033.441(c), a third party would have flexibility to determine its policies and procedures in light of the size, nature, and complexity of its activities. This flexibility would help third parties avoid conflicts with other legal obligations (including other record retention and data security obligations), manage data security risks, and minimize unnecessary impacts. To mitigate the risk that the flexibility of proposed § 1033.441(c) might result in the absence of critical evidence, proposed § 1033.441(e)(1) and (2) identifies examples of records that would need to be retained. Further, proposed § 1033.441(d) would require a third party to commit to periodically reviewing its policies and procedures and updating them as appropriate to ensure their continued effectiveness. The flexible policies and procedures approach of proposed § 1033.441 would be consistent with the SBREFA Panel's recommendation that the CFPB evaluate record retention requirements for consistency with other requirements and the avoidance of unnecessary data security risks, while still ensuring all evidence of compliance by a third party is retained.[160] The CFPB requests comment on whether the final rule should identify other examples of records to be retained.

As described above related to § 1033.421(b) and (h), the CFPB is proposing to require a third party to no longer retain covered data following a maximum durational period ending or upon a consumer's request for revocation, unless retention remains reasonably necessary. Proposed § 1033.421(b)(4) and (h)(3) are not designed to impact the requirement of proposed § 1033.441 for a third party to maintain policies and procedures to retain records for a reasonable period proposed in § 1033.441, as proposed § 1033.441 covers records that evidence compliance with proposed subpart D. In contrast, § 1033.421(b)(4) and (h)(3) cover data collected from data providers to provide a requested product or service. The CFPB seeks comment on whether additional guidance might be needed on the potential intersections of the record retention requirements in proposed § 1033.441 and limitations on retention in § 1033.421(b)(4) and (h)(3).

12 CFR Part 1001

Providing Financial Data Processing Products or Services (§ 1001.2(b))

The proposed rule would add § 1001.2(b) to part 1001 to define providing financial data processing products or services by any technological means, including processing, storing, aggregating, or transmitting financial or banking data, alone or in connection with another product or service, as a financial product or service under the CFPA. The CFPB preliminarily concludes that the activities in proposed § 1001.2(b) are already within scope of the CFPA's definition of financial product or service. Nevertheless, the CFPB is proposing to use its rulemaking authority to provide even greater certainty on this issue.

Under CFPA section 1002(15)(A)(xi)(II), the CFPB may issue a regulation to define as a financial product or service, for carrying out the objectives of CFPA section 1033, ''such other financial product or service'' that the CFPB finds is ''permissible for a bank or for a financial holding company to offer or to provide under any provision of a Federal law or regulation applicable to a bank or a financial holding company, and has, or likely will have, a material impact on consumers.'' The CFPB is proposing § 1001.2(b) pursuant to this authority.

As noted above, the CFPB's preliminary view is that the activities in proposed § 1001.2(b) are already within scope of the CFPA's definition of financial product or service. Specifically, CFPA section 1002(15)(A)(vii) defines as a financial product or service ''providing payments and other financial data processing to a consumer by any technological means.'' The language of this provision extends beyond payment processing to broadly include other forms of financial data processing, including where the financial data are processed in connection with other financial or non-financial products or services. Accordingly, consumers already receive the protections of the CFPA when entities process their potentially sensitive data, whether payments or any other category of financial or banking data.[161]

However, the CFPB is proposing to use its rulemaking authority to provide even greater certainty on this issue. By conferring authority on the CFPB to define additional financial products or services, the CFPA accounts for the possibility that the enumerated list of financial products and services in CFPA section 1002(15)(A)(i) through (x) may not completely capture the markets for financial products or services that are significant for consumers, especially as market developments lead to emerging concerns for consumers. As already noted, this proposed rule has the potential to greatly expand access to personal financial data and subject such data to a wider variety of data processing activities. The CFPB is thus proposing to add to the definition of financial product or service the category of ''providing data processing product or services'' to ensure that activities involving consumers' potentially

[160] SBREFA Panel Report at 45.

[161] Many of these activities could also fall within other categories of financial product or service. *E.g.,* CFPA section 1002(15)(A)(ix), 12 U.S.C. 5481(15)(A)(ix) (''collecting, analyzing, maintaining, or providing consumer report information or other account information'' under specified circumstances).

sensitive personal financial information are subject to the CFPA and its prohibition on unfair, deceptive, or abusive acts or practices to the full extent authorized by Congress.[162] The proposed definition includes examples to illustrate the breadth of activities that fall within the term financial data processing. The reference to financial data processing in connection with another product or service, as discussed above with respect to CFPA section 1002(15)(A)(vii), comprises both financial and non-financial products or services.

The CFPB preliminarily finds that proposed § 1001.2(b) meets the two factors set forth in CFPA section 1002(15)(A)(xi)(II). First, the activities in proposed § 1001.2(b) are permissible for financial holding companies under the Federal Reserve Board's Regulation Y and for national banks under OCC regulations. Both financial holding companies and national banks are permitted to engage, among other things, in data processing, data storage, and data transmission services by any technological means, so long as the data to be processed are financial, banking, or economic.[163]

Second, processing of personal financial information has, or is likely to have, a material impact on consumers. As already discussed above in part I, use of personal financial data has become an even more important part of consumer finance than it was at the time that the CFPA was enacted in 2010. The processing of this personal financial data, including storing, aggregating, and transmitting such data, has the potential to provide benefits to consumers but also expose them to a number of substantial risks. Financial data processing activities that are provided to consumers, to the extent they are not already included within the definition of a financial product or service under CFPA section 1002(15)(A)(vii), would raise the same type of consumer protection concerns as activities that do fall within this definition.

Proposed § 1001.2(b) states that it does not apply where the financial data processing is offered or provided by a person who, by operation of 12 U.S.C. 5481(15)(A)(vii)(I) or (II), is not a covered person. CFPA section 1002(15)(A)(vii) provides that a person shall not be deemed to be a covered person with respect to financial data processing solely because the person engages in certain narrowly proscribed processing activities. CFPA section 1002(15)(A)(vii)(I) excludes as covered persons certain merchants, retailers or sellers of non-financial products or services that are solely engaged in certain activities related to initiating payment instructions, whereas CFPA section 1002(15)(A)(vii)(II) excludes persons that solely provide access to a host server for websites. The CFPB proposes to parallel these exclusions in proposed § 1001.2(b).

## V. Proposed Effective Date

The CFPB proposes that the establishment of part 1033 and the amendment to part 1001 shall take effect 60 days after the date of the final rule's publication in the **Federal Register**. In the case of part 1033, proposed § 1033.121 provides for staggered compliance dates for data providers. In the case of the amendment to part 1001, the CFPB has preliminarily determined that the activities covered by the amendment are already within the scope of the CFPA's definition of financial product or service, as explained in part IV, and so no compliance date is necessary.

## VI. CFPA Section 1022(b) Analysis

The CFPB is considering the potential benefits, costs, and impacts of the proposed rule. The CFPB requests comment on the analysis presented below, as well as submissions of additional data that could inform its consideration of the benefits, costs, and impacts of the proposed rule.

### *A. Statement of Need*

In section 1033 of the CFPA, Congress directed the CFPB to adopt regulations governing consumers' data access rights. The CFPB is issuing this proposed rule primarily to begin implementing the CFPA section 1033 mandate, although the CFPB is also relying on other CFPA authorities for specific aspects of the proposed rule.

Because the primary purpose of this proposed rule is to implement section 1033 of the CFPA, the role of this CFPA section 1022(b) analysis is to evaluate the benefits, costs, and impacts of the specific policies within the proposed rule and potential alternatives to those policies. This *Statement of Need* summarizes the CFPB's understanding of the gaps between Congress's intended outcome for consumers' financial data rights and current practices, and describes the overall goals of the proposed rule in closing those gaps. The remainder of the CFPA section 1022(b) analysis discusses the benefits, costs, and impacts of the specific provisions to address these gaps, and potential alternatives.

Consumers should have control over their financial data, including accessing their data when desired, and controlling who else can access their data and for what purposes. When consumers access their financial data today, they often do not have this control. Consumer financial data are often accessed through methods that raise data security and privacy risks and consumers have little to no control over how the data are used by third parties that have access to it. In addition, there is a lack of secure, efficient methods for sharing data with third parties, and data providers may not be motivated to provide in a timely and readily usable manner all the data fields that consumers want to access. The result is that access to consumer financial data can be unreliable, or that financial data held by some providers may be unavailable to some consumers or their authorized third parties.

When data are made available, there is a general lack of consistency across data providers in the terms and conditions for access, and the data formats used. This creates inefficiencies for market participants, as every connection between a third party and a data provider requires many detailed terms and conditions to be negotiated. This often entails substantial levels of cost. This proposed rule aims to (1) expand access for consumers across a wide range of financial institutions, (2) ensure privacy and data security for consumers by limiting the collection, use, and retention of data that is not needed to provide the consumer's requested service, and (3) push for greater efficiency and reliability of data access across the industry to reduce industry costs, facilitate greater competition, and support the development of beneficial products and services.

### *B. Data and Evidence*

The CFPB's analysis of costs, benefits, and impacts is informed by data from a range of sources. These include data collected in the Provider Collection and Aggregator Collection,[164] as well as data

[162] 12 U.S.C. 5531, 5536.

[163] 12 CFR 225.28(b)(14), 7.5006(a); *see also* 68 FR 68493, 68495–96 (Dec. 9, 2003) (explaining that 12 CFR 225.28(b)(14) permits bank holding companies to engage in a ''wide range'' of data processing activities, including bill pay services, financial data processing for marketing purposes, and delivering financial products or services over the internet, among other activities).

[164] For information about the data collected in the Provider Collection and Aggregator Collection, respectively, *see Generic Order for Data Providers, https://files.consumerfinance.gov/f/documents/cfpb_generic-1022-order-data-provider_2023-01.pdf,* and Consumer Fin. Prot. Bureau, *Generic Order for Data Aggregators, https://files.consumerfinance.gov/f/documents/cfpb_generic-1022-order-data-aggregator_2023-01.pdf* (both last visited Aug. 28, 2023). Because data

Continued

obtained from other regulatory agencies [165] and publicly available sources.[166]

In 2016, the CFPB released and received comments on a Request for Information on consumer rights to access financial data. In 2020, the CFPB held a symposium titled ''Consumer Access to Financial Records'' and released a summary of the proceedings. Later in 2020, the CFPB released and received comments on an ANPR. In 2022, the CFPB convened a SBREFA Panel to gather input from small businesses and in 2023 the Panel issued the SBREFA Panel Report.[167] The CFPB also solicited and received comments from other industry participants on the SBREFA Outline.[168] In addition to these sources of information, these impact analyses are informed by consultations with other regulatory agencies, industry, and researchers. The CFPB's outreach is described in detail in part II.

For the types of financial data and access generally covered by this proposed rule, the information obtained through the Provider Collection and Aggregator Collection allow the CFPB to estimate: the number of data providers consumer-authorized data are accessed from; the number of third parties accessing or using consumer-authorized data; the number of consumers granting third parties permission to access data on their behalf; the total number of permissioned access attempts; as well as information about the technologies used and the purposes of the permissioned data access. The Provider Collection and Aggregator Collection also allow the CFPB to estimate the operational costs of providing direct and third party data access, and the costs of establishing data access agreements. To maintain the confidentiality of the respondents to these data collections, the CFPB provides approximate or bounded estimates derived from these data, rather than precise totals or figures specific to any one respondent.[169] The CFPB seeks additional information or data that could refine these estimates.

For data on the number and characteristics of covered depository institutions, the CFPB relies on data from FFIEC and NCUA Call Reports.[170] These sources provide quarterly information on the number of institutions, dollar amount of institution-level assets, number of deposit accounts, dollar volume of credit card lending, and other characteristics. Notably, these data provide information on the number of FDIC- or NCUA-insured deposit accounts, which are an imperfect, but nonetheless the best available proxy for the number of covered financial accounts held by depositories. While this measure includes covered depository accounts, it also includes business accounts and other accounts that are not covered by the proposal. It also does not include certain covered financial accounts, such as credit card accounts and non-bank products. The FFIEC data also provide information on the websites and digital banking capabilities for banks. The CFPB supplemented this information with comparable information in NCUA Profile (Form 4501A) data for credit unions.[171]

To estimate costs to small entities of the provisions, the CFPB relies on information gathered from the SBREFA process. This includes both written feedback submitted by small entity representatives and the discussions at the SBREFA Panel summarized in the SBREFA Panel Report.[172]

### *C. Coverage of the Proposed Rule*

Part VII.B.3 provides a discussion of the number and types of entities affected by the proposed rule.

### *D. Baseline for Consideration of Costs and Benefits*

In evaluating the proposal's benefits, costs, and impacts, the CFPB considers the impacts against a baseline in which the CFPB takes no regulatory action. This baseline includes existing regulations, State laws, and the current state of the market. In addition, because the market is still developing rapidly, the analysis assumes that the market trends toward greater data access and increased adoption of developer interfaces would continue under the baseline, but assumes no change in the State laws and regulations currently in effect that are related to consumers' data access rights for either direct access or access through third parties.

A large and growing number of consumers currently access their financial data through consumer-authorized third parties. This access is provided by a range of technologies, including credential-free APIs, APIs that require third parties to retain consumer credentials (credential-based APIs), and credential-based access through consumer-facing digital banking interfaces such as online banking websites or mobile applications (screen scraping). As discussed in part I.B, *State of the open banking system,* the CFPB estimates that more than 100 million consumers have used consumer-authorized data access, authorizing thousands of third parties to access their financial data at thousands of data providers, often through intermediaries such as data aggregators.[173]

In total, the CFPB estimates that there were between 50 billion and 100 billion total consumer-authorized access attempts in 2022.[174] Usage has grown substantially over the last four years, as the annual number of consumer-authorized access attempts approximately doubled from 2019 to 2022.

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providers and data aggregators vary substantially in size and business practices, the data from these collections are likely not representative of the market as a whole. The data are informative about the practices of some large data providers and a selection of data aggregators and similar third parties.

[165] In particular, these include entity-level FFIEC and NCUA data on characteristics of depository institutions.

[166] The analysis is informed by academic research papers, reports on research by industry and trade groups, practitioner studies, and comment letters received by the CFPB. Where used, these specific sources are cited in this analysis.

[167] Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on the CFPB's Proposals and Alternatives Under Consideration for the Required Rulemaking on Personal Financial Data Rights* (Mar. 30, 2023), *https://files.consumerfinance.gov/f/documents/cfpb_1033-data-rights-rule-sbrefa-panel-report_2023-03.pdf.*

[168] Consumer Fin. Prot. Bureau, *CFPB Kicks Off Personal Financial Data Rights Rulemaking* (Oct. 7, 2022), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-kicks-off-personal-financial-data-rights-rulemaking/.*

[169] The CFPB treats the information received in the Provider Collection and the Aggregator Collection in accordance with its confidentiality regulations at 12 CFR 1070.40 *et seq.*

[170] *See* Fed. Fin. Insts. Examination Council, *Central Data Repository's Public Data Distribution, https://cdr.ffiec.gov/* (last visited Sept. 12, 2023), and Nat'l Credit Union Admin., *Credit Union and Corporate Call Report Data, https://ncua.gov/analysis/credit-union-corporate-call-report-data* (last updated Sept. 7, 2023).

[171] *See* Nat'l Credit Union Admin., *CUOnline, https://ncua.gov/regulation-supervision/regulatory-reporting/cuonline* (last visited Oct. 5, 2023).

[172] Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on the CFPB's Proposals and Alternatives Under Consideration for the Required Rulemaking on Personal Financial Data Rights* (Mar. 30, 2023), *https://files.consumerfinance.gov/f/documents/cfpb_1033-data-rights-rule-sbrefa-panel-report_2023-03.pdf.*

[173] Unless described otherwise, the estimates in this part VI.D are derived from the total numbers of consumers, connections, and access attempts reported by data providers in the Provider Collection and third parties in the Aggregator Collection. These estimates are necessarily approximate, as the CFPB aims to protect the confidentiality of the respondents, account for the substantial share of consumer-authorized data sharing that is not captured by the respondents, and account for the likely potential overlap in counts for consumers, connections, and access attempts that involve respondents to both the Provider Collection and the Aggregator Collection.

[174] An access attempt is defined here as an individual instance in which a single consumer-authorized third party requests or attempts to pull data about a single consumer's accounts from a single data provider's systems. Not all attempts will lead to a successful data transfer, but the number of access attempts is used as an indicator for the overall size and growth of the open banking system.

This third party financial data access enables numerous use cases for consumers. In 2022, data available to the CFPB show that there were more than two billion access attempts to facilitate payment services, more than one billion access attempts for the purpose of identity verification (typically for opening new accounts), tens of billions of access attempts for account monitoring and personal financial management use cases, and over one billion access attempts facilitating other use cases, including fraud risk assessments, loan underwriting, and asset and income verification.

While the share of consumer-authorized data accessed through dedicated credential-free APIs has grown sharply, currently most access attempts rely on either credential-based APIs or screen scraping. As a share of all access attempts made by firms in the Aggregator Collection, the use of credential-free APIs has grown from less than 1 percent in 2019 and 2020 to 9 percent in 2021 and 24 percent in 2022. At the same time, the share of access attempts using screen scraping has declined from 80 percent in 2019 to 50 percent in 2022. Credential-based APIs have seen a slight increase from 20 percent in 2019 to 27 percent in 2022.

The recent growth in traffic through credential-free APIs reflects the adoption of this technology by some of the largest data providers, covering tens of millions of covered accounts. The CFPB understands that all depository data providers with more than $500 billion in assets have established, or in the near future will establish, a credential-free API. However, despite recent growth, the total share of data providers offering credential-free access methods remains limited. The CFPB estimates that at the end of 2022, between 5 and 10 percent of all data providers offered credential-free APIs, up from less than 1 percent in 2021. The CFPB understands that the adoption of credential-free APIs by core banking service providers and other vendors that serve hundreds of smaller depository institutions contributed to this growth.[175] While adoption is relatively high for the largest depository data providers, the CFPB estimates that only between 10 and 20 percent of depositories with more than $10 billion in assets had credential-free APIs at the end of 2022.

The future evolution of the marketplace enabled by the exchange of consumer financial data is, of course, uncertain. However, based on the data and market trends available, the CFPB makes the following assumptions for the baseline in this impact analysis. First, most of the very largest data providers have adopted or likely would in the near future adopt credential-free APIs, which would meet many—but possibly not all—requirements contained in the proposal. Awareness of CFPA section 1033 may have contributed to these outcomes, though adoption is also influenced by data providers' desire to shift third party access away from screen scraping and towards more secure and efficient technologies, as well as the demand for third party access from data providers' customers. Some share of smaller institutions would adopt credential-free APIs, depending on their technology and business models, over a longer-term horizon. Based on past trends, larger institutions would be more likely to adopt such interfaces sooner. However, adoption may be easier for (1) depositories whose systems are already well integrated with large core banking or online banking service providers and (2) nondepositories and newer depositories that do not have complex legacy systems, irrespective of the sizes of these types of institutions. In addition, in the current market some data providers block screen scraping access under certain circumstances, including for third party risk management, and the CFPB expects this would continue under the baseline.

The CFPB understands that all or most data providers and third parties seeking to access consumer-authorized information are subject to the GLBA, specifically either the FTC's Safeguards Rule or the Federal functional regulators' Interagency Guidelines. Additionally, third parties that operate in one of the 11 States with consumer data privacy legislation may be subject to other data security requirements and data usage restrictions. These State laws have all been passed since 2018. As described in part I.E.2, some third parties have obligations under the FCRA. Depository data providers also have third party risk management obligations required by their prudential regulators, which will impose data security requirements on third parties seeking to access consumer-authorized data. As a result, at baseline, the CFPB expects that many third parties are already subject to statutory and regulatory data privacy and security obligations, and third parties have adopted or would adopt some basic standards related to risk management, data security, and data use. These standards likely have some degree of overlap with the requirements in the proposed rule, though individual company systems or policies will depend on the size, location, practices, and other circumstances of each third party.

The impact analysis generally includes the major elements of costs to firms of complying with the proposed rule. It also includes a discussion of how some of these costs likely would have been borne under the baseline as data providers either would have adopted or already have adopted systems or policies similar to those required by the proposed rule. For example, where data providers have adopted some form of credential-free third party access under the baseline, the analysis discusses how the proposal would impact the terms, costs, and features of those interfaces.

Finally, in the context of direct access, all non-exempt data providers offer some digital banking interface and the CFPB assumes for its baseline that these interfaces typically provide all or nearly all data fields required to be made available by the provisions. The analysis considers how the provisions would impact the costs and features of those digital banking interfaces. Those covered entities that do not offer any form of digital banking would be exempt from the proposed rule's requirements.

### *E. Potential Benefits and Costs to Consumers and Covered Persons*

The analysis below describes the potential benefits and costs to consumers and covered persons in the following order: costs to data providers, costs to third parties, costs to consumers, benefits to data providers, benefits to third parties, benefits to consumers, and alternatives considered.

Individual provisions of the proposed rule may have costs for some groups and benefits for others. And some provisions interact with one another, preventing them from being analyzed in isolation. As a result, the discussion of costs for one group will not provide the net impacts of a particular provision or of the proposed rule as a whole. The net impacts depend on the combination of costs and benefits across data providers, third parties, and consumers.

#### 1. Costs to Covered Persons

##### Costs to Data Providers

As a result of the proposed rule, data providers may face increased costs

[175] For example, *see* Press Release, *Jack Henry Partners with Open Banking Providers to Enhance Digital Platform* (Oct. 12, 2021), *https://ir.jackhenry.com/news-releases/news-release-details/jack-henry-partners-open-banking-providers-enhance-digital.*

related to maintaining consumer interfaces and establishing and maintaining developer interfaces, including modifying their existing systems to comply with the proposed rule. The CFPB expects the largest costs to data providers to come from establishing and maintaining compliant developer interfaces. Covered data providers would also incur costs related to developing and implementing policies and procedures governing those systems. The proposed rule may have additional costs to covered data providers related to changes in the frequency, scope, or method of consumer-authorized data access relative to the baseline. These changes may have secondary effects on the profitability of certain business models or practices, including by facilitating competition and enabling new products and services.

Maintaining an Interface for Direct Consumer Access

The proposed rule would require data providers to make covered data available through consumer interfaces and to allow consumers to export the information in machine-readable formats. Data providers that do not offer a consumer interface would be exempt from the requirements of the proposed rule. During the SBREFA Panel meetings, the CFPB received feedback that certain categories of information under consideration in the SBREFA Outline are not typically made available directly to consumers, and thus would be costly to provide.[176] Based on this feedback, the proposed rule would cover a more limited set of information, which the CFPB understands is currently provided through existing consumer interfaces by all or nearly all data providers. Therefore, for most data providers, the CFPB expects limited additional costs due to the proposed rule's direct consumer access requirements. For those data providers that do not provide all required information under the baseline, the CFPB expects that such information could be added at relatively low cost because the required information is generally already necessary for compliance with other regulatory requirements, like account opening disclosures. The CFPB does not have sufficient data to quantify the levels of these costs. The CFPB requests data or information on whether any of the required data fields are not provided through consumer interfaces, as well as on the costs of adding such fields to consumer interfaces.

Establishing and Maintaining an Interface for Third Party Access

The proposed rule would require data providers to establish and maintain a compliant developer interface. Although many data providers already maintain developer interfaces, others would need to establish new interfaces, likely integrated with existing infrastructure that supports their consumer interfaces. The CFPB expects that the costs of modifying an existing developer interface to ensure compliance with the proposed rule would depend on the scope and nature of the necessary modifications but would generally be lower than the cost of establishing a new interface.[177]

In general, data providers must either contract with a vendor for their developer interfaces or develop and maintain such interfaces in-house. The analysis below estimates compliance costs under these two approaches. Some data providers may comply with the proposed rule through a combination of contracted services and in-house development. Because data providers will generally choose the lowest-cost approach, their costs will generally be at or below the lower of the two feasible alternatives analyzed here.

The CFPB understands that data providers' costs depend on many factors and the extent to which they vary is impossible to fully capture. To produce cost estimates that are practical, meaningful, and transparent, where feasible, the CFPB estimates initial upfront costs and annual costs that generally scale with the size of the data provider for each of the contracted services and in-house approaches. All else equal, a data provider's annual cost per account or per customer is likely to decrease with a greater number of accounts or customers due to economies of scale. During the SBREFA process and in the Provider Collection, some data providers provided cost estimates per account while others estimated costs per customer. Therefore, the analysis below discusses estimates of the annual cost per account or per customer of operating a compliant developer interface that are likely to be appropriate for data providers of different sizes.

Under the contracted services approach, data providers would primarily contract with a vendor for their developer interface. At baseline, many covered data providers contract with core banking providers or other vendors for transaction processing, online banking systems, or other key banking functions. Some core banking providers currently offer services to enable developer interfaces for data providers. The CFPB understands that some large core banking providers provide their clients with a basic developer interface at no additional cost.[178] Based on comments received during the SBREFA process and market research, the CFPB understands that other core banking providers charge flat monthly fees or per-account fees.[179] The CFPB understands that these fees vary but generally estimates that fees can be up to $24 per account per year.[180] The CFPB requests information related to the developer interfaces offered by core banking providers and other vendors and how such interfaces are priced.

Data providers taking this approach will generally have minimal upfront costs to deploy a developer interface. However, some data providers use service providers that do not currently offer a developer interface. Although other options exist and the CFPB expects service providers would face strong competitive pressure to offer compliant developer interfaces to their clients, the lowest cost option for some data providers may involve changing their core banking provider. The fixed costs of changing core banking providers can be high. Several small entity representatives stated that the upfront costs at a new core banking provider can range from $50,000 to $350,000 depending on the scale and complexity of the system, with up to $200,000 in additional decommissioning costs to retrieve information from the old core banking provider. Based on its market research, the CFPB understands that core banking providers that offer a developer interface have a combined market share exceeding 67 percent.[181] Therefore, at most, 33 percent of depository data providers would need to change core banking providers to obtain a compliant interface that is bundled with their other core banking services. However,

[176] SBREFA Panel Report at 24.

[177] For example, some data providers with existing interfaces may need to provide additional data fields, change the way their data are formatted, or make additional investments to ensure their interfaces meet the performance specifications required by the proposed rule.

[178] For example, *see* Jack Henry & Assocs., Inc., *Secure Data Connection: take back control of account connection, https://banno.com/data-aggregators/* (last visited Aug. 7, 2023).

[179] SBREFA Panel Report at 37.

[180] *Id.* at 38.

[181] *See* Fiserv, *Finicity and Fiserv Offer More Consumer Choice Through Secure Data Access* (Mar. 30, 2022), *https://newsroom.fiserv.com/news-releases/news-release-details/finicity-and-fiserv-offer-more-consumer-choice-through-secure.*

the CFPB expects that the true share of depository data providers that pay these costs will be much lower than 33 percent. Data aggregators and other software vendors offer developer interfaces and the CFPB expects that some data providers will obtain their interfaces through these channels and will not need to change their core banking provider. Furthermore, core banking providers will face strong competitive pressure to offer compliant developer interfaces to retain their clients and potentially capture additional market share. The CFPB expects that these forces are likely to cause the cost of obtaining compliant interfaces to decline over time, which may reduce compliance costs most substantially for small depository data providers, given that they have the latest compliance date.

Under the in-house approach, data providers would primarily employ software developers or similar staff to build and operate their developer interfaces. The estimates below are based on a fully in-house development of a compliant developer interface. Some data providers may instead contract with software providers for the initial development of their in-house developer interface. The CFPB anticipates that data providers would purchase their systems only if they could do so at a lower cost than the estimate provided here.

The CFPB expects that most data providers that already develop and maintain consumer interfaces in-house would also develop and maintain their developer interface in-house.[182] In the SBREFA Outline, the CFPB estimated that developing a compliant developer interface would likely require between 2,600 and 5,200 hours of work by software developers or similar staff, equivalent to five full-time employees over a period of three to six months, resulting in an estimated total upfront staffing cost of $216,000 to $432,000, updated to $237,000 to $475,000 based on more recent labor cost data.[183] However, these estimates strongly depend on the needs and capabilities of specific entities. For example, based on feedback from nondepository small entity representatives, the CFPB estimates that nondepository data providers may require only 480 hours of work by software developers at a total cost of $44,000.[184] In addition to these upfront costs, the CFPB estimates that data providers taking the in-house approach incur ongoing costs of $3 to $5 per account per year to maintain a compliant developer interface in-house, based on evidence from the Provider Collection described below.

During the SBREFA Panel meetings, data provider small entity representatives stated that establishing a compliant developer interface would require developing multiple internal APIs because their data are stored on three to eight separate information technology systems, most of which are not currently connected to their core banking system.[185] Depository small entity representatives estimated that each of these internal APIs could cost approximately $60,000 in upfront staffing costs and $20,000 in ongoing technology costs.[186] Nondepository small entity representatives estimated lower upfront staffing costs, of 240 to 480 hours, or $22,000 to $44,000. Although nondepository small entity representatives did not estimate ongoing technology costs, the CFPB expects these costs will generally also be smaller than costs for depository small entity representatives.[187] Based on this feedback, the proposed rule would require a more limited set of information to be provided, relative to those under consideration in the SBREFA Outline. The proposed rule's approach should significantly reduce the need for new internal APIs, particularly since the categories of information included in the proposed rule largely align with those available through consumer interfaces at most data providers.

Some small entity representatives stated that the CFPB's original estimate in the SBREFA Outline of $216,000 to $432,000 was too low, and one small entity representative estimated that the cost was likely to be above $500,000.[188] However, changes in the proposed rule should significantly reduce the need for new internal APIs, which was a primary component of these higher estimated costs. Therefore, the CFPB estimates a total upfront cost of $250,000 to $500,000 for small depository data providers that choose to build their developer interface in-house. Small nondepository data providers are likely to have somewhat smaller upfront costs. Based on small entity representative feedback, the CFPB estimates that small data providers choosing to build their developer interface in-house will incur ongoing annual technology costs of $20,000 as well as ongoing staffing costs of $45,000 to $91,000.[189]

The Provider Collection contains information on costs for a sample of large depository data providers. This complements the information on costs for small data providers gathered through the SBREFA process. For context, data provider small entity representatives generally may have up to a few tens of thousands of accounts, while data providers in the Provider Collection have millions of accounts.

In the Provider Collection, several data providers stated that it was difficult to disaggregate the costs of developer interfaces from their consumer interfaces and other information technology systems. These data providers also generally provided estimates of ongoing annual costs or total costs since the deployment of their developer interfaces, rather than upfront costs to build an interface. Reported estimates of the cost of establishing and maintaining a developer interface varied widely, from $2 million to $47 million per year, with a median of $21 million

[182] As discussed below, data providers have generally indicated that the resources required to maintain a developer interface in-house are a small fraction of the resources required for consumer interfaces. Therefore, the CFPB expects that data providers that have already invested in the capacity to operate a consumer interface in-house will take a similar approach to developer interfaces. However, it is likely that some data providers will find it less costly to contract with service providers. As the industry develops, it is possible that it will become more common for data providers to obtain developer interfaces from service providers.

[183] This estimate was derived from BLS data showing a mean hourly wage for software developers of $63.91. BLS data also show that wages account for 70 percent of total compensation for private industry workers, leading to a $91.30 estimate for total hourly compensation, which was multiplied by the expected total number of hours of work required.

[184] Costs for depository and nondepository data providers are likely to differ for several reasons, including that depository data providers are generally more likely to have multiple legacy information technology systems that are more technically difficult to integrate with a developer interface.

[185] SBREFA Panel Report at 37.

[186] *Id.*

[187] One data provider small entity representative that recently implemented an API explained that it and its vendors had spent approximately 50–60 hours understanding the requirements and planning, 50–60 hours creating the database, 80 hours prototyping for optimization and security, and 40 hours testing and documenting, or roughly 220–240 hours to develop and implement the API, in addition to ongoing hardware and cloud hosting expenses. Two nondepository data provider small entity representatives estimated that it would take one internal staff member approximately 12 weeks to comply with the proposed rule. Other small entity representatives stated that implementation would likely be less difficult for nondepository data providers because they do not have as many vendors or separate information technology systems.

[188] SBREFA Panel Report at 37–38.

[189] The CFPB estimates that small data providers choosing the in-house approach would require 500 to 1,000 hours per year of staff time by software developers. BLS data from May 2022 shows a mean hourly wage for software developers of $63.91. BLS data also show that wages account for 70 percent of total compensation for private industry workers, leading to a $91.30 estimate for total hourly compensation, which was multiplied by the expected total number of hours of work required.

per year. Of the data providers providing disaggregated estimates, the median cost of developer interfaces as a share of the cost of their consumer interfaces was 2.3 percent. An additional data provider did not provide a disaggregated estimate but reported their developer interface constituted a ''small portion of the total consumer-portal costs.''

These data providers are larger and more complex than most data providers. Therefore, the CFPB adopts the cost of a compliant developer interface per account as the relevant metric for estimating the costs for data providers generally. The reported cost of an in-house developer interface per customer or account ranges from $0.25 to $8 per year, with a median of $3.37 per year, substantially lower than the $24 per year reported by small entity representatives as the potential cost for the contracted services approach. Within the sample, the per account cost generally declined as the number of accounts increased.[190] Based on this evidence, the CFPB estimates that annual costs per account to maintain an in-house developer interface are likely to be approximately $3 for large depository data providers and $5 for medium-sized depository data providers. Although the Provider Collection sample is relatively limited, the pattern of per-account costs declining with the number of accounts suggests that—relative to the alternative of contracting for a developer interface—data providers developing and maintaining interfaces in-house likely have larger upfront fixed costs but smaller ongoing per account costs. These estimated costs are generally for depository institutions rather than nondepositories. Given feedback from small entity representatives of nondepository institutions that would qualify as data providers under the proposed rule, the CFPB expects that nondepository data providers would generally have less need to integrate across multiple systems and would be less likely to have legacy software that is difficult to update, resulting in lower costs on average. The CFPB requests additional data on the cost of developing and maintaining compliant developer interfaces compared to contracting with a service provider.

The estimates above relate to the costs of developing and maintaining a developer interface for data providers without such existing interfaces. Covered data providers with existing developer interfaces that are not fully compliant with the proposed rule would incur smaller costs to modify their interfaces and existing third party access agreements to align with the requirements of the proposed rule. The cost for such covered data providers would depend on the extent to which their developer interfaces do not comply with the requirements of the proposed rule. Without granular data on the nature of partially compliant interfaces, the CFPB cannot provide a precise estimate of the cost of bringing such systems into compliance with the proposed rule. However, that cost would generally be a fraction of the cost of developing and maintaining a new interface, as described above.

The CFPB seeks comment or additional data on the extent to which existing developer interfaces will need to be modified to meet the requirements of the proposed rule and the cost of required modifications relative to the cost of establishing a new compliant developer interface.

Developing and Implementing Policies and Procedures

The proposed rule would include disclosure and recordkeeping requirements for all covered data providers related to consumer-authorized data access. The proposed rule would require data providers to tally and disclose the number of proper responses divided by the total number of queries to their developer interface (the ''response rate'') on a monthly basis. The CFPB understands that a variety of performance metrics, including the response rate, may be calculated in the normal course of operating an API or other digital interface for diagnostic purposes. Therefore, the cost of this provision is included in the cost of developing and maintaining a compliant developer interface estimated above. Data providers may incur an additional upfront cost of developing and testing a system to regularly disclose required performance metrics on their website. The CFPB estimates that this process would take less than 80 hours of staff time at an estimated cost of $7,300 per data provider.[191] The CFPB expects that once the disclosure system is implemented it would be maintained at minimal incremental cost as part of the overall cost of operating data providers' websites.

The proposed rule would require data providers to have policies and procedures such that the developer interface is reasonably designed to ensure that data are accurately transferred to third parties. The CFPB expects that data providers would comply with this requirement as part of establishing and maintaining a compliant developer interface. Therefore, the costs of ensuring that the developer interface is reasonably designed to transfer data accurately are included in the analysis above.

The proposed rule would also require data providers to have policies and procedures reasonably designed to ensure that the reason for the decision to decline a third party's request to access its developer interface is communicated to the third party. The requirements to inform third parties when and why access was not permitted would likely be built into a data provider's developer interface, as automated responses to third party data access requests. Similarly, the requirements to retain records to demonstrate compliance with certain requirements of the proposal would likely be built into a data provider's developer interface. As a result, the CFPB considers the costs of complying with these requirements as part of the overall costs of implementing a compliant developer interface, as described above. The CFPB has previously estimated that developing policies and procedures to comply with a rule of similar complexity would require a one-time cost of $2,500 to $4,300 per data provider, as well as a one-time cost of $3,000 to $7,600 for a legal and compliance review.[192] Therefore, the CFPB estimates a total one-time cost of developing and implementing policies and procedures as required by the proposed rule of $5,500 to $11,900 per data provider.

Indirect Costs

In addition to the direct costs described above, data providers are likely to incur indirect costs as a result of the proposed rule. The CFPB expects costs related to negotiating additional agreements with third parties relative to baseline as well as changes in the frequency, scope, or method of consumer-authorized data access relative to the baseline. These changes may have secondary effects on the profitability of certain business models or practices, including by facilitating

[190] For the data providers in the Provider Collection that provided both cost estimates and numbers of accounts, there was a negative correlation coefficient of approximately −0.6 between per account costs and number of accounts.

[191] This estimate was derived from BLS data showing a mean hourly wage for software developers of $63.91. BLS data also show that wages account for 70 percent of total compensation for private industry workers, leading to a $91.30 estimate for total hourly compensation, which was multiplied by the expected total number of hours of work required.

[192] 86 FR 56356, 56556 (Oct. 8, 2021).

competition and enabling new products and services.

Increased Number of Agreements Between Data Providers and Third Parties

The proposed rule generally would require data providers to grant access to their developer interface, except for reasonable denials related to risk management or insufficient information. Although the proposed rule does not require formal data access agreements, the CFPB expects the proposed rule to lead to more third parties requesting and being granted access to data providers' developer interfaces relative to the baseline and that this is likely to require data providers to negotiate more agreements with third parties. In the Aggregator Collection responses, aggregators reported that negotiating a data access agreement with a data provider could take between 50 and 4,950 staff hours for business relationship managers, software developers, lawyers, compliance professionals, and senior management, depending on the complexity of the negotiation. The median estimated time was 385 staff hours per agreement. The CFPB expects that data providers currently spend roughly equivalent time and resources negotiating and signing data access agreements at baseline.

These costs are likely to decrease under the proposed rule relative to the baseline because many features of data access agreements would be regulated by the proposed rule and not subject to negotiation, including requirements for interface reliability, the scope of data accessible via the interface, authorization procedures, and the duration of access to consumers' covered data. One firm in the Aggregator Collection stated that in cases where data providers agree to use existing industry-defined standards there is essentially no need for negotiation. The CFPB expects that under the proposed rule nearly all data providers will use standardized agreements and the costs of establishing data access will generally be limited to ensuring third party risk management standards are satisfied and reviewing the agreements. The CFPB expects that this process will require 80 staff hours on average, representing approximately $6,800.[193] These costs may be further reduced if industry accreditations or standards develop which streamline data providers' required efforts on third party risk management. While some data providers and third parties may choose to negotiate customized data access agreements, they will generally only do so when the perceived benefits exceed the costs described here. Because the choice to negotiate a costly but more customized data access agreement is a business decision not required by the proposed rule, the additional costs of doing so are outside the scope of this analysis.

The total cost of negotiating additional agreements will depend on the difference between the number of agreements that would be negotiated under the baseline and the number that would be negotiated under the proposed rule. Because the consumer-authorized data system is developing rapidly, it is not possible to precisely estimate the number of additional connections that would be caused by the proposed rule. However, in the near term, the CFPB anticipates that most data providers will continue to offer third parties access to consumer-authorized data through specialized intermediaries, as they would have under the baseline. As a result, the CFPB expects that, on average, large data providers will need to negotiate 10 or fewer additional data access agreements in the years immediately following implementation of the proposed rule, at a maximum cost of $68,000 per large data provider. In contrast, smaller entities are likely to rely on core banking providers or other vendors to negotiate aspects of the agreements on their behalf at minimal incremental cost. Over time, data providers are likely to negotiate additional data access agreements due to entry by new third parties and other changes in the market.[194] The CFPB requests comment on how the proposed rule is likely to change both the cost of establishing data access agreements and the number of data access agreements negotiated by data providers.

Prohibition on Fees for Access

The proposed rule would not permit data providers to charge fees for the required interfaces or for access to covered data through their interfaces. To the extent that data providers are currently charging such fees, the proposed rule would eliminate these revenues. Based on the Aggregator Collection, the Provider Collection, and its market research, the CFPB understands that fees for consumer and third party access are currently rare.

The CFPB understands that third parties have in some cases made payments to data providers to incentivize data providers that are reluctant or unable to provide a developer interface of sufficient quality sufficiently quickly. While rare in the current market, the proposed rule would eliminate such fees that may have been charged in the future under the baseline.

The CFPB does not have representative data on the prevalence or size of payments to data providers and therefore cannot precisely estimate the cost of eliminating them. However, as described above, the information available to the CFPB indicates that few data providers currently charge third parties for access to their interfaces and that the total cost to data providers of eliminating such charges would be minimal.

More Frequent Access—Third Parties Allowed To Make More Frequent Data Queries

Based on responses to the Provider Collection, the CFPB is aware that covered data providers sometimes impose access caps, such as limiting the number of allowable data requests or the frequency with which authorized third parties can access consumer data. For example, the CFPB understands that data providers cap the number of data requests per day per connection. The proposed rule would generally prohibit a data provider from unreasonably restricting the frequency with which it receives and responds to requests for covered data from an authorized third party through its developer interface. All else equal, this is likely to increase total data requests and may therefore increase digital infrastructure costs for covered data providers relative to baseline.[195] This increase is likely to be larger for data providers with more restrictive access caps at baseline. The CFPB expects that for most data providers, the increase in traffic due to such increases in the number of data requests will generally be more than offset by declines in screen scraping, which the CFPB understands to typically involve heavier traffic loads

[193] This estimate was derived from BLS data showing a mean hourly wage for compliance officers ($37.01), general and operations managers ($59.07), lawyers ($78.74), and software developers ($63.91), for an average hourly wage of $59.68. BLS data also show that wages account for 70 percent of total compensation for private industry workers, leading to an $85.26 estimate for total hourly compensation, which was multiplied by the expected total number of hours of work required.

[194] For example, the proposed rule aims to accelerate the development and adoption of qualified industry standards covering myriad aspects of open banking. This would likely reduce the frictions and costs associated with establishing and maintaining connections between data providers and third parties, potentially increasing the number of access agreements negotiated by data providers.

[195] As discussed in the *Benefits to data providers* section, other features of the proposed rule are likely to decrease the frequency and scope of data requests and therefore digital infrastructure costs for covered data providers.

per request than requests through a developer interface. A small number of large data providers have already restricted screen scraping and may experience net increases in developer interface traffic. In general, the CFPB expects that incremental costs from increased data requests are likely to be minimal on a per-account basis. The CFPB requests data or other information that would inform its estimates of the cost of additional data requests through a developer interface.

Reduced Information Advantages

Through their role in providing financial products and services, data providers possess ''first party'' data on the accounts held by their customers. These data are a valuable source of information for data providers in developing, pricing, and marketing products and services, but authorized data access may reduce this information advantage. The proposed rule would generally increase third party access relative to the baseline and thus diminish data providers' informational advantages from first party data. This may enable third parties to more effectively compete with products or services offered by data providers, potentially limiting the prices data providers can charge for their own products and services or reducing data providers' market shares or data providers' profits. For example, the CFPB understands that an important use case for consumer-authorized financial data is transaction-based underwriting. At baseline, many data providers sell credit products to their depositors. To the extent that the proposed rule facilitates entry into the lending market or improves the quality of the products and services offered by nondepository lenders or other depository lenders that use consumer-authorized data, data providers may lose market share and therefore profits. As another example, consumer-authorized data sharing is likely to facilitate faster new account openings. As it becomes easier for consumers to compare account terms, transfer recurring payments, move funds, and have their identity verified, depository data providers may face pressure to pay higher deposit rates or make costly investments in service quality in order to retain deposits, as discussed in the *Benefits to Consumers* section.

In general, accurately predicting how changes in the availability of consumer-authorized financial data will change the structure of the market for consumer financial services or how changes in market structure will impact the profitability of individual firms or industries is very difficult, in large part because firms that are data providers in some cases also operate as third parties accessing data from other data providers, and the CFPB expects more data providers to act as third parties over time. As a result, the CFPB is not able to quantify the impacts of reduced informational advantages that stem from the proposal. The CFPB requests additional data or information that would inform this analysis.

The proposed rule is likely to increase the quality of services that use consumer-authorized financial data to facilitate competition, including by comparing or recommending products or services to consumers. This may impact data providers. For example, a consumer might use a comparison shopping service that would recommend credit cards likely to minimize their costs from interest and fees or maximize their benefits from rewards programs given their historical spending patterns. The CFPB is not able to accurately predict how many firms would develop services that facilitate competition in this way, how many consumers would opt in to such services, or how the availability of such services would impact individual firms or industries. The CFPB requests any additional data or information that would inform its analysis of this impact on data providers.

Costs to Third Parties

Third parties would be required to modify existing procedures, so they are consistent with the proposal's authorization procedures for accessing covered data on behalf of a consumer, such as providing the authorization disclosure; implementing the limitations on data collection, use, and retention; developing mechanisms for revocation of authorization; providing the annual reauthorization of access; and executing record retention requirements. In addition to these upfront and ongoing compliance costs, the proposed rule may impose further costs on third parties through the transition away from screen scraping access and restrictions on data use and retention. Potential effects of the new financial data processing products or services definition are also discussed.

Implementing Mechanisms for Revocation of Authorization

The proposed rule would require third parties to establish and maintain systems that could receive data access revocation requests, track duration-limited authorizations, and delete data when required due to revoked authorizations, lapsed authorizations, or because retaining the data is no longer reasonably necessary. Third parties would also need to retain records as required by the proposed rule. Many of these requirements overlap with the requirements of other State or international data privacy laws. For example, third parties that operate in the State of California and have gross annual revenues greater than $25 million may already have similar systems if they are subject to the California Consumer Privacy Act (CCPA),[196] which requires that businesses delete consumer personal data upon consumer request. These third parties would likely need to modify their systems, incorporate authorization duration limits, and process more revocation requests, but they would likely have lower costs than third parties that must establish such a system from scratch. The CFPB estimated in the SBREFA Panel Report that establishing and maintaining an appropriate data system would cost up to $75,000 based on analysis of the Standardized Regulatory Impact Assessment for the CCPA.[197]

As described in the SBREFA Panel Report, several small entity representatives provided cost estimates of implementing deletion requirements. At the low end, one third party small entity representative that had implemented deidentification and deletion systems stated that it took between 240 and 480 hours,[198] and another third party small entity representative stated that it developed a system to comply with the CCPA in about 480 hours. At the high end, one third party small entity representative estimated that building a system for information deletion would take 1,000 hours. If a third party chose not to establish a system to implement the deletion requirements of the proposed rule and instead chose to manually delete data, the CFPB understands that the time cost would be substantially

[196] Cal. Civ. Code section 1798.198(a) (2018).

[197] The Standardized Regulatory Impact Assessment for the CCPA estimated that the average technology cost would be $75,000. However, the CFPB estimates that the cost for many third parties would be lower, as the CCPA figure was based on a survey of the top one percent of California businesses by size (those with more than 500 employees), and the CCPA has more requirements than the proposed rule. *See* Off. of the Att'y Gen., Cal. Dep't of Just., *Standardized Regulatory Impact Assessment: California Consumer Privacy Act of 2018 Regulations* (Aug. 2019), *https://dof.ca.gov/wp-content/uploads/sites/352/Forecasting/Economics/Documents/CCPA_Regulations-SRIA-DOF.pdf.*

[198] The small entity representative reported that the task took its team two to four weeks. Based on other small entity representative team sizes, the CFPB assumes that the team included three people.

higher: one third party small entity representative explained that, as an organization of fewer than 50 people, complying with a single deletion request could require 480 hours. Based on this feedback, the CFPB estimates that the cost of implementing deletion requirements would be between $21,900 and $91,300.[199] The CFPB expects that the cost would be lower for third parties that already comply with existing data privacy laws. The CFPB requests additional data or other information to further refine this estimate. Third parties that do not retain any consumer-authorized data would be unaffected by these requirements.

Annual Reauthorization Process

The proposed rule would limit the duration of third party collection of covered data to no more than one year after a consumer's most recent authorization. Third parties would be required to obtain a new authorization from the consumer before the first anniversary of the consumer's most recent authorization to continue to collect the consumer's covered data without disruption. Because the new authorization would have the same legal requirements as the first authorization, most of its implementation costs would be captured by the costs described above for the initial authorization and data retention systems. The CFPB expects that reauthorization reminders will typically be delivered electronically—such as a within-app notification or an email—at minimal additional direct cost.

The reauthorization and retention requirements may limit the quality of data available for product improvement or other permissible uses of data. Some third parties may experience indirect costs due to service disruptions if they do not obtain a new authorization from the consumer before the anniversary of the consumer's most recent authorization, as they would not be able to request the consumer's data from data providers until the new authorization was obtained if more than one year has passed since the most recent authorization. Any gaps in the third party's collection of consumer data would likely be filled once it obtains the new authorization, as the third party could then access two years of retrospective data.

The costs associated with the reauthorization requirement will depend on the third party's business model. Two small entity representatives suggested that periodic reauthorization requirements on third parties could lead to reduced customer retention. One small entity representative stated that this would ''frustrate'' consumers, and another stated that only 0.32 percent of its users prompted to reconnect to their bank account ever did so. Reauthorization requirements created frictions for third parties in the United Kingdom's open banking regime after the implementation of a 90-day reauthorization requirement. One UK trade association estimated an attrition rate between 20 percent and 40 percent, while another trade association found an attrition rate between 35 percent and 87 percent.[200] These attrition rates may be different than those expected under the proposed rule because, on the one hand, a 90-day reauthorization requirement is more burdensome than an annual reauthorization requirement, but on the other hand, more consumers may still be actively using a product or service after 90 days than after one year and so may be more likely to reauthorize access. The CFPB expects that, while some third parties would incur costs from consumer attrition, third parties will be more likely to obtain a new authorization from a customer when that relationship is more valuable, and the reauthorization process will be relatively easy for consumers who wish to continue the relationship. These factors will generally limit the cost of disruptions due to the reauthorization requirements, particularly for third parties providing the most valuable services. The CFPB does not have data to estimate the costs to third parties of lost customers due to the annual reauthorization requirements.

Providing Authorization Disclosure and Certification Statement

The proposed rule would require third parties to provide the authorization disclosure and certification statement when seeking to access covered data. When a third party seeking authorization uses a data aggregator to assist with accessing covered data on behalf of a consumer, the proposed rule would require the data aggregator to make its own certification statement to the consumer, though both the aggregator and third party certifications would be permitted to be made in the same disclosure. The CFPB expects that, in many cases in the market today, data aggregators would provide the required authorization disclosure and certification statement on behalf of third parties seeking authorization. However, some third parties seeking authorization, including those that do not partner with data aggregators, may instead provide the authorization disclosure and certification statement through their own systems.

For data aggregators and other third parties that choose to provide the authorization disclosure and certification statement through their own systems, the CFPB estimates that building such a system would require approximately 1,000 hours of work by software developers or similar staff. This estimate is based on cost estimates in other consumer financial markets related to requirements for tailored disclosures provided at service initiation.[201] The CFPB estimates that this would result in a one-time cost for a third party of $91,300. However, if third parties already provide disclosures at authorization under the baseline, the costs of modifying these disclosures to satisfy the proposal's requirements may be reduced. One data aggregator stakeholder stated that modifying the content of its existing disclosures would involve 30 to 40 hours of employee time, representing an equivalent cost for a third party of between $2,700 and $3,700.[202]

Data aggregators may pass through these costs to third parties that contract with them. One data aggregator stated in its response to the Aggregator Collection that disclosures for third parties that contract with data aggregators would be largely uniform and easily adapted, and the CFPB anticipates that this will be the case under the proposed rule. The CFPB does not have data to estimate these costs. However, because data aggregators' costs would be spread across many third parties, the CFPB expects the burden of these requirements on any single third party that contracts with data aggregators to be small.

[199] The CFPB assumes that implementing deletion requirements would require between 240 and 1,000 hours of work by a software developer. The cost estimate was derived from BLS data showing a mean hourly wage for software developers of $63.91. BLS data also show that wages account for 70 percent of total compensation for private industry workers, leading to a $91.30 estimate for total hourly compensation.

[200] *See* Fin. Conduct Auth., *Changes to the SCA–RTS and to the guidance in 'Payment Services and Electronic Money—Our Approach' and the Perimeter Guidance Manual* (Nov. 2021), *https://www.fca.org.uk/publication/policy/ps21-19.pdf.*

[201] 82 FR 54472, 54823 (Nov. 17, 2017).

[202] This estimate was derived from BLS data showing a mean hourly wage for software developers of $63.91. BLS data also show that wages account for 70 percent of total compensation for private industry workers, leading to a $91.30 estimate for total hourly compensation, which was multiplied by the expected total number of hours of work required.

Record Retention

The CFPB understands that many third parties already retain records related to consumer data access requests. The proposed rule would require third parties to retain records that demonstrate compliance with the proposed rule, including a copy of the authorization disclosure and, if a data aggregator accessed consumer-authorized data, a copy of the certification statement. The costs of satisfying these requirements would be captured by the one-time costs to implement the revocation, use, and retention requirements. The three-year record retention requirement of the proposed rule would impose limited additional electronic storage costs.

Policies and Procedures

To implement the requirements of the proposed rule, third parties would need to develop and maintain policies and procedures in several distinct areas to ensure compliance with the proposed rule. These include (1) applying existing information security programs to their systems for the collection, use, and retention of covered data, (2) ensuring the accuracy of the information that they collect, (3) governing the limits on collection, use, and retention of consumer-authorized information, and (4) record retention requirements. The CFPB understands that all or most authorized third parties and data aggregators are currently subject to the GLBA Safeguards Framework and so they already have policies and procedures regarding information security programs and would have lower costs for developing and maintaining similar requirements of the proposed rule. However, a small portion of third parties may need to develop new GLBA-compliant systems and would face greater costs. In other consumer financial markets, the CFPB has estimated that nondepository institutions would face a one-time cost of $4,300 to develop new policies and procedures and a one-time cost of $3,900 for a legal/compliance review.[203] Assuming comparable costs for the requirements of the proposed rule yields a total cost of roughly $8,200 for developing and implementing policies and procedures. Maintaining these policies and procedures once they are implemented is likely to involve limited ongoing costs for third parties.[204]

Transition Away From Screen Scraping

The CFPB expects that third parties may face indirect costs from the transition away from screen scraping under the proposed rule. At baseline, screen scraping is a frequently used method of accessing consumer data: in 2022, roughly half of data access attempts by third parties in the Aggregator Collection were made through screen scraping. However, the share of access attempts made through screen scraping has declined by approximately one-third since 2019. The CFPB expects that screen scraping would continue to decline for non-covered financial products as data providers and third parties generally transition to developer interfaces for third parties. The CFPB expects that third parties would no longer use screen scraping to access covered financial data once data providers have compliant interfaces for third parties. While the CFPB expects data access volumes and the number of connections between third parties and data providers to increase as a result of the proposed rule, relative to the baseline third parties may incur additional costs related to contracting with data providers, as well as costs related to demonstrating to data providers the sufficiency of their risk management practices.

In the SBREFA process, multiple small entity representatives expressed that the transition away from screen scraping would limit data accessibility. The proposed rule would not apply to non-covered data. Relative to the baseline, the CFPB does not expect the transition away from screen scraping to negatively impact data availability. The CFPB requests comment on any specific data fields that may be less available due to the transition away from screen scraping, and the specific impacts of those changes.

At baseline, some third parties use screen scraping as a back-up access method when other data access systems are inoperable. The need for a back-up access method would be reduced under the proposed rule because the proposed rule would improve the reliability of data access systems, but in the current system at least one small entity representative stated that customers lose access to the small entity representative's services when access to data providers' interfaces is unavailable. The value of screen scraping as an alternative option may be limited by its relatively low success rates: in the Aggregator Collection, 40 percent of initial account connection attempts made through screen scraping were successful in 2022, compared to 51 percent of initial account connection attempts made through interfaces for third parties. The CFPB does not have data to quantify any net change in data access reliability stemming from the combination of reduced screen scraping and increased availability and reliability of interfaces for third parties. The CFPB requests data or evidence to quantify these potential effects.

Third parties that previously accessed covered data through screen scraping without negotiating the terms of their access with data providers would negotiate these terms under the proposed rule. The CFPB expects that many of these negotiations would occur between data aggregators and data providers, though some negotiations would occur between authorized third parties that do not contract with data aggregators and data providers. As described in the *Costs to Data Providers* section, the CFPB estimates that the cost of negotiations between data aggregators and data providers would be $6,800. One data aggregator suggested in its response to the Aggregator Collection that the cost of negotiation could fall by 80 percent under the proposed rule, as 60 percent of work hours for employees involved in negotiations are spent on topics that would be regulated by the proposed rule and nonnegotiable, and another 20 percent of work hours are spent on topics that would be covered by industry standards.

Third parties may be denied data access based on risk management concerns or other permissible grounds. The CFPB expects that third parties that comply with the data security requirements of the proposed rule or the GLBA Safeguards Framework would not be denied access to data providers' interfaces, and so very few third parties would incur costs related to this provision of the proposed rule.

Restrictions on Use and Retention

Under the proposed rule, third parties would be required to limit their collection, use, and retention of covered data to what is reasonably necessary to provide the consumer's requested product or service. These limitations could reduce some existing uses of both identifiable and deidentified consumer data by third parties, including the sale of covered data and targeted advertising using covered data. The proposed deletion requirements would also reduce the value of data available for product improvement. Several third party small entity representatives highlighted how consumer data can enable the development of new products and services and can inform research and public policy, even when only deidentified data are used for these secondary purposes. Furthermore, firms in the Aggregator Collection reported using consumer data for functions other

[203] 86 FR 56356, 56556 (Oct. 8, 2021).

[204] SBREFA Panel Report at 12.

than transmitting data to data recipients, including the improvement of existing products, the development of new products, and risk management assessments. The proposed rule may limit third parties' use of consumer-authorized covered data for some of these purposes, though third parties can continue to use data that they generated in providing their products and services for these purposes.

The reduction in available data may eliminate or lessen the profitability of certain business models. Third parties that generate revenue from sharing covered data with fourth parties—such as firms with no authorization to access data from the consumer—would lose that source of revenue. Though the CFPB does not have data on the number of third parties that share covered data or the amount of revenue generated by sharing consumer data, the CFPB notes that a survey of German app developers after the European General Data Protection Regulation (GDPR) was implemented found that while the share of app developers selling data was small, nearly all of the developers that sold data experienced a decline in revenue post-GDPR.[205] Third parties that use covered data for internal marketing of other products and services may also lose a source of revenue. The CFPB does not have data to quantify this impact.

New Financial Data Processing Products or Services Definition

The CFPB's preliminary view is that the activities covered by the proposed new financial data processing products or services definition in 12 CFR part 1001 are already within the scope of the CFPA's definition of financial product or service. As a result, the CFPB does not expect the new definition to impose costs on covered persons. However, to the extent that there are firms offering products or services that are within the new definition but outside of the existing financial product or service definition, the new definition could impose some potential costs. Such firms would be subject to the CFPA and its prohibition on unfair, deceptive, or abusive acts or practices, including potential enforcement by the CFPB. Under the baseline, the CFPB expects that such firms would already be subject to a prohibition on unfair or deceptive acts or practices under section 5 the Federal Trade Commission Act.[206] Relative to the baseline, the new definition would add potential enforcement against unfair and deceptive acts or practices by the CFPB and require firms to be compliant with the prohibition on abusive acts or practices. Given the overlap with existing prohibitions, the CFPB expects the potential costs would be limited, and would include developing and maintaining policies and procedures to ensure compliance with the prohibition on abusive practices for firms that are not compliant with the CFPA at baseline. The CFPB does not have data to quantify these potential costs. The CFPB requests comment on whether any firms offer products or services that would be covered by the new definition but fall outside the definition of financial product or service, and if so, what potential costs those firms may face.

2. Costs to Consumers

The proposed rule may increase costs for data providers and third parties, potentially leading to higher prices for consumers or reduced access to certain products or services. The proposed rule is likely to increase the availability of consumer-authorized data overall. While this may benefit many consumers, it could lead to higher credit costs for some consumers with data indicative of higher risk if the use of this data becomes standard for underwriting purposes. The proposed rule would also require consumers to reauthorize access to their financial data annually, which involves relatively minor costs. In addition, consumers may incur costs because of unintentional lapses in authorization. Finally, restrictions on secondary use of data may reduce revenues for some third parties, leading to changes in product offerings or pricing.

Changes in Industry Structure

Data providers would face additional compliance costs as a result of the proposed rule. Some of these costs may be passed on to consumers in the form of higher prices for credit, lower deposit rates, or higher account fees. The CFPB does not have the data necessary to determine the extent to which additional compliance costs may be passed through to consumers, which depends on a number of factors including market competition.[207]

The proposed rule would exempt depository data providers that have not established a consumer interface. While it is possible that some institutions may choose to cease operations of or decide against establishing a consumer interface rather than bringing their interfaces into compliance with the proposed rule, the CFPB expects that this would be very rare. Ceasing to operate an existing interface for consumers would likely be highly disruptive to customers or may increase other customer service costs for data providers by more than the potential costs of complying with the proposal. The CFPB does not have the data to determine how many data providers might decide not to operate a consumer interface as a result of the proposal.

Many of the largest depository data providers either already offer developer interfaces that meet many of the requirements of the proposal or are developing such interfaces, and thus their additional costs of complying with the proposed rule would be limited. While the CFPB does not have information to precisely estimate the number of consumers with accounts at such data providers, the available data suggest that the number is large. The Provider Collection indicates that at least 51 million consumers have connected accounts to third parties through credential-free developer interfaces. This count of 51 million consumers likely understates the true number of consumers who have access to credential-free interfaces for two reasons. First, it does not include the consumers at institutions in the Provider Collection who have access to, but have not yet connected to a developer interface. Second, it does not include consumers at other institutions—not included in the Provider Collection—that have established developer interfaces that meet many of the requirements of the proposal. It could, however, count consumers more than once if they have an account at more than one institution included in the Provider Collection. Overall, the CFPB expects that substantially more than 51 million consumers already have accounts at institutions that would face more limited costs of complying with the provisions. Consumers who only have accounts at these institutions are likely to incur minimal costs passed on by data providers due to the proposed rule because the institutions where they have accounts will face limited costs.

[205] Rebecca Janßen *et al., GDPR and the Lost Generation of Innovative Apps,* Nat'l Bureau of Econ. Rsch. Working Paper No. 30028 (May 2022), *https://www.nber.org/papers/w30028.*

[206] 15 U.S.C. 45.

[207] To the extent that the costs incurred by data providers and third parties as a result of the proposal are fixed costs, the CFPB expects that those costs would not be passed on to consumers in the form of higher prices. The CFPB does not have information to estimate what proportion of these costs will be fixed or variable; for example, while some providers may incur a fixed cost of building an interface themselves, others may pay a service provider for use of an interface on a per-account basis.

Effects of Greater Information Sharing

If finalized, the proposed rule would enhance third party access to consumers' financial data, which could be used in third parties' credit underwriting decisions. The ability for firms to screen customers using information generally increases total value in the market but may transfer value from some consumers to firms. Some consumers would likely benefit, but other consumers may be worse off. While the CFPB understands that the use of cash-flow data for underwriting to identify consumers who are a higher risk than traditional credit scores would predict is not common, it is possible that the market will evolve to use cash-flow data in this way as it becomes more accessible. As a benefit, increased information about consumers could lead to some consumers being offered cheaper credit, if, for example, the information accessed from data providers is viewed by third parties as indicating that the consumer is a lower credit risk than a traditional credit report would reveal. More information, however, could result in some consumers being charged higher prices or not being offered credit if the information reveals what a lender views as a signal that a consumer is a higher credit risk than it would have assessed without the consumer-authorized information.[208] Even though it would be the consumer's choice whether to authorize access to their covered data, it is possible that a creditor would view a consumer's decision not to authorize the sharing of their data as a negative signal of credit risk and raise the price of credit or refuse to offer a loan.[209]

Overall, the availability of consumer-authorized data would allow lenders to underwrite and price more efficiently. This would likely lead to greater credit access overall, with relatively greater access or lower prices for lower risk borrowers who share data, but relatively less credit access or higher prices for borrowers who are higher risk or choose not to share data. The CFPB does not have the data necessary to quantify these effects.

Time Cost of Reauthorizing Third Party Access Annually

Under the proposed rule, a third party would need to limit the duration of collection of covered data to a maximum period of one year after the consumer's most recent authorization. To collect covered data beyond the one-year period, the third party would need to obtain a new authorization from the consumer no later than the anniversary of the consumer's most recent authorization. The reauthorization process should not be more burdensome than the initial authorization certification, but consumers would incur a small time cost to reauthorize the collection of their data. As discussed in the *Costs to third parties* section, existing evidence suggests that many consumers may choose not to reauthorize a third party's access to their covered data. The CFPB interprets this evidence as suggesting that many consumers do not value the continued use of the third party product or service enough to continue authorizing the sharing of their covered data to a third party or that, given the quickly evolving market of third party products and services, consumers decide to use a different app.

Potential Changes in Pricing Models Due to Use and Retention Limitations

Changes that third parties make to their business models as a result of the proposal may be passed on to consumers through higher prices for services provided by third parties. For example, the CFPB understands that some third parties obtain revenue by sharing data that consumers provide to them with other third parties or, more commonly, sharing marketing information derived from such data. This may allow third parties to provide services to consumers free of charge. As discussed in the *Costs to third parties* section, there is evidence that firms in Europe that were sharing customers' data experienced a decline in revenue after data protection laws were enacted, suggesting that they may need to seek alternative sources of revenue.[210] To the extent that the proposal leads to third parties changing their business models, it is possible that some third parties will charge consumers directly for services that used to be free. The CFPB does not have data to estimate the share of consumers impacted or the magnitude of any corresponding price increases.

3. Benefits to Covered Persons

Benefits to Data Providers

At baseline, many third parties use screen scraping to access consumer data. The CFPB expects that third parties would reduce their use of screen scraping under the proposed rule. This is likely to benefit covered data providers because screen scraping involves security risks and heavy web traffic. By standardizing the terms of access and reducing the scope of negotiation, the proposed rule is also likely to decrease the per-agreement cost of negotiating data access agreements.

*Reduced Screen Scraping*

The CFPB understands that credential-based screen scraping creates data security, fraud, and liability risks for data providers, particularly because the credentials shared to facilitate data access also typically can be used to move funds. Furthermore, screen scraping can be used to gather data without data providers establishing a relationship with third parties or assessing data security risks. The CFPB cannot disaggregate fraud costs resulting from credential-based screen scraping from general costs of fraud, including measures to prevent fraud or insure against fraud-related damages. However, depository data providers have reported extensive costs related to preventing fraud and unauthorized transactions generally, and reimbursing consumers when such fraud occurs. During the

[208] For example, Jansen *et al.* (2023) study an opposite shock—the removal of information, instead of the addition—and find that removing bankruptcy information from credit reports redistributes consumer surplus from consumers who have never experienced bankruptcy to consumers with a previous bankruptcy. Mark Jansen *et al., Data and Welfare in Credit Markets* (June 15, 2023), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4015958.* Nelson (2023) finds that limiting the information that credit card issuers were able to use decreased prices for some high-risk borrowers and increased prices for some low-risk borrowers, but on aggregate raised consumer surplus. These are two examples of how the removal of information that can be used in crediting decisions may shift surplus towards consumers who appear to have lower repayment risk after the information removal. Scott Nelson, *Private Information and Price Regulation in the US Credit Card Market,* Univ. of Chic. Booth Sch. of Bus. (Aug. 4, 2023), *https://faculty.chicagobooth.edu/-/media/faculty/scott-nelson/research/private-information-and-price-regulation-in-the-us.pdf.* The CFPB expects that the following effects would occur under the proposed rule: third parties would have access to more information which would increase total surplus and would likely increase surplus for those who appear to have lower repayment risk with the additional information relative to those who appear to have higher repayment risk with the additional information.

[209] He, Huang and Zhou (2023) develop a model in which consumers who choose not to share data are worse off under an open banking system due to lenders taking opting out of data sharing as a sign that a consumer is a high credit risk. Zhiguo He *et al., Open banking: Credit market competition when borrowers own the data,* 147(2) J. Fin. Econ. at 449–74 (2023), *https://doi.org/10.1016/j.jfineco.2022.12.003.* Similarly, Babina, Buchak and Gornall (2023) develop a model showing that when open banking policies enable the addition of banking data to screening or pricing decisions, higher-cost consumers are worse off even if they opt out of sharing information because opting out sends a negative signal to lenders. Tania Babina *et al., Customer Data Access and Fintech Entry: Early Evidence from Open Banking,* Stanford Univ. Graduate Sch. of Bus. Rsch. Paper (May 12, 2023), *https://dx.doi.org/10.2139/ssrn.4071214.*

[210] Rebecca Janßen *et al., GDPR and the Lost Generation of Innovative Apps,* Nat'l Bureau of Econ. Rsch. Working Paper No. 30028 (May 2022), *https://www.nber.org/papers/w30028.*

SBREFA process, one small depository institution reported debit card fraud losses of 28 percent of their total revenue. Small entity representatives also noted that data providers typically pay premiums for insurance against catastrophic fraud losses, with plans typically covering losses in excess of $25,000, subject to certain restrictions. Through conversations with industry participants, the CFPB understands that ATO fraud is the most likely fraud risk that could be exacerbated by credential-based data access methods such as screen scraping.[211] In ATO fraud, the fraudster gains access to the consumer's account and transfers funds, makes purchases, or opens accounts without authorization. The CFPB expects that the reduction in credential-based access due to the proposed rule would lower the risk of ATO fraud, providing a benefit to data providers through reductions in direct liability and decreased fraud insurance premiums, although it is unclear how much ATO fraud is attributed to credential-based screen scraping. The CFPB does not have sufficient data to estimate how much the proposed rule would lower ATO fraud risk and requests comment on the potential benefit for data providers. However, even a small reduction in ATO fraud risk would have large benefits for data providers.[212]

Along with the proposed requirements to access only the data fields necessary to provide the specific product or service, the shift from credential-based screen scraping to developer interfaces would also tend to reduce overall traffic loads on the consumer-facing system and may reduce traffic loads overall. The CFPB does not have systematic data with which to estimate the net change in web traffic and the resulting decrease in necessary expenditures on digital infrastructure. As discussed above, the CFPB understands that the incremental cost of additional web traffic is small, and that reasonably anticipated reductions in traffic are likely to provide minimal benefits to data providers.

*Reduced Per-Agreement Negotiation Costs and More Standardized Terms of Access*

The CFPB understands that negotiating access agreements with third parties is often resource intensive for data providers. In the Aggregator Collection responses, aggregators reported that negotiating an access agreement with a data provider could take between 50 and 4,950 staff hours of business relationship managers, software developers, lawyers, compliance professionals, and senior management, depending on the complexity of the negotiation. The median estimated time was 385 staff hours per agreement. Based on these responses, the CFPB estimates a total cost of between $4,260 and $422,000 which varies depending on the complexity of the negotiation, with a median cost of around $32,825.[213] Although these estimates were provided by data aggregators, the CFPB expects that these costs are also representative for data providers at baseline.

For contract negotiations that would have occurred under the baseline, the CFPB expects that negotiation costs would decrease under the proposed rule because many features of access agreements would be regulated by the proposed rule and not subject to negotiation, including requirements for interface reliability, interface queries, and the scope of data accessible via the interface. One market participant stated that in cases where data providers agree to use existing industry-defined standards there is essentially no need for negotiation and data providers can immediately begin updating their developer interfaces in line with the standard specifications. The CFPB expects that under the proposed rule nearly all data providers will use standardized agreements and the costs of establishing data access will be limited to ensuring third party risk management standards are satisfied and reviewing the agreements. A non-small entity representative third party commenter stated that the negotiation of these elements represents approximately 20 percent of total negotiation time.[214] Based on this, the CFPB estimates that negotiations under the proposal would require roughly 80 staff hours. The required time may decline substantially over time as market participants and other stakeholders develop standards for certifying compliance with third party risk management standards. While some data providers and third parties may choose to negotiate customized access agreements with third parties, they will generally only do so when the perceived benefits exceed the costs described here. Therefore, the CFPB has preliminarily determined that the proposed rule is likely to reduce the cost of negotiating and signing an access agreement by $26,000 on average.[215] Under the baseline, data providers would have continued to negotiate access agreements with third parties and these benefits would not have applied to those agreements. As discussed in the *Costs to data providers* section, the CFPB expects that the proposed rule will cause data providers to negotiate additional agreements relative to baseline. The cost of additional negotiations is analyzed above.

Restrictions on Third Parties' Use and Retention of Data

The proposed rule would also have some indirect effects on the value of first party data held by data providers. Under the baseline, third and first party data are both used for marketing and new product development.[216] The proposed rule would limit third party collection of consumer-authorized data to what is reasonably necessary to provide the consumer's requested product or service. Third party use and retention of covered data would also be subject to that limitation, which would limit the availability of covered data for marketing and for the development of new products outside the scope of the original authorization. While the CFPB does not have data to quantify the benefits to data providers, all else equal, this is likely to increase the value of first party covered data held by data providers, which generally does not have these restrictions.

[211] For example, consumers' account credentials may not be securely stored by third parties or fraudsters may induce consumers to share their credentials by impersonating a legitimate third party.

[212] For example, based on the Javelin Strategy 2022 Identity Fraud Study, a 3 percent reduction in ATO fraud risks would generate an expected annual benefit of $340 million for data providers. *See* Javelin Strategy, *2022 Identity Fraud Study: The Virtual Battlegroun*d (Mar. 29, 2022), *https://javelinstrategy.com/2022-Identity-fraud-scams-report.*

[213] This estimate was derived from BLS data showing mean hourly wages for compliance officers ($37.01), general and operations managers ($59.07), lawyers ($78.74), and software developers ($63.91), which, assuming an equal division of hours across these occupations, yields an average composite hourly wage of $59.68. BLS data also show that wages account for 70 percent of total compensation for private industry workers, leading to an $85.26 estimate for total hourly compensation, which was multiplied by the expected total number of hours of work required.

[214] *See https://www.regulations.gov/comment/CFPB-2023-0011-0042* (last visited Oct. 5, 2023).

[215] This estimate is based on estimated total hourly compensation of $85.26 multiplied by the difference between the median expected hours required at baseline, 385 hours, and the expected hours required under the proposed rule, 80 hours.

[216] For example, a firm might target advertising towards consumers who qualify for a particular credit product or who are likely to be particularly profitable customers or develop new products based on insights from a dataset of consumer transaction histories.

Required Data Security Representations by Third Parties

The proposed rule would require authorized third parties to represent that they have reasonable security practices, in particular by representing that they implement the GLBA Safeguards Framework. These practices are likely to benefit data providers by increasing certainty regarding their potential third party risks, and generally would require minimum data security standards among third parties. The CFPB expects this to generally reduce the likelihood of data security breaches or other incidents, but the CFPB does not have data to quantify the size of this benefit.

Benefits to Third Parties

Right To Access Data Through Third Parties

Under the proposed rule, data providers that have consumer interfaces are required to provide data to authorized third parties. Third parties would be able to access data from new data providers that had not made data available under the baseline. Further, the proposal's data reliability requirements would ensure that data access is consistently available across all data providers. The CFPB understands that, at baseline, connectivity failure rates between third parties and data providers are high, in part because many data providers do not facilitate data sharing with many third parties, so these requirements may lead to large increases in the proportion of consumers who are successfully able to share their data under the proposed rule. Firms in the Aggregator Collection reported initial connectivity failure rates ranging from 28 percent up to 60 percent. The CFPB understands that some of these initial connectivity failure rates occur because the data provider denies the third party's request for data access, rather than because of low interface reliability, and so third parties would be able to reach more consumers under the proposed rule's requirement that authorized third parties have access to covered data.

Prohibition on Data Access Fees

The proposed rule prohibits data providers from imposing fees on third parties for costs associated with covered data provision. Firms in the Aggregator Collection generally did not report paying fees to data providers for access to covered data per customer or per interface call, though a small number of annual or one-time payments were reported. Though these costs are currently limited, the provisions would ensure that the absence of fees under the baseline continues in the future, providing more certainty to third parties about their costs of accessing covered data. The CFPB does not have data to estimate the benefit to third parties of this prohibition on fees because of the uncertainty in how fees may have evolved under the baseline.

Reduced Negotiation Costs

As described in the *Benefits to data providers* part, based on data and comments provided by third parties, the CFPB estimates that negotiation costs would fall by 80 percent under the proposed rule, or an average savings of $26,000 per negotiated connection agreement. This would bring about substantial savings for third parties, particularly data aggregators. The reduction in negotiation costs could also allow additional third parties to enter into access agreements with data providers directly, potentially saving on expenses paid to aggregators under the baseline.

More Frequent Access to Data

The proposed rule prohibits covered data providers from unreasonably limiting the frequency of third party requests for covered data and from delaying responses to those requests. Based on responses to the Provider Collection and conversations with industry participants, the CFPB is aware that some large covered data providers that offer developer interfaces currently impose access caps. Third parties would benefit from the ability to access consumer data as often as is reasonably necessary to provide the requested service. One firm in the Aggregator Collection reported spending ''significant resources'' to manage its traffic in order to avoid access cap limits. Additionally, an aggregator in the Aggregator Collection reported spending resources to persuade large financial institutions to raise or eliminate access caps.

In addition to reducing costs associated with managing and limiting traffic, third party services may become more valuable to consumers when third parties can access consumer data more often.[217] As discussed below, the CFPB expects that third party revenue would increase from the removal of unreasonable access caps under the proposed rule. The CFPB does not have data to quantify these benefits for third parties.

[217] For example, an app that warns consumers when the funds in their checking account fall below a predetermined threshold is generally more valuable to consumers when it can access their checking accounts more often.

Improved Accuracy of Data

The proposed rule would require that data providers have policies and procedures reasonably designed to ensure the accuracy of data transmitted through its interface. In addition, the proposed rule provides clarifying standards for several factors that third party small entity representatives reported as reducing accuracy, including data access reliability, inconsistencies in data field availability and formatting, and inaccuracies in screen scraped data.

The CFPB understands from the Aggregator Collection that access caps can prevent consumers from obtaining their most up-to-date data when a third party has surpassed its data limit. The removal of unreasonable access caps under the proposed rule would reduce such issues. The proposed rule would also require that a data provider make available the most recently updated covered data that it has in its control or possession at the time of a request, further ensuring that third parties would be more likely to have up-to-date data than under the baseline.

The transition away from screen scraping may lead to a reduction in the number of data fields that third parties can access, as described in the *Costs to third parties* section. However, it would lead to more consistency in the data fields that are available across all data providers and in data field formatting, and would reduce costs associated with ensuring that consumer data are accurate. One aggregator reported more frequent inaccuracies for data accessed through screen scraping, as well as the need to allocate more resources to meet accuracy standards for screen scraped data. The CFPB expects that once compliant developer interfaces are established, third parties would not screen scrape covered financial data under the proposed rule which would reduce the costs associated with maintaining accuracy in screen scraped data.

Costs associated with maintaining accuracy in consumer data will not be eliminated altogether, as the proposed rule would require that third parties ensure that covered data are accurately received from data providers, and accurately provided to other third parties, if applicable. The CFPB expects that the increased accuracy of data received from data providers would simplify third party procedures for meeting data accuracy standards. Third party products and services are likely to become more valuable to consumers when data received from data providers is more accurate and reliable. As

discussed below, the CFPB expects that this would increase third party revenue.

Improved Service Quality Due to Improved Data Access

As discussed in the *Benefits to third parties: Prohibition on data access fees* section, the proposed rule would prevent data providers from charging fees to consumers or third parties for access to covered data, guarantee access to data from all non-exempted covered data providers through compliant developer interfaces that meet reliability standards, eliminate unreasonable access caps, and improve the accuracy of received data. These effects reduce third party costs of providing services to consumers and improve the quality of the services that they can provide. The CFPB expects that the ability to provide more valuable services to consumers at a lower cost would increase profits for existing third parties and lead to increased entry into the market for third party services.[218]

The proposed rule is likely to enhance third party access to consumers' financial data, which could be used in third parties' credit underwriting decisions. Access to this data is likely to allow lenders to better differentiate between borrowers with different likelihoods of repayment and charge prices that are more aligned with potential borrowers' repayment risk, increasing underwriting profitability. As an example, the CFPB understands that access to consumer financial data enables some third party lenders to incorporate information about consumers' cash flow (*i.e.,* depository account inflows and outflows) into their underwriting models. Industry research has shown that cash flow is predictive of serious delinquency, and that models including cash flow can distinguish between the repayment risks of consumers with similar traditional credit profiles.[219] The CFPB expects that some third party lenders would be able to identify and reach more consumers with low repayment risk under the proposed rule, and may therefore experience an increase in profits. The CFPB does not have data to quantify these benefits for third parties.

Reduced Costs of Establishing and Maintaining Screen Scraping Systems

The CFPB expects that third parties would generally cease screen scraping for covered financial data under the proposed rule. Based on the Aggregator Collection, the CFPB understands that maintaining screen scraping systems is more costly than maintaining developer interface connections. The reported ratio of staff hours spent on maintaining screen scraping data access to staff hours spent on maintaining interface data access ranged between 2.5 and 12. For aggregators that separately reported costs of maintaining data provider connections through screen scraping and interfaces, the dollar cost of screen scraping ranged between $1.6 million and $7 million, or between $0.0005 and $0.0216 per access attempt; for interfaces, the reported dollar cost was between $1.5 million and $1.6 million, or between $0.0001 and $0.0194 per access attempt. Each request made through a developer interface rather than through screen scraping leads to expected savings between $0.0004 and $0.0022. The firms in the Aggregator Collection reported nearly 16 billion screen scraping attempts in 2022. Under the proposed rule, these screen scraping attempts would instead be made through requests to developer interfaces, leading to at least $6.4 million to $35.9 million worth of annual savings for data aggregators, based only on firms in the Aggregator Collection. Aggregators' savings may be passed on to data recipient third parties through lower prices for aggregator services. The CFPB expects that third parties' cost per access attempt would fall under the proposed rule because screen scraping is more costly for third parties than accessing data through developer interfaces, and most third parties would transition to only accessing covered financial data through interfaces.

Increased Standardization

The CFPB expects that the cost of accessing customer data would decrease not only through reductions in negotiation costs and costs per data access attempt, but also because the proposal would incentivize the industry to coalesce around uniform standards for data access. The increased standardization of data access may reduce the costs for third parties integrating with data providers and allow some third parties that provide services to consumers to bypass data aggregators. An increase in the share of third parties accessing data under access agreements with data providers would tend to reduce any degree of market power that data aggregators would enjoy under the baseline and will tend to reduce access prices for third parties.

One small entity representative shared that aggregator costs represent its single largest budgetary line item, at approximately 10 percent of monthly expenditures. Data aggregators in the Aggregator Collection reported a wide range in fees charged to data recipient third parties depending on the recipient's size, minimum commitments, and access volume. Reported median annualized fees ranged between $2,000 and $6,000. Average annualized fees ranged between $40,000 and $70,000, demonstrating that in the long right tail of the fee distribution a small number of data recipients pay substantially more fees than average.[220]

The proposed rule may make it comparatively less expensive for third parties to connect directly with data providers, rather than contracting with one or more data aggregators. Because a direct connection with a data provider is a substitute for aggregator services, a decrease in the cost of direct connections would likely decrease the price of aggregator services. However, because aggregators spread the costs of establishing data access agreements with each data provider across many authorized third parties, aggregators are likely to retain an advantage from scale in providing access. This advantage may decline over time if the proposed rule accelerates technological standard development by non-governmental groups. This would reduce frictions and costs from establishing and maintaining bespoke connections to each data provider. The CFPB does not have data to estimate the net benefits to data aggregators or data recipients due to increased standardization of data access.

[218] Third parties may experience an increase in investment under the proposed rule, in addition to a reduction in costs and improvement in service quality. Babina, Buchak, and Gornall (2022) study open banking polices adopted across 49 countries and find that fintechs, which include third party recipients of data, raised significantly more funding from venture capital following the implementation of open banking policies that require banks to share data with third parties. *See* Tania Babina *et al., Customer Data Access and Fintech Entry: Early Evidence from Open Banking,* Stanford Univ. Graduate Sch. of Bus. Rsch. Paper (rev. May 2023), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4071214.*

[219] One credit scoring company found that adding cash flow data to its traditional model improved predictiveness by 5 percent for consumers with thin or new credit profiles. Supporting this finding, FinRegLab studied six non-bank lenders in the current system and found the cash flow variables in their underwriting models were predictive of serious delinquency. *See* Can Arkali, *Icing on the Cake: How the FICO Score and alternative data work best together,* FICO Blog (June 2023), *https://www.fico.com/blogs/icing-cake-how-fico-score-and-alternative-data-work-best-together;* FinRegLab, *The Use of Cash-Flow Data in Underwriting Credit: Empirical Research Findings* (July 2019), *https://finreglab.org/wp-content/uploads/2019/07/FRL_Research-Report_Final.pdf.*

[220] For example, responses in the Aggregator Collection suggested that a smaller number of data recipients may pay annualized fees totaling several million dollars.

4. Benefits to Consumers

The proposed rule would likely increase consumers' ability to access their data through third parties as desired. This increase may result in more third party products and services that consumers find useful in the marketplace. The use of credential-free data access would make this sharing possible without consumers revealing their credentials to third parties, reducing the potential harms that consumers may experience due to a data breach. Consumers would also have increased control over how third parties use their data, since third parties would no longer have indefinite authorization to use a consumer's data or use it for reasons other than the primary purpose. The proposal would likely have important secondary benefits for consumers as well, for example through new underwriting methods or increasing competition among data providers or third parties. Finally, the potential effects of the new financial data processing product or service definition are discussed below.

Right to Third Party Data Access

The proposal would require covered data providers to facilitate consumer instructions to provide consumer-authorized third parties with covered data. As discussed in the *Benefits to Third Parties* section, consumers' initial account connection attempts through authorized third parties experience high failure rates, and the proposal would benefit both consumers and third parties by guaranteeing consumer-authorized third parties the right to access covered data. Under the proposed rule, data providers are required to offer a developer interface with commercially reasonable performance, including a proper response rate of at least 99.5 percent. This would benefit consumers by increasing the quality of third party products and services as well as the likelihood that consumers are able to use them at all. As discussed above, the CFPB expects third parties' costs of establishing connections with data providers would decline as a result of the proposal, and this may benefit consumers to the extent that lower costs are passed through to them.

Further, guaranteed access to consumer-authorized data would likely increase investment in third parties that request that data, providing consumers with more options in the marketplace and increasing competition.[221] As evidenced by the estimated 100 million consumers using third party data access discussed in the *Baseline* section, consumers have substantial demand for financial products and services offered by third parties, which may feature more convenient and automated means of gathering and using consumers' financial data relative to legacy financial service providers.[222] The CFPB expects that an expanded range of third party products and services would increase competition and innovation, offering important secondary benefits to consumers, including improved credit access and lower prices, discussed below.

Credential-Free Access—Increased Privacy, Reduced Data Breach Risks

Under the proposal, data providers would be required to create an interface that can be used to share consumer-authorized data with third parties without consumers' credentials being held by the third party. Many third parties currently use screen scraping techniques or credential-based APIs to access consumer information, which requires the consumer to provide the third party with their username and password for the data provider's website. This current practice may expose consumers to greater risk if a third party experiences a data breach. Data breaches can be very costly for consumers. While the CFPB does not have data to estimate the resulting consumer benefits of credential-free access, the academic and practitioner literature indicates that the associated benefits can be substantial.[223] Courts have approved large settlements in cases where data breaches affected financial service providers.[224] It is common for consumers to have their personal information compromised. For example, a 2019 Pew Research Center survey found that in the past 12 months, 28 percent of respondents reported having someone make fraudulent charges on their debit or credit card, take over a social media or email account without permission, or attempt to open a credit account in their name.[225] Under the proposed rule, consumers would benefit from a reduced likelihood that third party data breaches would expose their account login information, since they would no longer have to give third parties their account credentials in order for the third party to access consumer-authorized covered data. If the third party experienced a data breach it would be less likely to compromise the consumer's account since the breach would no longer potentially include the consumer's account access credentials. This in turn may reduce the risks of unauthorized transfers or other fraudulent account activity.

The CFPB expects the provisions may induce some data providers and third parties to transition voluntarily to credential-free interfaces for non-covered products that would have been accessed using credentials under the baseline. This would yield additional data security benefits to consumers.

Third Party Limitations on Collection, Use, and Retention—Ability To Be Forgotten, Increased Privacy, More Control Over Use of Own Data

The proposal would increase consumers' control over how their

[221] For example, Babina, Buchak and Gornall (2023) find that after other countries implemented open banking policies, venture capital investment in fintech companies increased 50 percent on average and the number of new entrants in the financial advice and mortgage markets increased. Tania Babina *et al., Customer Data Access and Fintech Entry: Early Evidence from Open Banking,* Stanford Univ. Graduate Sch. of Bus. Rsch. Paper (rev. May 12, 2023), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4071214.*

[222] As an example of how this can potentially increase access to credit for underserved populations, Howell *et al.* (2022) find that automation of underwriting processes for small business lending are associated with a higher share of loans being made to Black borrowers. Sabrina T. Howell *et al., Lender Automation and Racial Disparities in Credit Access,* Nat'l Bureau of Econ. Rsch. Working Paper No. 29364 (Nov. 2022), *https://www.nber.org/papers/w29364.*

[223] Albon *et al.* (2016) surveyed more than 6,000 consumers and found that in the previous year, 26 percent reported receiving a data breach notification. When asked about the costs that the data breach imposed on them, 68 percent of consumers whose data was breached estimated a nonzero financial loss, with a median value of $500. Lillian Ablon *et al., Consumer Attitudes Toward Data Breach Notifications and Loss of Personal Information,* RAND Corp. (2016), *https://www.rand.org/content/dam/rand/pubs/research_reports/RR1100/RR1187/RAND_RR1187.pdf.* A study of identity fraud by Javelin Strategy found that the average consumer who identified as a victim of identity fraud lost $1,551 and spent nine hours resolving the issue. Javelin Strategy, *Identity Fraud Losses Total $52 Billion in 2021, Impacting 42 Million U.S. Adults* (Mar. 29, 2022), *https://javelinstrategy.com/press-release/identity-fraud-losses-total-52-billion-2021-impacting-42-million-us-adults.* Consumers' liability for ATO fraud may be limited under Regulation E, but it is possible that not all consumers can or do successfully exercise their rights to limited liability.

[224] In 2019, a settlement for $190 million was approved in a data breach at Capital One that affected approximately 100 million consumers. Capital One, *Information on the Capital One cyber incident* (Apr. 22, 2022), *https://www.capitalone.com/digital/facts2019/.* A settlement of $425 million for consumers was reached in the 2017 Equifax data breach, which affected approximately 147 million consumers. Fed. Trade Comm'n, *Equifax Data Breach Settlement* (Dec. 2022), *https://www.ftc.gov/enforcement/refunds/equifax-data-breach-settlement.*

[225] Brooke Auxier *et al., Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information,* Pew Rsch. Ctr. (Nov. 15, 2019), *https://www.pewresearch.org/internet/2019/11/15/how-americans-think-about-privacy-and-the-vulnerability-of-their-personal-data/.*

covered data are used by third parties. There is strong evidence that consumers value control over how their personal information is used and thus would benefit from the proposal. In a 2015 survey, the Pew Research Center found that 93 percent of Americans said that it was very or somewhat important to be ''in control of who can get information about you.'' [226] One consumer advocacy stakeholder stated that under the baseline, consumers may not understand how third parties share their data due to difficult-to-understand disclosures and may also not understand the rights they may have to limit how their data are shared. The Pew Research Center found in another study that 70 percent of Americans feel that their personal information is less secure than it was five years ago, 79 percent are very or somewhat concerned about how their personal information is being used by companies, and only 18 percent feel that they have a great deal of or some control over the data that companies collect about them.[227] Eighty-one percent feel that the potential risks of personal data collection by companies outweigh the benefits. This evidence suggests consumers have a strong desire for more control over how their personal information is used and thus would benefit substantially from the proposal. The CFPB does not have sufficient data to provide a quantitative estimate of these benefits to consumers.

Effects of Increased Data Sharing on Innovation and Competition

Increased availability of consumer-authorized data to third parties could have a number of other indirect—but potentially large—benefits for consumers. For example, as discussed in the *Costs to consumers* section, while increased availability of data could result in lenders assessing some consumers as higher credit risk than they would be otherwise and charging them higher prices, it is also likely to result in lenders assessing some consumers as lower credit risk and charging them lower prices. It is possible that a consumer would be denied a loan that they would have been granted in the absence of the use of consumer-authorized data in underwriting. If the loan was not affordable for the consumer, then this denial could benefit the consumer in the long term.

Consumer-authorized data may be particularly useful for consumers who have a limited credit history or do not have a credit file with a nationwide consumer reporting company. Among consumers who do have credit scores, a study by FinRegLab found that cash flow underwriting can help identify consumers who have low traditional credit scores but are actually a low credit risk for lenders.[228] It is possible that many consumers will experience increased access to credit or lower prices under the proposal, to the extent that they are less able to share covered data with third parties under the baseline.[229] Even without the proposal, the Aggregator Collection shows that in 2022, tens of millions of data requests were made through those data aggregators for consumer data to be used for underwriting purposes.[230]

The use of consumer-authorized data may also benefit consumers through increased availability and quality of payment services. The availability of consumer-authorized data may improve payment services by, for example, making it easier to sign up for such services and allowing the service to verify a consumer's balance before initiating a payment to ensure that they are not overdrafting the consumer's account. In 2022, the Aggregator Collection shows nearly two billion requests for consumer data for facilitating payment services. Increased use of payment services is likely to benefit consumers.[231] Easier person-to-person payments may help consumers send or receive money from friends and family to avoid overdrafting their bank accounts or incurring fees through other forms of borrowing. In addition to providing benefits for person-to-person payments, consumer-authorized data are increasingly used to facilitate consumer-to-business ''pay by bank'' purchases, with lower fees relative to credit cards for merchants, some of which may be passed through as benefits to consumers.

Increased availability of consumer-authorized data may also lower the costs for a consumer switching financial institutions in search of higher deposit rates, lower fees, better service, or lower rates on credit products. Recent research has found that digital banking technology affects the movement of deposits into and out of banks in response to market pressures.[232] The provisions may make it easier for a consumer to move to a new institution by easing the transfer of funds and account information from the old institution to the new institution.

Even marginal improvements in consumers' ability to shop for and transfer deposits could have large potential benefits for consumers, given the substantial size of the deposit market and the dispersion in prices across institutions. Consumers with sizeable savings may benefit most from accounts offering higher interest rates, while consumers with limited funds may benefit most from accounts with low or no fees. Recent studies suggest there is potential for substantial gains on both measures. On interest rates, researchers have documented high average savings interest rates available from large online banks, substantially above average savings interest rates.[233]

[226] Pew Rsch. Ctr., *Americans Hold Strong Views About Privacy in Everyday Life* (May 19, 2015), *https://www.pewresearch.org/internet/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/pi_15-05-20_privacysecurityattd00/.*

[227] Brooke Auxier *et al., Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information,* Pew Rsch. Ctr. (Nov. 2019), *https://www.pewresearch.org/internet/2019/11/15/how-americans-think-about-privacy-and-the-vulnerability-of-their-personal-data/.*

[228] FinRegLab, *The Use of Cash-Flow Data in Underwriting Credit* (July 2019), *https://finreglab.org/wp-content/uploads/2019/07/FRL_Research-Report_Final.pdf.*

[229] For example, using data from a German fintech lender, Nam (2022) finds that borrowers across the credit score distribution benefit on average when they choose to share data with the lender, with lower credit score borrowers experiencing a larger increase in acceptance rates and higher credit score borrowers experiencing a larger decrease in interest rates. *See* Rachel J. Nam, *Open Banking and Customer Data Sharing: Implications for Fintech Borrowers,* SAFE Working Paper No. 364 (Nov. 30, 2022), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4278803.*

[230] These requests include requests for information relating to existing accounts, like credit card limit increases, as well as the underwriting of new loans.

[231] For example, Balyuk and Williams (2021) find that low-income consumers with increased exposure to a person-to-person payment platform are less likely to overdraft their bank accounts and more likely to borrow from family and friends using the platform if they have a low balance relative to their needs. *See* Tetyana Balyuk & Emily Williams, *Friends and Family Money: P2P Transfers and Financially Fragile Consumers* (Nov. 2021), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3974749.*

[232] Koont, Santos and Zingales (2023) find that in response to Federal Funds rate changes, deposits flow out of banks with an online platform more quickly. Naz Koont *et al., Destabilizing Digital Bank Walls* (May 2023), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4443273.* Erel, Liebersohn, Yannelis, and Earnest (2023) found that primarily online banks saw larger inflows of interest-bearing deposits when Federal Funds rates increased. Isil Erel *et al., Monetary Policy Transmission Through Online Banks,* Fisher Coll. of Bus. Working Paper No. 2023–03–015 & Charles A. Dice Ctr. Working Paper No. 2023–15 (May 26, 2023), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4459621.*

[233] Erel, Liebersohn, Yannelis, and Earnest (2023) found that in April 2023, there were at least 15 large online banks offering an average savings interest rate of 2.17 percent, compared to 0.28 percent at other banks. Similarly, FDIC data from April 2023 show that, weighted by share of deposits, average savings interest rates were 0.39 percent. The authors also find that the online banks offer substantially higher rates for other products like

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On fees, the CFPB has found that although deposit account fees are trending lower since 2019, banks with over $1 billion in assets collectively earned $7.7 billion in revenue from overdraft and insufficient funds (NSF) fees in 2022.[234] This is despite the availability of at least 397 deposit account products with zero overdraft and NSF fees, with options available in every state.[235]

If the proposal improves consumers' ability to switch providers, it would have two benefits. First, those consumers who switch could earn higher interest rates or pay lower fees. To estimate the potential size of this benefit, the CFPB assumes for this analysis that of the approximately $19 trillion [236] in domestic deposits at FDIC- and NCUA-insured institutions, a little under a third ($6 trillion) are interest-bearing deposits held by consumers, as opposed to accounts held by businesses or noninterest-bearing accounts.[237] If, due to the proposal, 1 percent of consumer deposits were shifted from lower earning deposit accounts to those with interest rates one percentage point (100 basis points) higher, consumers would earn an additional $600 million annually in interest. Similarly, if due to the proposal, consumers were able to switch accounts and avoid 1 percent of the overdraft and NSF fees they currently pay, they would pay at least $77 million less in fees per year.[238]

The second potential way consumers could benefit is through improved prices and service even for consumers who do not switch providers, due to the proposal's effects on competition. Increased competition from improved online banking services and open banking services under the baseline may have already contributed to consumers receiving higher interest rates on deposits and paying lower fees in recent years.[239] To estimate the scale of potential benefits from the provisions, if the proposal further increases these competitive pressures such that average offered interest rates on deposits increase by even one basis point (0.01 percentage points), consumers would accrue an additional $600 million in annual benefits from interest even without moving their deposits. Similarly, if increased competitive pressures due to the provisions caused banks to lower overdraft and NSF fees by 1 percent on average, consumers would benefit from at least $77 million in reduced fees annually.

In addition to the effects in the deposit market, under the proposal, a consumer's depository institution would no longer have a potential advantage in underwriting a loan based on the consumer's transaction data, which could increase competition and potentially lower interest rates on loan products for consumers. While these potential impacts are difficult to quantify, even marginal improvements in the interest rates or fees paid by consumers could have substantial benefits, given the size of consumer lending markets.

The provisions would likely make it easier for consumers to access their data through personal financial management platforms. This increased ability to access and monitor information about their personal finances could benefit consumers.[240]

### New Financial Data Processing Products or Services Definition

The CFPB's preliminary view is that the activities covered by the new financial data processing products or services definition are already within the scope of the CFPA's definition of financial product or service. As a result, the CFPB does not expect the new definition to have benefits to consumers. However, to the extent that there are firms offering products or services that are within the new definition but outside of the financial product or service definition, the new definition could benefit consumers by increasing protections against unfair,

certificates of deposit, individual retirement accounts, and money market deposit accounts. Isil Erel *et al., Monetary Policy Transmission Through Online Banks,* Fisher Coll. of Bus. Working Paper No. 2023–03–015 & Charles A. Dice Ctr. Working Paper No. 2023–15 (May 26, 2023), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4459621; Fed. Deposit Ins. Corp., FDIC National Rates and Rate Caps* (Apr. 17, 2023), *https://www.fdic.gov/resources/bankers/national-rates/2023-04-17.html.*

[234] Off. of Consumer Populations & Mkts., Consumer Fin. Prot. Bureau, *Overdraft/NSF revenue down nearly 50% versus pre-pandemic levels* (May 24, 2023), *https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-overdraft-nsf-revenue-in-q4-2022-down-nearly-50-versus-pre-pandemic-levels/full-report/.*

[235] These accounts are certified as meeting the Bank On National Account Standards established by the Cities for Financial Empowerment Fund. See list of certified accounts at *https://joinbankon.org/accounts/* (last visited Sept. 12, 2023), and current account standards, *https://bankon.wpenginepowered.com/wp-content/uploads/2022/08/Bank-On-National-Account-Standards-2023-2024.pdf* (last visited Sept. 12, 2023).

[236] Fed. Deposit Ins. Corp., *Insured Institution Performance,* 17(2) FDIC Quarterly (2023) *https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/2023mar/qbp.pdf,* and Nat'l Credit Union Admin., *Quarterly Credit Union Data Summary* (2022 Q4), *https://ncua.gov/files/publications/analysis/quarterly-data-summary-2022-Q4.pdf.*

[237] Derived from several data sources, the assumption that slightly under one third of total deposits are interest-bearing deposits held by consumers is based on assuming slightly under half of all deposits are held by consumers, and about 70 percent of consumers' deposits are interest bearing. First, in the most recent available 2019 data from the Survey of Consumer Finances, households' mean savings in transaction accounts and certificates of deposit was $48,803; *see* Bd. of Governors of the Fed. Rsrv. Sys., *Survey of Consumer Finances (SCF), https://www.federalreserve.gov/econres/scfindex.htm (last updated Dec. 9, 2022).* The 2020 Census estimates that there were 127 million U.S. households, and the product of these two numbers yields an estimate of $6.2 trillion in deposits held by consumers; *see* Thomas Gryn *et al., Married Couple Households Made Up Most of Family Households,* America Counts: Stories, *https://www.census.gov/library/stories/2023/05/family-households-still-the-majority.html.* This is slightly under half of the $14 trillion in deposits based on Call Report data for 2019; Fed. Deposit Ins. Corp., *2019 Summary of Deposits Highlights,* 14(1) FDIC Quarterly (2020), *https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2020-vol14-1/fdic-v14n1-4q2019-article.pdf,* Nat'l Credit Union Admin., *Quarterly Credit Union Data Summary* (2019 Q4), *https://ncua.gov/files/publications/analysis/quarterly-data-summary-2019-Q4.pdf.* The estimate for share of deposits that are interest bearing is derived from Figure A.3 in Erel, Liebersohn, Yannelis, and Earnest (2023). Isil Erel *et al., Monetary Policy Transmission Through Online Banks,* Fisher Coll. of Bus. Working Paper No. 2023–03–015 & Charles A. Dice Ctr. Working Paper No. 2023–15 (May 26, 2023), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4459621.*

[238] Survey evidence suggests that a small share of consumers value overdraft as a form of borrowing while a majority would prefer that the transactions were declined; *see* The Pew Ctr. on the States, *Overdraft America: Confusion and Concerns about Bank Practices* (May 2012), *https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/sciboverdraft20america1pdf.* In addition, the CFPB has found that some overdraft practices can be unfair, if they could not be reasonably anticipated; Consumer Fin. Prot. Bureau, *Unanticipated overdraft fee assessment practices,* Consumer Financial Protection Circular (Oct. 26, 2022), *https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2022-06-unanticipated-overdraft-fee-assessment-practices/.* This analysis assumes that those consumers who prefer overdraft would stay with institutions offering these services, while those switching would prefer accounts without overdraft fees.

[239] Kang-Landsberg, Luck and Plosser (2023) find that the pass-through of the Federal Funds rate to deposit rates is increasing and nearing the levels seen in the early 2000s. Alena Kang-Landsberg *et al., Deposit Betas: Up, Up, and Away?,* Liberty St. Econ. (Apr. 11, 2013), *https://libertystreeteconomics.newyorkfed.org/2023/04/deposit-betas-up-up-and-away.*

[240] Carlin, Olafsson, and Pagel (2023) find that increased access to a personal financial management platform substantially lowers overdraft fees. Bruce Carlin *et al., Mobile Apps and Financial Decision-Making,* 27(3) Rev. of Fin. at 977–96 (May 2023), *https://academic.oup.com/rof/article/27/3/977/6619575.* The evidence on this subject is mixed, however, as Medina (2020) finds that reminders to consumers to make credit card payments in a personal financial management platform increased the probability that consumers incurred overdraft fees and slightly increased overall net fees paid by consumers, since consumers were more likely to overdraft their bank account to pay their credit card bill. Paolina C Medina, *Side Effects of Nudging: Evidence from a Randomized Intervention in the Credit Card Market,* 34(5) Rev. of Fin. Studies at 2580–2607 (Sept. 10, 2020), *https://academic.oup.com/rfs/article/34/5/2580/5903746.*

deceptive, or abusive acts or practices. The CFPB does not have data to quantify these potential benefits. The CFPB requests comment on whether any firms offer products or services that would be covered by the new definition but fall outside the definition of financial product or service, and if so, what potential benefits to consumers could result from the new definition.

5. Alternatives Considered

The CFPB considered the impacts of several alternatives to the proposal. These include alternatives which would allow secondary use of data by third parties in certain circumstances (*i.e.,* through an opt-in mechanism allowing the consumer to consent to specific uses, while retaining a prohibition on certain high-risk secondary uses) or allow retention and use of deidentified data as an exception to the general limitation standard that otherwise limits retention.[241] The CFPB also considered alternatives specific to small entities, such as exemptions or longer compliance timelines, which are discussed in part VII.

Rather than prohibiting secondary uses, the CFPB considered allowing some secondary uses through an opt-in mechanism while prohibiting certain high-risk secondary uses. Relative to the proposal, this alternative would generally benefit third parties by allowing additional uses of data and potentially impose costs on consumers by reducing their privacy and their control of how their data are used. If these secondary uses lead to improved products and services offered by third parties, this alternative could benefit consumers relative to the proposal. If, however, the additional secondary uses are detrimental to consumers despite the consumer's opt-in consent, allowing such uses could harm consumers relative to the baseline. The CFPB requests comment on whether any secondary uses should be allowed through an opt-in mechanism. The CFPB also requests comment on how potentially harmful secondary uses could be defined and prohibited under this alternative.

The CFPB also considered an exception to the general limitation standard for retention and use of deidentified data. Relative to the proposal, this alternative would generally benefit third parties by allowing the continued retention and use of deidentified consumer data after the general limitation standard would normally require the deletion of identified data. For example, deidentified data could potentially be used for product improvement or development, which would benefit third parties. These uses could also potentially benefit consumers through improved or new products. However, if the risk of reidentification remains for the consumers in deidentified data, the retention of such data creates a potential cost to consumers in privacy and fraud risks in the case of a data breach or misuse of data. The CFPB requests comment on whether there should be an exception to the general limitation standard for deidentified data, and if so, how deidentification should be defined to limit risks to consumers.

*F. Potential Impacts on Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, as Described in Section 1026*

The proposed rule would require most depositories and credit unions with $10 billion or less in total assets (community banks and credit unions) to maintain a consumer interface and establish and maintain a developer interface through which they receive requests for covered data and make that data available in an electronic form usable by consumers and authorized third parties. Compared to larger data providers, these institutions likely are more reliant on core banking providers and other service providers to comply, have fewer consumers and thus reduced efficiencies of scale, and may be less likely to act as data recipients in addition to being data providers. These institutions are also less likely to have a consumer interface and thus more likely to be exempt from the proposed rule, relative to larger data providers. Compared to nondepository data providers of all sizes, these institutions likely have more legacy systems that may be costly to modify to come into compliance with the proposal.

As discussed in part VI.E.1, the CFPB expects that most depositories of this size will contract with a vendor for their interfaces for consumers and third parties. To examine the types of vendors used by smaller institutions, the CFPB uses a data field in the NCUA Profile data which asks credit unions to indicate ''the name of the primary share and loan information processing vendor.'' [242] While the vendor that provides core banking services to a credit union is not always the same vendor that provides digital banking services to the credit union, the CFPB expects that in many cases the same vendor provides both services. Based on the reported information for all credit unions, 99.6 percent of whom have $10 billion or less in total assets, the CFPB estimates that at least 53 percent of credit unions already use a vendor that offers interfaces for third parties. To measure the size of vendors used, the CFPB estimates that 89 percent of credit unions use a vendor with at least 100 credit union clients, and 94 percent of credit unions use a vendor with at least 50 credit union clients. The CFPB expects that many of these vendors would likely offer interfaces for third parties by the compliance date applicable for community banks and credit unions. However, the 6 percent of credit unions using smaller vendors—and in particular the 2 percent of credit unions that did not report using a vendor or reported using a vendor with only a single or handful of clients—are more likely to need to either switch vendors or build a developer interface in house. This could lead to higher costs, as the costs of switching to a new vendor may be larger as a proportion of total assets or revenues for smaller depositories relative to larger depositories.

The CFPB does not have data on the vendors used by community banks, but expects that they may have a similar distribution of vendors as the comparably sized credit unions, and thus would face comparable costs to establish a developer interface.

The CFPB seeks comment on its analysis of the potential impact on depository institutions and credit unions with $10 billion or less in total assets.

*G. Potential Impacts on Consumers in Rural Areas, as Described in Section 1026*

To the extent that the compliance costs of the provisions lead to higher fees or reductions in services offered by small banks and credit unions, consumers in rural areas may be disproportionately affected by the proposed rule because smaller banks hold a larger share of deposits in rural areas. For example, analysis by the Federal Reserve Board in 2017 found that the market share of community banks (defined as assets of less than $10 billion) in rural areas is nearly 80 percent on average, compared with nearly 40 percent in urban areas.[243]

[241] Some additional alternatives are considered and discussed in part IV. For example, alternatives to the prohibition on fees for establishing and maintaining interfaces and for accessing data through interfaces are discussed in part IV.C.1.

[242] A ''share'' denotes a deposit account held by a credit union, and thus will include the Regulation E covered accounts under the proposal.

[243] Bd. of Governors of the Fed. Rsrv. Sys., *Trends in Urban and Rural Community Banks* (Oct. 4,

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Rural consumers are substantially less likely to use online banking than those who live in urban areas, defined to include all MSAs. For example, Benson *et al.* (2020) find that 56 percent of consumers in rural areas use online banking compared to 75 percent in large MSAs.[244] It is possible that rural consumers are more likely to have deposit accounts at institutions without online banking platforms. Since these institutions would be exempt from the requirements for data providers in the proposal, rural consumers at these institutions could experience less of both the costs and the benefits of the proposal. Some of the difference in online banking use may also be explained by differences in access to high-speed internet, since as of 2018 consumers in rural areas were 20.8 percentage points less likely to have the option of subscribing to high-speed internet.[245] Given that rural consumers are less likely to use online banking, they may also be less likely to use third party online services. The CFPB does not have comprehensive data on the geographic distribution of the use of third party products and services, though since rural consumers are less likely to have high-speed internet access, they may be less likely to use third party products and services. The 2021 FDIC National Survey of Unbanked and Underbanked Households found that 68.7 percent of consumers with bank accounts outside of MSAs had linked their bank account to a third party online payment service, compared with 72.3 percent in MSAs, showing that rural consumers are slightly less likely to use at least one type of third party product.[246]

The CFPB seeks comment on its analysis of potential impacts on consumers in rural areas.

## VII. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA) [247] generally requires an agency to conduct an IRFA and a FRFA of any rule subject to notice-and-comment requirements. These analyses must ''describe the impact of the proposed rule on small entities.'' [248] An IRFA or FRFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[249] The CFPB also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[250] The CFPB has not certified that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. Accordingly, the CFPB convened and chaired a Small Business Review Panel under SBREFA to consider the impact of the proposed rule on small entities that would be subject to that rule and to obtain feedback from representatives of such small entities. The Small Business Review Panel for this proposed rule is discussed in part VII.A. The CFPB is also publishing an IRFA. Among other things, the IRFA estimates the number of small entities that will be subject to the proposed rule and describes the impact of that rule on those entities. The IRFA for this proposed rule is set forth in part VII.B.

### *A. Small Business Review Panel*

Under section 609(b) of the RFA, as amended by SBREFA and the CFPA, the CFPB must seek, prior to conducting the IRFA, information from representatives of small entities that may potentially be affected by its proposed rules to assess the potential impacts of that rule on such small entities.

The CFPB complied with this requirement. Details on the SBREFA Panel and SBREFA Panel Report for this proposed rule are described in part II.B.

### *B. Initial Regulatory Flexibility Analysis*

#### 1. Description of the Reasons Why Agency Action Is Being Considered

In section 1033 of the CFPA, Congress directed the CFPB to adopt regulations governing consumers' data access rights. The CFPB is issuing this proposed rule primarily to begin implementing the CFPA section 1033 mandate, although the CFPB is also relying on other CFPA authorities for specific aspects of the proposed rule. See part VI.A for additional discussion.

#### 2. Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

As discussed in part VI.A, the primary purpose of this proposed rule is to implement section 1033 of the CFPA. This proposed rule aims to (1) expand consumers' access to their financial data across a wide range of financial institutions, (2) ensure privacy and data security for consumers by limiting the collection, use, and retention of data that is not needed to provide the consumer's requested service, and (3) push for greater efficiency and reliability of data access across the industry to reduce industry costs, facilitate greater competition, and support the development of beneficial products and services. The CFPB is issuing this proposed rule pursuant to its authority under the CFPA. The specific CFPA provisions relied upon are discussed in part III.

#### 3. Description and, Where Feasible, Provision of an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

The small entities affected by the proposed rule would be those that meet the definitions of covered data providers, third parties, or data aggregators. Covered data providers include depository institutions and nondepository institutions. In the case of the new financial data processing product or service definition, it would apply to third parties, data aggregators, or others who provide financial data processing products or services for consumer purposes.

Nondepository financial institutions and entities outside of the financial industry may also be affected, though it is important to note that entities within these industries would only be subject to the proposed rule if they meet the definitions of covered data provider, third party, or data aggregator. Examples of potentially affected small third parties include entities using consumer-authorized information to underwrite loans, offer budgeting or personal financial management services, or facilitate payments.

For the purposes of assessing the impacts of the proposed rule on small entities, ''small entities'' are defined in the RFA to include small businesses, small nonprofit organizations, and small

2018), *https://www.federalreserve.gov/newsevents/speech/quarles20181004a.htm.*

[244] David Benson *et al., How do Rural and Urban Retail Banking Customers Differ?,* FEDS Notes (June 2020), *https://www.federalreserve.gov/econres/notes/feds-notes/how-do-rural-and-urban-retail-banking-customers-differ-20200612.html.*

[245] Fed. Commc'ns Comm'n, *2020 Broadband Deployment Report* (Apr. 24, 2020), *https://docs.fcc.gov/public/attachments/FCC-20-50A1.pdf.*

[246] Fed. Deposit Ins. Corp., *2021 National Survey of Unbanked and Underbanked Households, https://www.fdic.gov/analysis/household-survey/index.html* (last updated July 24, 2023).

[247] 5 U.S.C. 601 *et seq.*

[248] 5 U.S.C. 603(a). For purposes of assessing the impacts of the proposed rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A ''small business'' is determined by application of SBA regulations and reference to the NAICS classifications and size standards. 5 U.S.C. 601(3). A ''small organization'' is any ''not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' 5 U.S.C. 601(4). A ''small governmental jurisdiction'' is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

[249] 5 U.S.C. 605(b).

[250] 5 U.S.C. 609.

government jurisdictions. A ''small business'' is defined by the SBA's Office of Size Standards for all industries in the NAICS. The CFPB has identified several categories of small entities that may be subject to the proposals under consideration. Within the financial industry, these include depository institutions (such as commercial banks, savings associations, and credit unions), credit card issuing nondepositories, sales financing companies, consumer lending companies, real estate credit companies, firms that engage in financial transactions processing, reserve, and clearinghouse activities, firms that engage in other activities related to credit intermediation, investment banking and securities dealing companies, securities brokerage companies, and commodities contracts brokerage companies. Outside of the financial industry, potentially affected small entities include software publishers, firms that provide data processing and hosting services, firms that provide payroll services, firms that provide custom computer programming services, and credit bureaus. According to the SBA's Office of Size Standards, depository institutions are small if they have less than $850 million in assets. Nondepository firms that may be subject to the proposals under consideration have a maximum size of $47 million in receipts, but the threshold is lower for some NAICS categories.[251] Table 1 shows the number of small businesses within NAICS categories that may be subject to the proposed rule based on December 2022 NCUA and FFIEC Call Report data and 2017 Economic Census data from the U.S. Census Bureau. Entity counts are not provided for the specific revenue amounts that the SBA uses to define small entities and are instead usually provided at multiples of five or ten million dollars. Table 1 includes the closest upper and lower estimates for each revenue limit (*e.g.,* a NAICS category with a maximum size of $47 million in receipts has both the count of entities with less than $50 million in revenue and the count of entities with less than $40 million in revenue). Not all small entities within each included NAICS category would be subject to the proposed rule.

TABLE 1—NUMBER OF SMALL BUSINESSES WITHIN NAICS INDUSTRY CODES THAT MAY BE SUBJECT TO THE PROVISIONS UNDER CONSIDERATION

| | Number of entities | Percent of entities |
|---|---|---|
| **A. Small Depository Firms** | | |
| Commercial Banking (522110) and Savings Institutions (522120) | 4,706 | |
| < $850M (Assets) | 3,566 | 75.8 |
| Credit Unions (522130) | 4,861 | |
| < $850M (Assets) | 4,365 | 89.8 |
| **B. Small Nondepository Firms** | | |
| Software Publishers (511210) | 10,014 | |
| < $40M (Revenue) | 9,395 | 93.8 |
| < $50M (Revenue) | 9,461 | 94.5 |
| Data Processing, Hosting, and Related Services (518210) | 10,860 | |
| < $40M (Revenue) | 9,930 | 91.4 |
| Sales Financing (522220) | 2,367 | |
| < $40M (Revenue) | 2,112 | 89.2 |
| < $50M (Revenue) | 2,124 | 89.7 |
| Consumer Lending (522291) | 3,037 | |
| < $40M (Revenue) | 2,905 | 95.7 |
| < $50M (Revenue) | 2,915 | 96.0 |
| Real Estate Credit (522292) | 3,289 | |
| < $40M (Revenue) | 2,872 | 87.3 |
| < $50M (Revenue) | 2,904 | 88.3 |
| Financial Transactions Processing, Reserve, and Clearinghouse Activities (522320) | 3,068 | |
| < $40M (Revenue) | 2,916 | 95.0 |
| < $50M (Revenue) | 2,928 | 95.4 |
| Other Activities Related to Credit Intermediation (522390) | 3,772 | |
| < $25M (Revenue) | 3,610 | 95.7 |
| < $30M (Revenue) | 3,621 | 96.0 |
| Investment Banking and Securities Dealing (523110) | 2,394 | |
| < $40M (Revenue) | 2,214 | 92.5 |
| < $50M (Revenue) | 2,227 | 93.0 |
| Securities Brokerage (523120) | 6,919 | |
| < $40M (Revenue) | 6,703 | 96.9 |
| < $50M (Revenue) | 6,717 | 97.1 |
| Commodities Contracts Brokerage (523140) | 856 | |
| < $40M (Revenue) | 825 | 96.4 |
| < $50M (Revenue) | 829 | 96.8 |
| Payroll Services (541214) | 4,328 | |
| < $35M (Revenue) | 4,111 | 95.0 |
| < $40M (Revenue) | 4,116 | 95.1 |
| Custom Computer Programming Services (541511) | 62,205 | |
| < $30M (Revenue) | 60,959 | 98.0 |
| < $35M (Revenue) | 61,088 | 98.2 |
| Credit Bureaus (561450) | 307 | |

[251] SBA regularly updates its size thresholds to account for inflation and other factors. The SBA Size Standards described here reflect the thresholds in effect at the publication date of this report. The 2017 Economic Census data are the most recently available data with entity counts by annual revenue. *See* Small Bus. Admin., *SBA Size Standards* (effective Mar. 17, 2023), *https://www.sba.gov/sites/sbagov/files/2023-06/Table%20of%20Size%20Standards_Effective%20March%2017%2C%202023%20%282%29.pdf.*

TABLE 1—NUMBER OF SMALL BUSINESSES WITHIN NAICS INDUSTRY CODES THAT MAY BE SUBJECT TO THE PROVISIONS UNDER CONSIDERATION—Continued

| | Number of entities | Percent of entities |
|---|---|---|
| < $35M (Revenue) | 279 | 90.9 |
| < $75M (Revenue) | 283 | 92.2 |

Table 2 provides the CFPB's estimate of the actual number of affected entities within the categories of depositories, nondepository data providers, and third parties, and the NAICS codes these entities may fall within. As described in part VII.B.6, the CFPB estimates that approximately 13 percent of the small depositories would not be subject to the proposed rule because they did not have a consumer interface as of December 2022, leaving approximately 6,897 small depositories subject to the proposed rule. The CFPB is not able to estimate with precision the number of small nondepository entities that would be subject to the proposed rule, but expects that approximately 100 small nondepository institutions would be covered data providers subject to the proposed rule. In addition, based on data from the Provider Collection and Aggregator Collection, the CFPB estimates that between 6,800 and 9,500 small entities are third parties that access consumer-authorized data.

TABLE 2—ESTIMATED NUMBER OF AFFECTED ENTITIES AND SMALL ENTITIES BY CATEGORY

| Category | NAICS | Small entity threshold | Est. total affected entities | Est. number of small entities |
|---|---|---|---|---|
| Depository Institutions | 522110, 522120, 522130, 522210 | $850 million in assets | 8,506 | 6,897 |
| Nondepository financial institutions and data providers. | 511210, 522291, 522320 | Varies, less than $47 million in annual receipts. | 120 | 100 |
| Third parties | 511210, 518210, 522220, 522291, 522292, 522320, 522390, 523110, 523120, 523140, 541214, 541511, 561450. | Varies, less than $47 million in annual receipts. | 7,000–10,000 | 6,800–9,500 |

4. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for the Preparation of the Report

The proposed rule would impose new reporting, recordkeeping, and other compliance requirements on small entities subject to the proposal. These requirements generally differ for small entities in two classes: data providers and third parties. Part VI.E provides a detailed description of the requirements and estimated compliance costs that would be faced by affected small entities under the proposed rule. These requirements would be imposed on an estimated 6,897 depository data providers, 100 nondepository data providers, and between 6,800 and 9,500 third parties, as shown in Table 2. The proposed requirements and their costs are summarized in this section.

Requirements for Data Providers

The proposed rule would require data providers to report the number of proper responses divided by the total number of queries to their developer interface on a monthly basis. The CFPB estimates that data providers may face a $7,300 cost of developing and testing a system to regularly disclose this performance metric on their websites. The CFPB expects these reports will generally be automated and will have minimal ongoing costs after the system is implemented.

The proposed rule would require data providers to have policies and procedures to retain records to demonstrate compliance with certain other requirements of the proposed rule. Data providers would also be required to have policies and procedures designed to ensure that the reason for the decision to decline a third party's request to access its developer interface is communicated to the third party. The CFPB expects that these recordkeeping requirements would likely be built into a data provider's developer interface and the cost methodology described in part IV.E.1 includes these in the overall cost of establishing and maintaining a compliant developer interface. Incremental costs of these requirements are limited to developing and implementing reasonable policies and procedures, which the CFPB estimates would cost $5,500 to $11,900 per data provider.

The proposed rule requires data providers to establish and maintain a consumer interface that allows consumers to export their covered data in machine-readable formats. As discussed in part VII.B.4, the CFPB expects that data providers subject to this requirement generally already provide the required information under the baseline and estimates that the incremental costs of this requirement will be minimal.

The proposed rule requires data providers to establish and maintain a developer interface. As described in part VII.B.4, the CFPB expects that data providers will either contract with a vendor for their developer interfaces or develop and maintain their developer interfaces in-house. The cost estimate of developing and maintaining a developer interface is up to $24 per account per year for small data providers that choose to contract with a vendor. For small data providers that choose to build their developer interface in-house, the estimated upfront cost is between $250,000 and $500,000. Estimated annual costs for in-house developer interfaces include technology costs of $20,000 as well as ongoing staffing costs of $45,000 to $91,000. The proposed rule would require data providers to report the number of proper responses divided by the total number of queries to their developer interface on a monthly basis. The CFPB estimates that data providers may face a $7,300 cost of developing and testing a system to

regularly disclose this performance metric on their websites, with minimal maintenance costs after the system is implemented.

The proposed rule would require data providers to have policies and procedures to ensure that data are accurately transferred to third parties. In the cost methodology described in part IV.E.1, the CFPB includes these costs in the estimate for establishing and maintaining a compliant developer interface.

Satisfying these requirements for data providers would generally involve professional skills related to software development, general and operational management, legal expertise, compliance, and customer support.

Requirements for Third Parties

Third parties are not subject to reporting requirements but would be required to retain records of consumer data access requests and actions taken in response to these requests, reasons for not making the data available, and data access denials under the proposed rule. The CFPB understands that most third parties maintain similar records and costs would be limited to a one-time change to existing systems and small storage costs. The CFPB estimates a one-time cost of $8,200 for third parties to develop and implement appropriate policies and procedures, with minimal ongoing costs.

The proposed rule would require third parties to establish and maintain systems that could receive data access revocation requests, track duration-limited authorizations, delete data when required due to revoked or lapsed authorizations, and retain the relevant records. The CFPB estimates that the one-time cost to establish these systems would be between $21,900 and $91,300, with minimal ongoing costs.

The proposed rule would require third parties to provide authorization disclosure and certification statements. The CFPB estimates that the one-time cost to third parties of establishing an automated system to provide these disclosures would be $91,300. However, the CFPB expects that small third parties will generally use another third party to provide these disclosures and this cost will not be incurred. If third parties currently provide disclosures, modifying the content to comply with the proposed rule is estimated to cost between $2,700 and $3,700.

Satisfying these requirements for data providers would generally involve professional skills related to software development, general and operational management, legal expertise, compliance, and customer support.

As discussed in part VI.E.1, the CFPB does not expect the new financial data processing products or services definition to impose costs on small entities.

5. Identification, to the Extent Practicable, of All Relevant Federal Rules Which May Duplicate, Overlap, or Conflict With the Proposed Rule

The Equal Credit Opportunity Act (ECOA) [252] and the CFPB's implementing regulation, Regulation B (12 CFR part 1002), prohibit creditors from discriminating in any aspect of a credit transaction, including a business-purpose transaction, on the basis of race, color, religion, national origin, sex, marital status, age (if the applicant is old enough to enter into a contract), receipt of income from any public assistance program, or the exercise in good faith of a right under the Consumer Credit Protection Act.[253]

EFTA and the CFPB's implementing regulation, Regulation E, establish a basic framework of the rights, liabilities, and responsibilities of participants in the electronic fund and remittance transfer systems. Among other requirements, EFTA and Regulation E prescribe requirements applicable to electronic fund transfers, including disclosures, error resolution, and rules related to unauthorized electronic fund transfers.

The FCRA and the CFPB's implementing regulation, Regulation V (12 CFR part 1022), govern the collection, assembly, and use of consumer report information and provide the framework for the consumer reporting system in the United States. They also promote the accuracy, fairness, and privacy of information in the files of consumer reporting agencies. They also include limitations on the use of certain types of consumer information, limitations on the disclosure of such information to third parties, as well as certain requirements related to accuracy and dispute resolution.

The GLBA and the CFPB's implementing regulation, Regulation P (12 CFR part 1016), require financial institutions subject to the CFPB's jurisdiction to provide their customers with notices concerning their privacy policies and practices, among other things. They also place certain limitations on the disclosure of nonpublic personal information to nonaffiliated third parties, and on the redisclosure and reuse of such information. Other parts of the GLBA, as implemented by regulations and guidelines of certain other Federal agencies (*e.g.,* the FTC's Safeguards Rule and the prudential regulators' Safeguards Guidelines), set forth standards for administrative, technical, and physical safeguards with respect to financial institutions' customer information. These standards generally apply to the security and confidentiality of customer records and information, anticipated threats or hazards to the security or integrity of such records, and unauthorized access to or use of such records or information that could result in substantial harm or inconvenience to any customer.

TILA and the CFPB's implementing regulation, Regulation Z, impose requirements on creditors and include special provisions for credit offered by credit card issuers. Among other requirements, TILA and Regulation Z prescribe requirements applicable to credit cards, including disclosures, error resolution, and rules related to unauthorized credit card use.

TISA and the CFPB's implementing regulation, Regulation DD (12 CFR part 1030), apply to depository institutions; TISA and part 707 of the NCUA Rules and Regulations apply to credit unions. Among other things, TISA and Regulation DD prescribe requirements applicable to deposit accounts, including disclosure requirements.

The Real Estate Settlement Procedures Act of 1974 [254] and the CFPB's implementing regulation, Regulation X (12 CFR part 1024), include requirements applicable to mortgage servicers that seek to protect borrowers against certain billing and servicing errors.

6. Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

The CFPB considered several alternatives to the proposed rule that would minimize economic impacts on small entities. These alternatives generally fall into four categories: (1) exemptions from the proposed rule for small data providers, (2) permitting small data providers to charge fees for making covered data available, (3) exemptions from the proposed rule for small third parties, or (4) alternative compliance dates for small depository data providers.

For small data providers, the CFPB considered exemptions based on the

[252] 15 U.S.C. 1691 *et seq.*

[253] 15 U.S.C. 1601 *et seq.*

[254] 12 U.S.C. 2601 *et seq.*

number of covered accounts or on total assets. To estimate the potential number of entities and share of accounts that would be exempted under the alternatives, the CFPB uses Call Report data as of the end of December 2022 on the number of FDIC- or NCUA-insured deposit accounts as a proxy for covered accounts at depository data providers. The CFPB expects that depositories make up a large majority of small entity data providers but lacks data to estimate the number and size of small nondepository data providers. The CFPB requests data and evidence on these entities.

Tables 3 and 4 report the share and number of all depositories that would be exempted under the proposed rule and under alternative exemption thresholds, as well as the number and share of small entity depositories—those with less than $850 million in assets—that would be exempted. For the estimates under the proposed rule, banks are estimated to be exempt if they did not report ''Yes'' in response to the question ''Do any of the bank's internet websites have transactional capability, *i.e.,* allow the bank's customers to execute transactions on their accounts through the website?'' in December 2022 FFIEC Call Report data. Credit unions are estimated to be exempt if they did not affirmatively report having ''Online Banking'' or a ''Mobile Application'' or services to offer ''Download Account History'' or ''E-Statements'' electronically in December 2022 NCUA Profile Form 4501A data. These data do not precisely identify which entities may be exempt from the proposal, but the CFPB is not aware of better available data to estimate whether entities are exempt. In addition, because at least some entities not reporting online banking or transactional websites have online banking websites as of the publication of this proposal, this is likely an overestimate of the number of exempt entities. The CFPB requests comment on its estimate of the share of depositories exempted.

TABLE 3—NUMBER OF EXEMPTED ENTITIES UNDER ACCOUNT-BASED ALTERNATIVE EXEMPTION THRESHOLDS CONSIDERED

| Exemption threshold | Share of depositories exempted (approx.) (%) | Number of depositories exempted (approx.) | Share of small entity depositories exempted (approx.) (%) | Number of small entity depositories exempted (approx.) | Share of accounts exempted (approx.)[255] (%) |
|---|---|---|---|---|---|
| Proposed rule[256] | 11 | 1,061 | 13 | 1,033 | 0.64 |
| Less than 500 accounts[257] | 5 | 479 | 6 | 464 | 0.01 |
| Less than 1,000 accounts | 10 | 964 | 12 | 943 | 0.04 |
| Less than 2,000 accounts | 18 | 1,731 | 21 | 1,705 | 0.15 |
| Less than 3,000 accounts | 26 | 2,492 | 31 | 2,460 | 0.32 |
| Less than 4,000 accounts | 32 | 3,091 | 38 | 3,047 | 0.51 |
| Less than 5,000 accounts | 38 | 3,622 | 45 | 3,573 | 0.72 |
| Less than 10,000 accounts | 57 | 5,407 | 67 | 5,302 | 1.88 |

TABLE 4—NUMBER OF EXEMPTED ENTITIES UNDER ASSET-BASED ALTERNATIVE EXEMPTION THRESHOLDS CONSIDERED

| Exemption threshold | Share of depositories exempted (%) | Number of depositories exempted | Share of small entity depositories exempted (%) | Number of small entity depositories exempted | Share of accounts exempted (approx.)[258] (%) |
|---|---|---|---|---|---|
| Proposed rule[259] | 11 | 1,061 | 13 | 1,033 | 0.64 |
| Less than $50 million in assets | 27 | 2,621 | 33 | 2,621 | 0.57 |
| Less than $100 million in assets | 40 | 3,799 | 48 | 3,799 | 1.29 |
| Less than $150 million in assets | 48 | 4,631 | 58 | 4,631 | 1.98 |
| Less than $200 million in assets | 55 | 5,249 | 66 | 5,249 | 2.64 |
| Less than $250 million in assets | 60 | 5,704 | 72 | 5,704 | 3.23 |

The CFPB has preliminarily determined that the exemption in the proposed rule would best target the exemption to those entities which would face the highest cost of compliance absent the exemption. Small depositories without any digital banking infrastructure would face the highest costs from establishing and maintaining interfaces for both consumer and authorized third party access. While many of these entities would be exempted by alternative account- or asset-based exemptions, the CFPB has preliminarily determined that such alternatives would also exempt some data providers that may be able to comply at lower cost. The CFPB also

[255] This is the number of FDIC- or NCUA-insured deposit accounts that would be exempted divided by the total number of FDIC- or NCUA-insured deposit accounts. Credit cards are not in the numerator or denominator. Commercial deposit accounts are in both the numerator and denominator.

[256] For this analysis, banks are classified as exempt if they do not report ''Yes'' to Item 9 of the Schedule RC–M on their December 2022 Call Report. Credit unions are classified as exempt if they did not report that they have ''Online Banking'' or ''Mobile Application'' for question 2 or ''Download Account History'' or ''E-Statements'' for question 4 under ''Information Technology (IT)'' on their December 2022 NCUA Profile Form 4501A.

[257] The estimates in this table are based on FDIC- or NCUA-insured deposit accounts, as there is no available data on number of covered accounts.

[258] This is the number of FDIC- or NCUA-insured deposit accounts that would be exempted divided by the total number of FDIC- or NCUA-insured deposit accounts. Credit cards are not in the numerator or denominator. Commercial deposit accounts are in both the numerator and denominator.

[259] For this analysis, banks are classified as exempt if they do not report ''Yes'' to Item 9 of the Schedule RC–M on their December 2022 Call Report. Credit unions are classified as exempt if they did not report that they have ''Online Banking'' or ''Mobile Application'' for Item 2 or ''Download Account History'' or ''E-Statements'' for Item 4 under ''Information Technology (IT)'' on their December 2022 NCUA Profile Form 4501A.

expects that the later compliance date for these smaller entities will generally reduce the burden on these entities, mitigating the need for broader exemptions.

Small data providers not excluded from the requirements of proposed part 1033 (because they have a consumer interface) that do not have a developer interface would incur the costs necessary to establish and maintain such an interface. To help offset those costs, the CFPB has considered the alternative of permitting small data providers to charge fees for making covered data available through developer interfaces. The CFPB is proposing, however, to prohibit fees across data providers of all sizes. This is because the CFPB has preliminarily determined that a data provider charging such fees would be inconsistent with the data provider's statutory obligation under CFPA section 1033 to make covered data available to consumers and to their authorized third party representatives. Further, consumers at small data providers could be harmed through reduced access to third parties' products and services if the CFPB were to permit only small data providers to charge fees.

The CFPB also considered exemptions as a means to reduce burden for small entity third parties. Based on data from the Aggregator Collection, the CFPB estimates that there are approximately 6,800 to 9,500 third parties with fewer than 100,000 connected accounts, many of whom may be small entities. However, exempting third parties from certain conditions of access under the proposed rule, such as the requirements on collection, use, and retention, would likely create risks of harm for consumers on data security and privacy grounds, provide unfair competitive advantages for exempt versus non-exempt third parties, and increase the risks of losses from data security incidents for consumers and data providers.

Finally, the CFPB considered alternative compliance dates for small entities to reduce burden. The proposed rule has a compliance date of approximately four years after the final rule is published in the **Federal Register** for depository data providers with less than $850 million in assets. Since depositories are defined as small entities if they have less than $850 million in assets, all depository small entities would fall into this compliance date tier by definition. As a result, all depository small entities would have a significant amount of time from the issuance of this proposed rule to come into compliance with the rule. Given the development of credential-free interfaces for third parties by core banking providers and other vendors, the CFPB expects that it will not be overly burdensome for small entity data providers to come into compliance before this date. Alternative compliance dates further into the future would extend the period during which screen scraping and other less secure and less privacy-protective data access methods would continue to be used, creating risks of harm to consumers and data providers.

7. Discussion of Impact on Cost of Credit for Small Entities

The CFPB expects that the proposal may have some limited impact on the cost or availability of credit for small entities but does not expect that the impact would be substantial. The CFPB expects there are several ways the proposal could potentially impact the cost or availability of credit to small entities. First, the provisions could impact the availability of credit to small entities if small businesses are using loans from lenders (either data providers or third parties) affected by the provisions and the provisions lead to a contraction of the market. Second, the proposal could potentially increase the cost of credit for small businesses if the costs of implementing the proposal are passed through in the form of higher prices on loans from lenders. Third, for small business owners that use consumer-authorized data to qualify for or access credit, the provisions could potentially increase credit availability or lower costs for small entities by facilitating increased data access.[260] Small entity representatives did not provide feedback on this topic.[261] The CFPB does not have data to quantify these potential impacts.

The CFPB seeks comment on its analysis of the proposal's impact on the cost of credit for small entities, and requests data or evidence on these potential impacts.

## VIII. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA),[262] Federal agencies are generally required to seek, prior to implementation, approval from OMB for information collection requirements. Under the PRA, the CFPB may not conduct or sponsor, and, notwithstanding any other provision of law, a person is not required to respond to, an information collection unless the information collection displays a valid control number assigned by OMB.

As part of its continuing effort to reduce paperwork and respondent burden, the CFPB conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on the information collection requirements in accordance with the PRA. This helps ensure that the public understands the CFPB's requirements or instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, information collection instruments are clearly understood, and the CFPB can properly assess the impact of information collection requirements on respondents.

The proposed rule would create a new 12 CFR part 1033 and amend 12 CFR part 1001. The proposed rule contains seven new information collection requirements.

1. Obligation to make covered data available (proposed § 1033.201), including general requirements (proposed § 1033.301) and requirements applicable to developer interface (proposed § 1033.311).

2. Information about the data provider (proposed § 1033.341).

3. Policies and procedures for data providers (proposed § 1033.351).

4. Third party authorization; general (proposed § 1033.401), including the authorization disclosure (proposed § 1033.411).

5. Third party obligations (proposed § 1033.421).

6. Use of data aggregator (proposed § 1033.431).

7. Policies and procedures for third party record retention (proposed § 1033.441).

The information collection requirements in this proposed rule would be mandatory.

The collections of information contained in this proposed rule, and identified as such, have been submitted to OMB for review under section 3507(d) of the PRA. A complete description of the information collection requirements (including the burden estimate methods) is provided in the information collection request (ICR) that the CFPB has submitted to OMB under the requirements of the PRA. The ICR submitted to OMB requesting approval under the PRA for the information collection requirements contained herein is available at *www.regulations.gov* as well as on OMB's public-facing docket at

[260] As an example, Howell *et al.* found that more automated fintech lenders facilitated a higher share of Paycheck Protection Program loans to small, Black-owned firms relative to traditional lenders. Sabrina T. Howell *et al., Lender Automation and Racial Disparities in Credit Access,* NBER Working Paper No. 29364 (Nov. 2022), *https://www.nber.org/system/files/working_papers/w29364/w29364.pdf.*

[261] SBREFA Panel Report at 40.

[262] 44 U.S.C. 3501 *et seq.*

*www.reginfo.gov.* Please submit your comments to OMB at *www.reginfo.gov/public/do/PRAMain* by clicking the link ''Currently under Review—Open for Public Comments'' and using the search function to find the ICR for comment.

*Title of Collection:* 12 CFR part 1033.

*OMB Control Number:* 3170–XXXX.

*Type of Review:* New collection.

*Affected Public:* Private Sector.

*Estimated Number of Respondents:* 17,006.

*Estimated Total Annual Burden Hours:* 2,040,600 annually and 10,323,120 one-time.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the CFPB, including whether the information will have practical utility; (2) the accuracy of the CFPB's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (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 other forms of information technology. Comments submitted in response to this proposal will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

If applicable, the notice of final rule will display the control number assigned by OMB to any information collection requirements proposed herein and adopted in the final rule.

## IX. Severability

The CFPB preliminarily intends that, if any provision of the final rule, or any application of a provision, is stayed or determined to be invalid, the remaining provisions or applications are severable and shall continue in effect.

However, this is subject to the following significant exception. The CFPB preliminarily considers data providers' proposed obligations to provide data under 12 CFR part 1033 to authorized third parties to be inseparable from the protections the CFPB is proposing in subpart D to ensure that authorized third parties are acting on behalf of consumers. Accordingly, if any of the provisions in subpart D were stayed or determined to be invalid, the CFPB preliminary intends that subpart D, together with references to third parties and authorized third parties elsewhere in part 1033, shall not continue in effect. This would not affect direct access by consumers to covered data under the remainder of part 1033, and it would also not affect the definition of financial product or service under proposed § 1001.2(b).

## List of Subjects

*12 CFR Part 1001*

Consumer protection, Credit.

*12 CFR Part 1033*

Banks, banking, Consumer protection, Credit, Credit Unions, Electronic funds transfers, National banks, Privacy, Reporting and recordkeeping requirements, Savings associations, Voluntary standards.

## Authority and Issuance

For the reasons set forth in the preamble, the CFPB proposes to amend 12 CFR part 1001 and add part 1033, as set forth below:

# PART 1001—FINANCIAL PRODUCTS OR SERVICES

■ 1. The authority citation for part 1001 continues to read as follows:

**Authority:** 12 U.S.C. 5481(15)(A)(xi); and 12 U.S.C. 5512(b)(1).

■ 2. Amend §1001.2 by revising paragraph (b) and adding reserved paragraph (c) to read as follows:

### §1001.2 Definitions.

* * * * *

(b) Providing financial data processing products or services by any technological means, including processing, storing, aggregating, or transmitting financial or banking data, alone or in connection with another product or service, where the financial data processing is not offered or provided by a person who, by operation of 12 U.S.C. 5481(15)(A)(vii)(I) or (II), is not a covered person.

(c) [Reserved].

■ 3. Add part 1033 to read as follows:

# PART 1033—PERSONAL FINANCIAL DATA RIGHTS

### Subpart A—General

Sec.



### Subpart B—Obligation to Make Covered Data Available



### Subpart C—Data Provider Interfaces; Responding to Requests



### Subpart D—Authorized Third Parties



**Authority:** 12 U.S.C. 5512; 12 U.S.C. 5514; 12 U.S.C. 5532; 12 U.S.C. 5533.

## Subpart A—General

### § 1033.101 Authority, purpose, and organization.

(a) *Authority.* The regulation in this part is issued by the Consumer Financial Protection Bureau (CFPB) pursuant to the Consumer Financial Protection Act of 2010 (CFPA), Pub. L. 111–203, tit. X, 124 Stat. 1955.

(b) *Purpose.* This part implements the provisions of section 1033 of the CFPA by requiring data providers to make available to consumers and authorized third parties, upon request, covered data in the data provider's control or possession concerning a covered consumer financial product or service, in an electronic form usable by consumers and authorized third parties; and by prescribing standards to promote the development and use of standardized formats for covered data, including through industry standards developed by standard-setting bodies recognized by the CFPB. This part also sets forth obligations of third parties that would access covered data on a consumer's behalf, including limitations on their collection, use, and retention of covered data.

(c) *Organization.* This part is divided into subparts as follows:

(1) Subpart A establishes the authority, purpose, organization, coverage of data providers, compliance dates, and definitions applicable to this part.

(2) Subpart B provides the general obligation of data providers to make covered data available upon the request of a consumer or authorized third party, including what types of information must be made available.

(3) Subpart C provides the requirements for data providers to establish and maintain interfaces to

receive and respond to requests for covered data.

(4) Subpart D provides the obligations of third parties that would access covered data on behalf of a consumer.

**§ 1033.111 Coverage of data providers.**

(a) *Coverage of data providers.* A data provider has obligations under this part if it controls or possesses covered data concerning a covered consumer financial product or service, subject to the exclusion in paragraph (d) of this section.

(b) *Definition of covered consumer financial product or service. Covered consumer financial product or service* means a consumer financial product or service, as defined in 12 U.S.C. 5481(5), that is:

(1) A *Regulation E account,* which means an account, as defined in Regulation E, 12 CFR 1005.2(b);

(2) A *Regulation Z credit card,* which means a credit card, as defined in Regulation Z, 12 CFR 1026.2(a)(15)(i); and

(3) Facilitation of payments from a Regulation E account or Regulation Z credit card.

(c) *Definition of data provider. Data provider* means a covered person, as defined in 12 U.S.C. 5481(6), that is:

(1) A *financial institution,* as defined in Regulation E, 12 CFR 1005.2(i);

(2) A *card issuer,* as defined in Regulation Z, 12 CFR 1026.2(a)(7); or

(3) Any other person that controls or possesses information concerning a covered consumer financial product or service the consumer obtained from that person.

*Example 1 to paragraph (c):* A digital wallet provider is a data provider.

(d) *Excluded data providers.* The requirements of this part do not apply to data providers that are depository institutions that do not have a consumer interface.

**§ 1033.121 Compliance dates.**

A data provider must comply with §§ 1033.201 and 1033.301 beginning on:

(a) [Approximately six months after the date of publication of the final rule in the **Federal Register**], for depository institution data providers that hold at least $500 billion in total assets and nondepository institution data providers that generated at least $10 billion in revenue in the preceding calendar year or are projected to generate at least $10 billion in revenue in the current calendar year.

(b) [Approximately one year after the date of publication of the final rule in the **Federal Register**], for data providers that are:

(1) Depository institutions that hold at least $50 billion in total assets but less than $500 billion in total assets; or

(2) Nondepository institutions that generated less than $10 billion in revenue in the preceding calendar year and are projected to generate less than $10 billion in revenue in the current calendar year.

(c) [Approximately two and a half years after the date of publication of the final rule in the **Federal Register**], for depository institutions that hold at least $850 million in total assets but less than $50 billion in total assets.

(d) [Approximately four years after the date of publication of the final rule in the **Federal Register**], for depository institutions that hold less than $850 million in total assets.

**§ 1033.131 Definitions.**

For purposes of this part, the following definitions apply:

*Authorized third party* means a third party that has complied with the authorization procedures described in § 1033.401.

*Card issuer* is defined at § 1033.111(c)(2).

*Consumer* means a natural person. Trusts established for tax or estate planning purposes are considered natural persons for purposes of this definition.

*Consumer interface* means an interface through which a data provider receives requests for covered data and makes available covered data in an electronic form usable by consumers in response to the requests.

*Covered consumer financial product or service* is defined at § 1033.111(b).

*Covered data* is defined at § 1033.211.

*Data aggregator* means an entity that is retained by and provides services to the authorized third party to enable access to covered data.

*Data provider* is defined at § 1033.111(c).

*Developer interface* means an interface through which a data provider receives requests for covered data and makes available covered data in an electronic form usable by authorized third parties in response to the requests.

*Financial institution* is defined at § 1033.111(c)(1).

*Qualified industry standard* means a standard issued by a standard-setting body that is fair, open, and inclusive in accordance with § 1033.141(a).

*Regulation E account* is defined at § 1033.111(b)(1).

*Regulation Z credit card* is defined at § 1033.111(b)(2).

*Third party* means any person or entity that is not the consumer about whom the covered data pertains or the data provider that controls or possesses the consumer's covered data.

**§ 1033.141 Standard setting.**

(a) *Fair, open, and inclusive standard-setting body.* A standard-setting body is fair, open, and inclusive and is an issuer of qualified industry standards when it has all of the following attributes:

(1) Openness: The sources, procedures, and processes used are open to all interested parties, including: consumer and other public interest groups with expertise in consumer protection, financial services, community development, fair lending, and civil rights; authorized third parties; data providers; data aggregators and other providers of services to authorized third parties; and relevant trade associations. Parties can meaningfully participate in standards development on a non-discriminatory basis.

(2) Balance: The decision-making power is balanced across all interested parties, including consumer and other public interest groups, at all levels of the standard-setting body. There is meaningful representation for large and small commercial entities within these categories. No single interest or set of interests dominates decision-making. Achieving balance requires recognition that some participants may play multiple roles, such as being both a data provider and an authorized third party. The ownership structure of entities is considered in achieving balance.

(3) Due process: The standard-setting body uses documented and publicly available policies and procedures, and it provides adequate notice of meetings and standards development, sufficient time to review drafts and prepare views and objections, access to views and objections of other participants, and a fair and impartial process for resolving conflicting views.

(4) Appeals: An appeals process is available for the impartial handling of appeals.

(5) Consensus: Standards development proceeds by consensus, which is defined as general agreement, but not unanimity. During the development of consensus, comments and objections are considered using fair, impartial, open, and transparent processes.

(6) Transparency: Procedures or processes for participating in standards development and for developing standards are transparent to participants and publicly available.

(7) CFPB recognition: The standard-setting body has been recognized by the CFPB within the last three years as an issuer of qualified industry standards.

(b) *CFPB consideration.* A standard-setting body may request that the CFPB recognize it as an issuer of qualified industry standards. The attributes set forth in paragraphs (a)(1) through (6) of this section will inform the CFPB's consideration of the request.

## Subpart B—Obligation to Make Covered Data Available

### § 1033.201 Obligation to make covered data available.

(a) *Obligation to make covered data available.* A data provider must make available to a consumer and an authorized third party, upon request, covered data in the data provider's control or possession concerning a covered consumer financial product or service that the consumer obtained from the data provider, in an electronic form usable by consumers and authorized third parties. Compliance with the requirements in §§ 1033.301 and 1033.311 is required in addition to the requirements of this paragraph (a).

(b) *Current data.* In complying with paragraph (a) of this section, a data provider must make available the most recently updated covered data that it has in its control or possession at the time of a request. A data provider must make available information concerning authorized but not yet settled debit card transactions.

### § 1033.211 Covered data.

*Covered data* in this part means, as applicable:

(a) Transaction information, including historical transaction information in the control or possession of the data provider. A data provider is deemed to make available sufficient historical transaction information for purposes of § 1033.201(a) if it makes available at least 24 months of such information.

*Example 1 to paragraph (a):* This category includes amount, date, payment type, pending or authorized status, payee or merchant name, rewards credits, and fees or finance charges.

(b) Account balance.

(c) Information to initiate payment to or from a Regulation E account.

*Example 1 to paragraph (c):* This category includes a tokenized account and routing number that can be used to initiate an Automated Clearing House transaction. In complying with its obligation under § 1033.201(a), a data provider is permitted to make available a tokenized account and routing number instead of, or in addition to, a non-tokenized account and routing number.

(d) Terms and conditions.

*Example 1 to paragraph (d):* This category includes the applicable fee schedule, any annual percentage rate or annual percentage yield, rewards program terms, whether a consumer has opted into overdraft coverage, and whether a consumer has entered into an arbitration agreement.

(e) Upcoming bill information.

*Example 1 to paragraph (e):* This category includes information about third party bill payments scheduled through the data provider and any upcoming payments due from the consumer to the data provider.

(f) Basic account verification information, which is limited to the name, address, email address, and phone number associated with the covered consumer financial product or service.

### § 1033.221 Exceptions.

A data provider is not required to make available the following covered data to a consumer or authorized third party:

(a) Any confidential commercial information, including an algorithm used to derive credit scores or other risk scores or predictors. Information does not qualify for this exception merely because it is an input to, or an output of, an algorithm, risk score, or predictor. For example, annual percentage rate and other pricing terms are sometimes determined by an internal algorithm or predictor but do not fall within this exception.

(b) Any information collected by the data provider for the sole purpose of preventing fraud or money laundering, or detecting, or making any report regarding other unlawful or potentially unlawful conduct. Information collected for other purposes does not fall within this exception. For example, name and other basic account verification information do not fall within this exception.

(c) Any information required to be kept confidential by any other provision of law. Information does not qualify for this exception merely because the data provider must protect it for the benefit of the consumer. For example, the data provider cannot restrict access to the consumer's own information merely because that information is subject to privacy protections.

(d) Any information that the data provider cannot retrieve in the ordinary course of its business with respect to that information.

## Subpart C—Data Provider Interfaces; Responding to Requests

### § 1033.301 General requirements.

(a) *Requirement to establish and maintain interfaces.* A data provider subject to the requirements of this part must maintain a consumer interface and must establish and maintain a developer interface. The consumer interface and the developer interface must satisfy the requirements set forth in this section. The developer interface must satisfy the additional requirements set forth in § 1033.311.

(b) *Machine-readable files upon specific request.* Upon specific request, a data provider must make available to a consumer or an authorized third party covered data in a machine-readable file that can be retained by the consumer or authorized third party and transferred for processing into a separate information system that is reasonably available to and in the control of the consumer or authorized third party.

*Example 1 to paragraph (b):* A data provider makes available covered data in a machine-readable file that can be retained if the data can be printed or kept in a separate information system that is in the control of the consumer or authorized third party.

(c) *Fees prohibited.* A data provider must not impose any fees or charges on a consumer or an authorized third party in connection with:

(1) *Interfaces.* Establishing or maintaining the interfaces required by paragraph (a) of this section; or

(2) *Requests.* Receiving requests or making available covered data in response to requests as required by this part.

### § 1033.311 Requirements applicable to developer interface.

(a) *General.* A developer interface required by § 1033.301(a) must satisfy the requirements set forth in this section.

(b) *Standardized format.* The developer interface must make available covered data in a standardized format. The interface is deemed to satisfy this requirement if:

(1) The interface makes available covered data in a format that is set forth in a qualified industry standard; or

(2) In the absence of a qualified industry standard, the interface makes available covered data in a format that is widely used by the developer interfaces of other similarly situated data providers with respect to similar data and is readily usable by authorized third parties.

(c) *Performance specifications.* The developer interface must satisfy the following performance specifications:

(1) *Commercially reasonable performance.* The performance of the interface must be commercially reasonable.

(i) *Quantitative minimum performance specification.* The

performance of the interface cannot be commercially reasonable if it does not meet the following quantitative minimum performance specification regarding its response rate: The number of proper responses by the interface divided by the total number of queries for covered data to the interface must be equal to or greater than 99.5 percent. For purposes of this paragraph (c)(1)(i), all of the following requirements apply:

(A) Any responses by and queries to the interface during scheduled downtime for the interface must be excluded respectively from the numerator and the denominator of the calculation.

(B) In order for any downtime of the interface to qualify as scheduled downtime, the data provider must have provided reasonable notice of the downtime to all third parties to which the data provider has granted access to the interface. Indicia that the data provider's notice of the downtime may be reasonable include that the notice adheres to a qualified industry standard.

(C) The total amount of scheduled downtime for the interface in the relevant time period, such as a month, must be reasonable. Indicia that the total amount of scheduled downtime may be reasonable include that the amount adheres to a qualified industry standard.

(D) A proper response is a response, other than any message such as an error message provided during unscheduled downtime of the interface, that meets all of the following criteria:

(*1*) The response either fulfills the query or explains why the query was not fulfilled;

(*2*) The response is consistent with the reasonable written policies and procedures that the data provider establishes and maintains pursuant to § 1033.351(a); and

(*3*) The response is provided by the interface within a commercially reasonable amount of time. The amount of time cannot be commercially reasonable if it is more than 3,500 milliseconds.

(ii) *Indicia of compliance.* Indicia that the performance of the interface is commercially reasonable include that it:

(A) Meets the applicable performance specifications set forth in a qualified industry standard; and

(B) Meets the applicable performance specifications achieved by the developer interfaces established and maintained by similarly situated data providers.

(2) *Access cap prohibition.* Except as otherwise permitted by §§ 1033.221, 1033.321, and 1033.331(b) and (c), a data provider must not unreasonably restrict the frequency with which it receives and responds to requests for covered data from an authorized third party through its developer interface. Any frequency restrictions must be applied in a manner that is non-discriminatory and consistent with the reasonable written policies and procedures that the data provider establishes and maintains pursuant to § 1033.351(a). Indicia that any frequency restrictions applied are reasonable include that they adhere to a qualified industry standard.

(d) *Security specifications*—(1) *Access credentials.* A data provider must not allow a third party to access the data provider's developer interface by using any credentials that a consumer uses to access the consumer interface.

(2) *Security program.* (i) A data provider must apply to the developer interface an information security program that satisfies the applicable rules issued pursuant to section 501 of the Gramm-Leach-Bliley Act, 15 U.S.C. 6801; or

(ii) If the data provider is not subject to section 501 of the Gramm-Leach-Bliley Act, the data provider must apply to its developer interface the information security program required by the Federal Trade Commission's Standards for Safeguarding Customer Information, 16 CFR part 314.

**§ 1033.321 Interface access.**

(a) *Denials related to risk management.* A data provider does not violate the general obligation in § 1033.201(a) by reasonably denying a consumer or third party access to an interface described in § 1033.301(a) based on risk management concerns. Subject to paragraph (b) of this section, a denial is not unreasonable if it is necessary to comply with section 39 of the Federal Deposit Insurance Act, 12 U.S.C. 1831p–1 or section 501 of the Gramm-Leach-Bliley Act, 15 U.S.C. 6801.

(b) *Reasonable denials.* To be reasonable pursuant to paragraph (a) of this section, a denial must, at a minimum, be directly related to a specific risk of which the data provider is aware, such as a failure of a third party to maintain adequate data security, and must be applied in a consistent and non-discriminatory manner.

(c) *Indicia of reasonable denials.* Indicia that a denial pursuant to paragraph (a) of this section is reasonable include whether access is denied to adhere to a qualified industry standard related to data security or risk management.

(d) *Denials related to lack of information.* A data provider has a reasonable basis for denying access to a third party under paragraph (a) of this section if:

(1) The third party does not present evidence that its data security practices are adequate to safeguard the covered data, provided that the denial of access is not otherwise unreasonable; or

(2) The third party does not make the following information available in both human-readable and machine-readable formats, and readily identifiable to members of the public, meaning the information must be at least as available as it would be on a public website:

(i) Its legal name and, if applicable, any assumed name it is using while doing business with the consumer;

(ii) A link to its website;

(iii) Its Legal Entity Identifier (LEI) that is issued by:

(A) A utility endorsed by the LEI Regulatory Oversight Committee, or

(B) A utility endorsed or otherwise governed by the Global LEI Foundation (or any successor thereof) after the Global LEI Foundation assumes operational governance of the global LEI system; and

(iv) Contact information a data provider can use to inquire about the third party's data security practices.

**§ 1033.331 Responding to requests for information.**

(a) *Responding to requests—access by consumers.* To comply with the requirement in § 1033.201(a), upon request from a consumer, a data provider must make available covered data when it receives information sufficient to:

(1) Authenticate the consumer's identity; and

(2) Identify the scope of the data requested.

(b) *Responding to requests—access by third parties.* (1) To comply with the requirement in § 1033.201(a), upon request from an authorized third party, a data provider must make available covered data when it receives information sufficient to:

(i) Authenticate the consumer's identity;

(ii) Authenticate the third party's identity;

(iii) Confirm the third party has followed the authorization procedures in § 1033.401; and

(iv) Identify the scope of the data requested.

(2) The data provider is permitted to confirm the scope of a third party's authorization to access the consumer's data by asking the consumer to confirm:

(i) The account(s) to which the third party is seeking access; and

(ii) The categories of covered data the third party is requesting to access, as

disclosed by the third party pursuant to § 1033.411(b)(4).

(c) *Response not required.* Notwithstanding the general rules in paragraphs (a) and (b) of this section, a data provider is not required to make covered data available in response to a request when:

(1) The data are withheld because an exception described in § 1033.221 applies;

(2) The data provider has a basis to deny access pursuant to risk management concerns in accordance with § 1033.321(a);

(3) The data provider's interface is not available when the data provider receives a request requiring a response under this section. However, the data provider is subject to the performance specifications in § 1033.311(c);

(4) The request is for access by a third party, and:

(i) The consumer has revoked the third party's authorization pursuant to paragraph (e) of this section;

(ii) The data provider has received notice that the consumer has revoked the third party's authorization pursuant to § 1033.421(h)(2); or

(iii) The consumer has not provided a new authorization to the third party after the maximum duration period, as described in § 1033.421(b)(2).

(d) *Jointly held accounts.* A data provider that receives a request for covered data from a consumer that jointly holds an account or from an authorized third party acting on behalf of such a consumer must make available covered data to that consumer or authorized third party, subject to the other requirements of this section.

(e) *Mechanism to revoke third party authorization to access covered data.* A data provider does not violate the general obligation in § 1033.201(a) by making available to the consumer a reasonable method to revoke any third party's authorization to access all of the consumer's covered data. To be reasonable, the revocation method must, at a minimum, be unlikely to interfere with, prevent, or materially discourage consumers' access to or use of the data, including access to and use of the data by an authorized third party. Indicia that the data provider's revocation method is reasonable include its conformance to a qualified industry standard. A data provider that receives a revocation request from consumers through a revocation method it makes available must notify the authorized third party of the request.

**§ 1033.341 Information about the data provider.**

(a) *Requirement to make information about the data provider readily identifiable.* A data provider must make the information described in paragraphs (b) through (d) of this section:

(1) Readily identifiable to members of the public, meaning the information must be at least as available as it would be on a public website; and

(2) Available in both human-readable and machine-readable formats.

(b) *Identifying information.* A data provider must disclose in the manner required by paragraph (a) of this section:

(1) Its legal name and, if applicable, any assumed name it is using while doing business with the consumer;

(2) A link to its website;

(3) Its LEI that is issued by:

(i) A utility endorsed by the LEI Regulatory Oversight Committee, or

(ii) A utility endorsed or otherwise governed by the Global LEI Foundation (or any successor thereof) after the Global LEI Foundation assumes operational governance of the global LEI system; and

(4) Contact information that enables a consumer or third party to receive answers to questions about accessing covered data under this part.

(c) *Developer interface documentation.* For its developer interface, a data provider must disclose in the manner required by paragraph (a) of this section documentation, including metadata describing all covered data and their corresponding data fields, and other documentation sufficient for a third party to access and use the interface. The documentation must:

(1) Be maintained and updated as the developer interface is updated;

(2) Include how third parties can get technical support and report issues with the interface; and

(3) Be easy to understand and use, similar to data providers' documentation for other commercially available products.

(d) *Performance specification.* On or before the tenth calendar day of each calendar month, a data provider must disclose in the manner required by paragraph (a) of this section the quantitative minimum performance specification described in § 1033.311(c)(1)(i) that the data provider's developer interface achieved in the previous calendar month. The data provider's disclosure must include at least a rolling 13 months of the required monthly figure, except that the disclosure need not include the monthly figure for months prior to the compliance date applicable to the data provider. The data provider must disclose the metric as a percentage rounded to four decimal places, such as ''99.9999 percent.''

**§ 1033.351 Policies and procedures.**

(a) *Reasonable written policies and procedures.* A data provider must establish and maintain written policies and procedures that are reasonably designed to achieve the objectives set forth in subparts B and C of this part, including paragraphs (b) through (d) of this section. Policies and procedures must be appropriate to the size, nature, and complexity of the data provider's activities. A data provider must periodically review the policies and procedures required by this section and update them as appropriate to ensure their continued effectiveness.

(b) *Policies and procedures for making covered data available.* The policies and procedures required by paragraph (a) of this section must be reasonably designed to ensure that:

(1) *Making available covered data.* A data provider creates a record of the data fields that are covered data in the data provider's control or possession, what covered data are not made available through a consumer or developer interface pursuant to an exception in § 1033.221, and the reasons the exception applies. A data provider is permitted to comply with this requirement by incorporating the data fields defined by a qualified industry standard, provided doing so is appropriate to the size, nature, and complexity of the data provider's activities. Exclusive reliance on data fields defined by a qualified industry standard would not be appropriate if such data fields failed to identify all the covered data in the data provider's control or possession.

(2) *Denials of developer interface access.* When a data provider denies a third party access to a developer interface pursuant to § 1033.321, the data provider:

(i) Creates a record explaining the basis for denial; and

(ii) Communicates to the third party, electronically or in writing, the reason(s) for the denial, and that the communication occurs as quickly as is practicable.

(3) *Denials of information requests.* When a data provider denies a request for information pursuant to § 1033.331, the data provider:

(i) Creates a record explaining the basis for the denial; and

(ii) Communicates to the consumer or third party, electronically or in writing, the type(s) of information denied and the reason(s) for the denial, and that the

communication occurs as quickly as is practicable.

(c)(1) *Policies and procedures for ensuring accuracy.* The policies and procedures required by paragraph (a) of this section must be reasonably designed to ensure that covered data are accurately made available through the data provider's developer interface.

(2) *Elements.* In developing its policies and procedures regarding accuracy, a data provider must consider, for example:

(i) Implementing the format requirements of § 1033.311(b); and

(ii) Addressing information provided by a consumer or a third party regarding inaccuracies in the covered data made available through its developer interface.

(3) *Indicia of compliance.* Indicia that a data provider's policies and procedures regarding accuracy are reasonable include whether the policies and procedures conform to a qualified industry standard regarding accuracy.

(d) *Policies and procedures for record retention.* The policies and procedures required by paragraph (a) of this section must be reasonably designed to ensure retention of records that are evidence of compliance with subparts B and C of this part.

(1) *Retention period.* Records related to a data provider's response to a consumer's or third party's request for information or a third party's request to access a developer interface must be retained for at least three years after a data provider has responded to the request. All other records that are evidence of compliance with subparts B and C of this part must be retained for a reasonable period of time.

(2) *Certain records retained pursuant to policies and procedures.* Records retained pursuant to policies and procedures required under paragraph (a) of this section must include, without limitation:

(i) Records of requests for a third party's access to an interface, actions taken in response to such requests, and reasons for denying access, if applicable;

(ii) Records of requests for information, actions taken in response to such requests, and reasons for not making the information available, if applicable;

(iii) Copies of a third party's authorization to access data on behalf of a consumer; and

(iv) Records of actions taken by a consumer and a data provider to revoke a third party's access pursuant to any revocation mechanism made available by a data provider.

## Subpart D—Authorized Third Parties

### § 1033.401 Third party authorization; general.

To become an authorized third party, the third party must seek access to covered data from a data provider on behalf of a consumer to provide a product or service the consumer requested and:

(a) Provide the consumer with an authorization disclosure as described in § 1033.411;

(b) Provide a statement to the consumer in the authorization disclosure, as provided in § 1033.411(b)(5), certifying that the third party agrees to the obligations described in § 1033.421; and

(c) Obtain the consumer's express informed consent to access covered data on behalf of the consumer by obtaining an authorization disclosure that is signed by the consumer electronically or in writing.

### § 1033.411 Authorization disclosure.

(a) *General requirements.* To comply with § 1033.401(a), a third party must provide the consumer with an authorization disclosure electronically or in writing. The authorization disclosure must be clear, conspicuous, and segregated from other material.

(b) *Content.* The authorization disclosure must include:

(1) The name of the third party that will be authorized to access covered data pursuant to the third party authorization procedures in § 1033.401.

(2) The name of the data provider that controls or possesses the covered data that the third party identified in paragraph (b)(1) of this section seeks to access on the consumer's behalf.

(3) A brief description of the product or service that the consumer has requested the third party identified in paragraph (b)(1) of this section provide and a statement that the third party will collect, use, and retain the consumer's data only for the purpose of providing that product or service to the consumer.

(4) The categories of covered data that will be accessed.

(5) The certification statement described in § 1033.401(b).

(6) A description of the revocation mechanism described in § 1033.421(h)(1).

(c) *Language access*—(1) *General language requirements.* The authorization disclosure must be in the same language as the communication in which the third party conveys the authorization disclosure to the consumer. Any translation of the authorization disclosure must be complete and accurate.

(2) *Additional languages.* If the authorization disclosure is in a language other than English, it must include a link to an English-language translation, and it is permitted to include links to translations in other languages. If the authorization disclosure is in English, it is permitted to include links to translations in other languages.

### § 1033.421 Third party obligations.

(a) *General limitation on collection, use, and retention of consumer data*—(1) *In general.* The third party will limit its collection, use, and retention of covered data to what is reasonably necessary to provide the consumer's requested product or service.

(2) *Specific activities.* For purposes of paragraph (a)(1) of this section, the following activities are not part of, or reasonably necessary to provide, any other product or service:

(i) Targeted advertising;

(ii) Cross-selling of other products or services; or

(iii) The sale of covered data.

(b) *Collection of covered data*—(1) *In general.* Collection of covered data for purposes of paragraph (a) of this section includes the scope of covered data collected and the duration and frequency of collection of covered data.

(2) *Maximum duration.* In addition to the limitation described in paragraph (a) of this section, the third party will limit the duration of collection of covered data to a maximum period of one year after the consumer's most recent authorization.

(3) *Reauthorization after maximum duration.* To collect covered data beyond the one-year maximum period described in paragraph (b)(2) of this section, the third party will obtain a new authorization from the consumer pursuant to § 1033.401 no later than the anniversary of the most recent authorization from the consumer. The third party is permitted to ask the consumer for a new authorization pursuant to § 1033.401 in a reasonable manner. Indicia that a new authorization request is reasonable include its conformance to a qualified industry standard.

(4) *Effect of maximum duration.* If a consumer does not provide the third party with a new authorization as described in paragraph (b)(3) of this section, the third party will:

(i) No longer collect covered data pursuant to the most recent authorization; and

(ii) No longer use or retain covered data that was previously collected pursuant to the most recent authorization unless use or retention of that covered data remains reasonably

necessary to provide the consumer's requested product or service under paragraph (a) of this section.

(c) *Use of covered data.* Use of covered data for purposes of paragraph (a) of this section includes both the third party's own use of covered data and provision of covered data by that third party to other third parties. Examples of uses of covered data that are permitted under paragraph (a) of this section include:

(1) Uses that are specifically required under other provisions of law, including to comply with a properly authorized subpoena or summons or to respond to a judicial process or government regulatory authority;

(2) Uses that are reasonably necessary to protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability; and

(3) Servicing or processing the product or service the consumer requested.

(d) *Accuracy.* The third party will establish and maintain written policies and procedures that are reasonably designed to ensure that covered data are accurately received from a data provider and accurately provided to another third party, if applicable.

(1) *Flexibility.* A third party has flexibility to determine its policies and procedures in light of the size, nature, and complexity of its activities.

(2) *Periodic review.* A third party will periodically review its policies and procedures and update them as appropriate to ensure their continued effectiveness.

(3) *Elements.* In developing its policies and procedures regarding accuracy, a third party must consider, for example:

(i) Accepting covered data in a format required by § 1033.311(b); and

(ii) Addressing information provided by a consumer, data provider, or another third party regarding inaccuracies in the covered data.

(4) *Indicia of compliance.* Indicia that a third party's policies and procedures are reasonable include whether the policies and procedures conform to a qualified industry standard regarding accuracy.

(e) *Data security.* (1) A third party will apply to its systems for the collection, use, and retention of covered data an information security program that satisfies the applicable rules issued pursuant to section 501 of the Gramm-Leach-Bliley Act (15 U.S.C. 6801); or

(2) If the third party is not subject to section 501 of the Gramm-Leach-Bliley Act, the third party will apply to its systems for the collection, use, and retention of covered data the information security program required by the Federal Trade Commission's Standards for Safeguarding Customer Information, 16 CFR part 314.

(f) *Provision of covered data to other third parties.* Before providing covered data to another third party, subject to the limitation described in paragraphs (a) and (c) of this section, the third party will require the other third party by contract to comply with the third party obligations in paragraphs (a) through (g) of this section and the condition in paragraph (h)(3) of this section upon receipt of the notice described in paragraph (h)(2) of this section.

(g) *Ensuring consumers are informed.* (1) The third party will provide the consumer with a copy of the authorization disclosure that is signed or otherwise agreed to by the consumer and reflects the date of the consumer's signature or other written or electronic consent. Upon obtaining authorization to access covered data on the consumer's behalf, the third party will deliver a copy to the consumer or make it available in a location that is readily accessible to the consumer, such as the third party's interface. If the third party makes the authorization disclosure available in such a location, the third party will ensure it is accessible to the consumer until the third party's access to the consumer's covered data terminates.

(2) The third party will provide contact information that enables a consumer to receive answers to questions about the third party's access to the consumer's covered data. The contact information must be readily identifiable to the consumer.

(3) The third party will establish and maintain reasonable written policies and procedures designed to ensure that the third party provides to the consumer, upon request, the information listed in this paragraph (g)(3) about the third party's access to the consumer's covered data. The third party has flexibility to determine its policies and procedures in light of the size, nature, and complexity of its activities, and the third party will periodically review its policies and procedures and update them as appropriate to ensure their continued effectiveness.

(i) Categories of covered data collected;

(ii) Reasons for collecting the covered data;

(iii) Names of parties with which the covered data was shared;

(iv) Reasons for sharing the covered data;

(v) Status of the third party's authorization; and

(vi) How the consumer can revoke the third party's authorization to access the consumer's covered data and verification the third party has adhered to requests for revocation.

(h) *Revocation of third party authorization*—(1) *Provision of revocation mechanism.* The third party will provide the consumer with a mechanism to revoke the third party's authorization to access the consumer's covered data that is as easy to access and operate as the initial authorization. The third party will also ensure the consumer is not subject to costs or penalties for revoking the third party's authorization.

(2) *Notice of revocation.* The third party will notify the data provider, any data aggregator, and other third parties to whom it has provided the consumer's covered data when the third party receives a revocation request from the consumer.

(3) *Effect of revocation.* Upon receipt of a consumer's revocation request as described in paragraph (h)(1) of this section or notice of a revocation request from a data provider as described in § 1033.331(e), a third party will:

(i) No longer collect covered data pursuant to the most recent authorization; and

(ii) No longer use or retain covered data that was previously collected pursuant to the most recent authorization unless use or retention of that covered data remains reasonably necessary to provide the consumer's requested product or service under paragraph (a) of this section.

**§ 1033.431 Use of data aggregator.**

(a) *Responsibility for authorization procedures when the third party will use a data aggregator.* A data aggregator is permitted to perform the authorization procedures described in § 1033.401 on behalf of the third party seeking authorization under § 1033.401 to access covered data. However, the third party seeking authorization remains responsible for compliance with the authorization procedures described in § 1033.401, and the data aggregator must comply with paragraph (c) of this section.

(b) *Disclosure of the name of the data aggregator.* The authorization disclosure must include the name of any data aggregator that will assist the third party seeking authorization under § 1033.401 with accessing covered data and a brief description of the services the data aggregator will provide.

(c) *Data aggregator certification.* When the third party seeking

authorization under § 1033.401 will use a data aggregator to assist with accessing covered data on behalf of a consumer, the data aggregator must certify to the consumer that it agrees to the conditions on accessing the consumer's data in § 1033.421(a) through (f) and the condition in § 1033.421(h)(3) upon receipt of the notice described in § 1033.421(h)(2) before accessing the consumer's data. Any data aggregator that is retained by the authorized third party after the consumer has completed the authorization procedures must also satisfy this requirement. For this requirement to be satisfied:

(1) The third party seeking authorization under § 1033.401 must include the data aggregator's certification in the authorization disclosure described in § 1033.411; or

(2) The data aggregator must provide its certification to the consumer in a separate communication.

**§ 1033.441 Policies and procedures for third party record retention.**

(a) *General requirement.* A third party that is a covered person or service provider, as defined in 12 U.S.C. 5481(6) and (26), must establish and maintain written policies and procedures that are reasonably designed to ensure retention of records that are evidence of compliance with the requirements of subpart D.

(b) *Retention period.* Records required under paragraph (a) of this section must be retained for a reasonable period of time, not less than three years after a third party obtains the consumer's most recent authorization under § 1033.401(a).

(c) *Flexibility.* A third party covered under paragraph (a) of this section has flexibility to determine its policies and procedures in light of the size, nature, and complexity of its activities.

(d) *Periodic review.* A third party covered under paragraph (a) of this section must periodically review its policies and procedures and update them as appropriate to ensure their continued effectiveness to evidence compliance with the requirements of subpart D.

(e) *Certain records retained pursuant to policies and procedures.* Records retained pursuant to policies and procedures required under this section must include, without limitation:

(1) A copy of the authorization disclosure that is signed or otherwise agreed to by the consumer and reflects the date of the consumer's signature or other written or electronic consent and a record of actions taken by the consumer, including actions taken through a data provider, to revoke the third party's authorization; and

(2) With respect to a data aggregator covered under paragraph (a) of this section, a copy of any data aggregator certification statement provided to the consumer separate from the authorization disclosure pursuant to § 1033.431(c)(2).

**Rohit Chopra,**

*Director, Consumer Financial Protection Bureau.*

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