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Presidential Documents

Title 3—

The President

Proclamation 10682 of December 4, 2023

Death of Sandra Day O'Connor

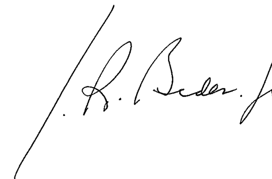
By the President of the United States of America

A Proclamation

Justice Sandra Day O'Connor was an American icon, the first woman on our Nation's highest court. She spent her career committed to the stable center, pragmatic and in search of common ground. Defined by her no-nonsense Arizona ranch roots, Justice O'Connor overcame discrimination early on, at a time when law firms too often told women to seek work as secretaries, not attorneys. She gave her life to public service, even holding elected office, and never forgot those ties to the people whom the law is meant to serve. She sought to avoid ideology, and was devoted to the rule of law and to the bedrock American principle of an independent judiciary. Justice O'Connor never quit striving to make this Nation stronger, calling on us all to engage with our country and with one another, and her institute's work to promote civics education and civil discourse has touched millions. She knew that for democracy to work, we have to listen to each other, and remember how much more we all have in common as Americans than what keeps us apart.

As a mark of respect for the memory and longstanding service of Sandra Day O'Connor, retired Associate Justice of the Supreme Court of the United States, I hereby order, by the authority vested in me by the Constitution and the laws of the United States of America, that on the day of her interment, 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 on such day. I also direct that the flag shall be flown at half-staff for the same period 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 fourth day of December, 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.



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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1717; Project Identifier MCAI–2023–00728–A; Amendment 39–22578; AD 2023–21–06]

RIN 2120–AA64

Airworthiness Directives; Embraer S.A. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: The FAA is correcting an airworthiness directive (AD) that published in the **Federal Register**. That AD applies to certain Embraer S.A. (Embraer) Model EMB–505 airplanes. As published, two references to an Agência Nacional de Aviação Civil (ANAC) AD in the preamble Background section are incorrect. This document corrects those errors. In all other respects, the original document remains the same.

DATES: This correction is effective December 11, 2023. The effective date of AD 2023–21–06 remains December 11, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 11, 2023 (88 FR 76114, November 6, 2023).

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1717; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule; correction, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

• For the service information identified in this final rule, contact ANAC, Continuing Airworthiness Technical Branch (GTAC), Rua Doutor Orlando Feirabend Filho, 230—Centro Empresarial Aquarius—Torre B—Andares 14 a 18, Parque Residencial Aquarius, CEP 12.246–190—São José dos Campos—SP, Brazil; phone: 55 (12) 3203–6600; email: *pac@anac.gov.br;* website: *anac.gov.br/en/*. You may find this material on the ANAC website at *sistemas.anac.gov.br/certificacao/DA/DAE.asp.*

• You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available in the AD docket at *regulations.gov* under Docket No. FAA–2023–1717.

FOR FURTHER INFORMATION CONTACT: Jim Rutherford, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329–4165; email: *jim.rutherford@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

AD 2023–21–06, Amendment 39–22578 (88 FR 76114, November 6, 2023) (AD 2023–21–06), requires installing structural reinforcements on certain monuments and replacing certain floor support rivets, as specified in ANAC AD 2023–05–03, effective June 2, 2023 (ANAC AD 2023–05–03), for certain Embraer Model EMB–505 airplanes.

Need for Correction

As published, two references to the ANAC AD in the preamble Background section of AD 2023–21–06 are incorrect. The Background section refers to the ANAC AD as ''ANAC AD 2023–04–01'' in two places. The correct reference is ''ANAC AD 2023–05–03.''

Related Service Information Under 1 CFR Part 51

ANAC AD 2023–05–03 specifies procedures for installing structural reinforcements on certain monuments and replacing applicable fasteners on the floor support.

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

Correction of Publication

This document corrects two errors and correctly adds the AD as an amendment to 14 CFR 39.13. Although no other part of the preamble or regulatory information has been corrected, the FAA is publishing the entire rule in the **Federal Register**.

The effective date of this AD remains December 11, 2023.

Since this action only corrects two incorrect references to an ANAC AD in the preamble Background section, it has no adverse economic impact and imposes no additional burden on any person. Therefore, the FAA has determined that notice and public comment procedures are unnecessary.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Corrected]

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

2023–21–06 Embraer S.A.: Amendment 39–22578; Docket No. FAA–2023–1717; Project Identifier MCAI–2023–00728–A.

(a) Effective Date

This airworthiness directive (AD) is effective December 11, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Embraer S.A. Model EMB–505 airplanes, as identified in Agência Nacional de Aviação Civil (ANAC) AD 2023–05–03, effective June 2, 2023 (ANAC AD 2023–05–03), certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code 2500, Cabin Equipment/Furnishings.

(e) Unsafe Condition

This AD was prompted by analysis of certain monuments (the right-hand refreshment center and left-hand forward cabinet) that identified the need for installing structural reinforcements and replacing applicable floor support rivets. The FAA is issuing this AD to address the unsafe condition. The unsafe condition, if not addressed, could result in a monument not withstanding the loads expected for specific emergency landing conditions, which may cause the detachment of mass items and result in injuries to the airplane occupants.

(f) Compliance

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

(g) Required Actions

Except as specified in paragraphs (h) and (i) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, ANAC AD 2023–05–03.

(h) Exceptions to ANAC AD 2023–05–03

(1) Where ANAC AD 2023–05–03 refers to its effective date, this AD requires using the effective date of this AD.

(2) The service information referenced in ANAC AD 2023–05–03 allows the use of alternative or similar parts in place of the ones specified in the kits, provided that these alternative or similar parts are approved by Embraer. This AD requires approval from either the Manager, International Validation Branch, FAA; ANAC; or ANAC's authorized Designee. If approved by the ANAC Designee, the approval must include the Designee's authorized signature.

(3) Where the service information referenced in ANAC AD 2023–05–03 specifies discarding parts, this AD requires removing those parts from service.

(4) This AD does not adopt paragraph (d) of ANAC AD 2023–05–03.

(i) No Reporting Requirement

Although the service information referenced in ANAC AD 2023–05–03 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(j) Alternative Methods of Compliance (AMOCs)

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

(k) Additional Information

For more information about this AD, contact Jim Rutherford, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329–4165; email: *jim.rutherford@faa.gov.*

(l) Material Incorporated by Reference

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

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

(i) Agência Nacional de Aviação Civil (ANAC) AD 2023–05–03, effective June 2, 2023.

(ii) [Reserved]

(3) For ANAC AD 2023–05–03, contact ANAC, Continuing Airworthiness Technical Branch (GTAC), Rua Doutor Orlando Feirabend Filho, 230—Centro Empresarial Aquarius—Torre B—Andares 14 a 18, Parque Residencial Aquarius, CEP 12.246–190—São José dos Campos—SP, Brazil; phone: 55 (12) 3203–6600; email: *pac@anac.gov.br;* website: *anac.gov.br/en/.* You may find this material on the ANAC website at *sistemas.anac.gov.br/certificacao/DA/DAE.asp.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110.

(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 November 29, 2023.

Victor Wicklund,

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

[FR Doc. 2023–26637 Filed 12–6–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–2192; Airspace Docket No. 23–AEA–19]

RIN 2120–AA66

Amendment of Class D and Class E Airspace; Wilmington, DE

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class D airspace and Class E surface airspace for New Castle Airport, Wilmington, DE, by making editorial changes to the airspace legal descriptions. This action does not change the airspace boundaries or operating requirements.

DATES: Effective 0901 UTC, March 21, 2024. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order JO 7400.11H, Airspace Designations, Reporting Points, and subsequent amendments online at *www.faa.gov/air_traffic/publications/.* For further information, contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: John Goodson, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; telephone: (404) 305–5966.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it updates airspace descriptions. This update is an administrative change and does not change the airspace boundaries or operating requirements.

Incorporation by Reference

Class D and Class E airspace are published in paragraphs 5000 and 6002 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 annually. This document amends the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. FAA Order JO 7400.11H is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next FAA Order JO 7400.11 update. FAA Order JO

7400.11H lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This action amends the Class D airspace and Class E surface airspace for New Castle Airport, Wilmington, DE, by replacing Notice to Airmen with Notice to Air Missions.

This action is an administrative change and does not affect the airspace boundaries or operating requirements; therefore, notice and public procedure under 5 U.S.C. 553(b) is unnecessary.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant the preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order JO 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

AEA DE D Wilmington, DE [Amended]

New Castle Airport, DE
(Lat. 39°40′43″ N, long. 75°36′24″ W)

That airspace extending upward from the surface to and including 2,600 feet MSL within a 4.2-mile radius of the New Castle Airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be continuously published in the Chart Supplement.

* * * * *

Paragraph 6002 Class E Surface Airspace.

* * * * *

AEA DE E2 Wilmington, DE [Amended]

New Castle Airport, DE
(Lat. 39°40′43″ N, long. 75°36′24″ W)

That airspace extending upward from the surface to and including 2,600 feet MSL within a 4.2-mile radius of the New Castle Airport, a 4.2-mile radius of the New Castle Airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be continuously published in the Chart Supplement.

* * * * *

Issued in College Park, Georgia, on November 30, 2023.

Lisa E. Burrows,

Manager, Airspace & Procedures Team North, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2023–26712 Filed 12–6–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 231204–9999]

RIN 0694–AJ51

Addition of Entities to the Entity List

AGENCY: Bureau of Industry and Security, Department of Commerce.

ACTION: Final rule.

SUMMARY: In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) by adding forty-two entities under forty-four entries to the Entity List. These entities are listed under the destinations of Armenia (3), Belarus (1), Belgium (3), China, People's Republic of (China) (1), Cyprus (4), Germany (1), Kazakhstan (1), Netherlands (1), Russia (28), and the United Arab Emirates (1). Two entities are added to the Entity List under two destinations, accounting for the difference in the totals. These entities have been determined by the U.S. Government to be acting contrary to the national security or foreign policy interests of the United States.

DATES: This rule is effective December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Chair, End-User Review Committee, Office of the Assistant Secretary for Export Administration, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–5991, Email: *ERC@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Entity List (supplement no. 4 to part 744 of the EAR (15 CFR parts 730–774)) identifies entities for which there is reasonable cause to believe, based on specific and articulable facts, that the entities have been involved, are involved, or pose a significant risk of being or becoming involved in activities contrary to the national security or foreign policy interests of the United States, pursuant to § 744.11(b). The EAR impose additional license requirements on, and limit the availability of, most license exceptions for exports, reexports, and transfers (in-country) when a listed entity is a party to the transaction. The license review policy for each listed entity is identified in the ''License Review Policy'' column on the Entity List, and the impact on the availability of license exceptions is described in the relevant **Federal Register** document that added the entity to the Entity List. The Bureau of Industry and Security (BIS) places entities on the Entity List pursuant to parts 744 (Control Policy: End-User and End-Use Based) and 746 (Embargoes and Other Special Controls) of the EAR.

The End-User Review Committee (ERC), composed of representatives of the Departments of Commerce (Chair), State, Defense, Energy and, where appropriate, the Treasury, makes all decisions regarding additions to, removals from, or other modifications to the Entity List. The ERC makes all decisions to add an entry to the Entity

List by majority vote and makes all decisions to remove or modify an entry by unanimous vote.

Entity List Decisions

Additions to the Entity List

The ERC determined to add Elem Group, LLC, under the destination of Kazakhstan, to the Entity List pursuant to § 744.11 of the EAR for posing a risk of diversion of items subject to the EAR to Russia. The ERC determined to add Hans Maria De Geetere, Knokke-Heist Support Management Corporation, and European Technical Trading BV under the destination of Belgium; Eriner Limited and The Mother Ark., under the destination of Cyprus; and Hasa Nederland B.V., under the destination of the Netherlands to the Entity List. These entities are involved in ongoing efforts to circumvent U.S. export controls on sensitive military electronics, contrary to U.S. national security and foreign policy interests under § 744.11 of the EAR. Specifically, these entities acquired and illicitly diverted U.S.-origin electronic components on behalf of parties in China and Russia. These components can be used in military applications including missiles, unmanned aerial vehicles, electronic warfare receivers, and military radar. Further, Hans Maria De Geetere has falsified official documents and provided false end-user information to U.S. and foreign companies to circumvent export controls and sanctions. At times, these falsified documents were also used for export license applications.

The ERC determined to add two individuals, Aram Kocharyan and Hermine Kocharyan, and one company, ARM–BEKAR LLC, under the destination of Armenia; one individual, Alexander Nikolayevich Vadyunin, and one company, OOO Aviation Service Int'l, under the destinations of both Cyprus and Russia; one company, FTL GmBH, under the destination of Germany; one company, RosAero FZC, under the destination of the United Arab Emirates; and three companies, Aircompany North-West LLC, North-West Technics LLC, and RosAero JSC, under the destination of Russia to the Entity List for engaging in or enabling activities contrary to U.S. national security and foreign policy interests under § 744.11 of the EAR. Specifically, these entities and individuals are believed to have procured and transshipped U.S.-origin avionics equipment to Russia, including to governmental entities and military end users, both before and after Russia's invasion of Ukraine on February 24, 2022. For these seventeen entities under nineteen entries, BIS imposes a license requirement for all items subject to the EAR and will review license applications under a presumption of denial.

The ERC also determined to add to the Entity List, for engaging in activities contrary to the national security and foreign policy interests under § 744.11 of the EAR, the following thirteen entities: Argussoft Company LLC; AST Components; ATB Electronica LLC; Digicom, LTD.; Elektrokom VPK; Inelso LLC; Intekh LLC; JSC Yue Complex Service Solutions; PF RIELTA LLC; Prius Electronics LLC; PT Air; and YE-International AO, under the destination of Russia, and Nanotech Ltd under the destination of Belarus. Specifically, these entities have performed contracts for Russian government entities, including entities in the Russian defense sector, have engaged in dealings with entities on Entity List, including entities designated as Russian 'military end users', or have dealings with entities that are subject to sanctions administered by the Department of the Treasury's Office of Foreign Assets Control. Additionally, the ERC determined to add Planet Technology, under the destination of China, to the Entity List on the basis of actions and activities that are contrary to the national security and foreign policy interests of the United States. Specifically, this entity has procured U.S.-origin items that were recovered from a downed Iranian drone used by Russia in Ukraine. These fourteen entities qualify as military end users under § 744.21(g) of the EAR. These entities are receiving a footnote 3 designation because the ERC has determined that they are Russian or Belarusian 'military end users' pursuant to § 744.21. A footnote 3 designation subjects these entities to the Russia/Belarus-Military End User Foreign Direct Product (FDP) rule, detailed in § 734.9(g). These fourteen entities are added with a license requirement for all items subject to the EAR and a license review policy of denial.

Finally, the ERC determined to add AO Geomir, AO SET–1, Dolphin Alabuga LLC, OOO Alabuga-Volokno, OOO Albatross, OOO Alb.Aero, OOO Assistagro, OOO Druzhba, OOO Geomiragro, OOO SMU5, and OOO Ural-Trast, all under the destination of Russia, to the Entity List based on information that these companies significantly contribute to Russia's military and/or defense industrial base in connection with the development of military-grade drones in Russia. This activity is contrary to U.S. national security and foreign policy interests under § 744.11(b) and these entities qualify as military end users under § 744.21(g) of the EAR. These entities are receiving a footnote 3 designation because the ERC has determined that they are Russian or Belarusian 'military end users' pursuant to § 744.21. A footnote 3 designation subjects these entities to the Russia/Belarus-Military End User Foreign Direct Product (FDP) rule, detailed in § 734.9(g) of the EAR. These eleven entities are added with a license requirement for all items subject to the EAR and a license review policy of denial for all items subject to the EAR apart from food and medicine designated as EAR99, which will be reviewed on a case-by-case basis.

For the reasons described above, this final rule adds the following forty-two entities under forty-four entries, including aliases where appropriate, to the Entity List:

Armenia

- Aram Kocharyan;
- ARM–BEKAR LLC; *and*
- Hermine Kocharyan.

Belarus

- Nanotech Ltd.

Belgium

- European Technical Trading BV;
- Hans Maria De Geetere; *and*
- Knokke-Heist Support Management Corporation.

China

- Planet Technology.

Cyprus

- Alexander Nikolayevich Vadyunin;
- Eriner Limited;
- OOO Aviation Service Int'l; *and*
- The Mother Ark.

Germany

- FTL GmBH.

Kazakhstan

- Elem Group, LLC.

Netherlands

- Hasa Nederland B.V.

Russia

- Aircompany North-West LLC;
- Alexander Nikolayevich Vadyunin;
- AO Geomir;
- AO SET–1;
- Argussoft Company LLC;
- AST Components;
- ATB Electronica LLC;
- Digicom, LTD.;
- Dolphin Alabuga LLC;
- Elektrokom VPK;
- Inelso LLC;
- Intekh LLC;

- JSC Yue Complex Service Solutions;
- North-West Technics LLC;
- OOO Alabuga-Volokno;
- OOO Albatross;
- OOO Alb.Aero;
- OOO Assistagro;
- OOO Aviation Service Int'l;
- OOO Druzhba;
- OOO Geomiragro;
- OOO SMU5;
- OOO Ural-Trast;
- PF RIELTA LLC;
- Prius Electronics LLC;
- PT Air;
- RosAero JSC; *and*
- YE-International AO.

United Arab Emirates

- RosAero FZC.

Savings Clause

For the changes being made in this final rule, shipments of items removed from eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR) as a result of this regulatory action that were en route aboard a carrier to a port of export, reexport, or transfer (in-country), on December 7, 2023, pursuant to actual orders for export, reexport, or transfer (in-country) to or within a foreign destination, may proceed to that destination under the previous eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR) before January 8, 2024. Any such items not actually exported, reexported or transferred (in-country) before midnight, on January 8, 2024, require a license in accordance with this final rule.

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA) (50 U.S.C. 4801–4852). ECRA provides the legal basis for BIS's principal authorities and serves as the authority under which BIS issues this rule.

Rulemaking Requirements

1. This rule has been determined to be not significant for purposes of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to or be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves an information collection approved by OMB under control number 0694–0088, Simplified Network Application Processing System. BIS does not anticipate a change to the burden hours associated with this collection as a result of this rule. Information regarding the collection, including all supporting materials, can be accessed at *https://www.reginfo.gov/public/do/PRAMain.*

3. This rule does not contain policies with federalism implications as that term is defined in Executive Order 13132.

4. Pursuant to section 1762 of the Export Control Reform Act of 2018, this action is exempt from the Administrative Procedure Act (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date.

5. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

List of Subjects in 15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

Accordingly, part 744 of the Export Administration Regulations (15 CFR parts 730–774) is amended as follows:

PART 744—END-USE AND END-USER CONTROLS

■ 1. The authority citation for part 744 is revised to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of November 8, 2022, 87 FR 68015, 3 CFR, 2022 Comp., p. 563; Notice of September 7, 2023, 88 FR 62439 (September 11, 2023).

■ 2. Amend supplement no. 4:

■ a. Under ARMENIA, by adding, in alphabetical order, entries for ''Aram Kocharyan;'' ''ARM–BEKAR LLC;'' and ''Hermine Kocharyan;''

■ b. Under BELARUS, by adding, in alphabetical order, an entry for ''NanoTech Ltd;''

■ c. Under BELGIUM, by adding, in alphabetical order, entries for ''European Technical Trading BV;'' ''Hans Maria De Geetere;'' and ''Knokke-Heist Support Management Corporation;''

■ d. Under CHINA, by adding, in alphabetical order, an entry for ''Planet Technology;''

■ e. Under CYPRUS, by adding, in alphabetical order, entries for ''Alexander Nikolayevich Vadyunin;'' ''Eriner Limited;'' ''OOO Aviation Service Int'l;'' *and* ''The Mother Ark.;''

■ f. Under GERMANY, by adding, in alphabetical order, an entry for ''FTL GmBH;''

■ g. Under KAZAKHSTAN, by adding in alphabetical order, an entry for ''Elem Group, LLC;''

■ h. Under NETHERLANDS, by adding in alphabetical order, an entry for ''Hasa Nederland B.V.;''

■ i. Under RUSSIA, by adding, in alphabetical order, entries for ''Aircompany North-West LLC;'' ''Alexander Nikolayevich Vadyunin;'' ''AO Geomir;'' ''AO SET–1;'' ''Argussoft Company LLC;'' ''AST Components;'' ''ATB Electronica LLC;'' ''Digicom, LTD.;'' ''Dolphin Alabuga LLC;'' ''Elektrokom VPK;'' ''Inelso LLC;'' ''Intekh LLC;'' ''JSC Yue Complex Service Solutions;'' ''North-West Technics LLC;'' ''OOO Alabuga-Volokno;'' ''OOO Albatross;'' ''OOO Alb.Aero;'' ''OOO Assistagro;'' ''OOO Aviation Service Int'l;'' ''OOO Druzhba;'' ''OOO Geomiragro;'' ''OOO SMU5;'' ''OOO Ural-Trast;'' ''PF RIELTA LLC;'' ''Prius Electronics LLC;'' ''PT Air;'' ''RosAero JSC;'' *and* ''YE-International AO;'' *and*

■ j. Under UNITED ARAB EMIRATES, by adding, in alphabetical order, an entry for ''RosAero FZC.'' to read as follows:

Supplement No. 4 to Part 744—Entity List

* * * * *

Country	Entity	License requirement	License review policy	**Federal Register** citation
*	* *	*	* *	*
ARMENIA	Aram Kocharyan, Aram Khachatrian 12, Apt 93, Yerevan, 0015, Armenia.	For all items subject to the EAR (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
	ARM–BEKAR LLC, Aram Khachatrian 12, Apt 93, Yerevan, 0015, Armenia.	For all items subject to the EAR (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
	* *	*	* *	*
	Hermine Kocharyan, Aram Khachatrian 12, Apt 93, Yerevan, 0015, Armenia.	For all items subject to the EAR (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
*	* *	*	* *	*
BELARUS	* *	*	* *	*
	Nanotech Ltd, a.k.a., the following one alias: —OOO NANOTEKH. 6 Oginskogo Street, Minsk, 220114, Belarus.	For all items subject to the EAR. (See §§ 734.9(g),[3] 746.8(a)(3), and 744.21(b) of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
	* *	*	* *	*
BELGIUM	European Technical Trading BV, a.k.a., the following one alias: —ETT BV. 24 Booiebos, Ghent, Flemish Region, 9031, Belgium.	For all items subject to the EAR (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
	Hans Maria De Geetere, a.k.a., the following one alias: —Hans De Geetere. 121 Paul Parmentierlaan, Knokke-Heist, 8300, Belgium; *and* 4 Nyckeestraat, Knokke-Heist, 8300, Belgium.	For all items subject to the EAR (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
	* *	*	* *	*
	Knokke-Heist Support Management Corporation, a.k.a., the following two aliases: —Hasa-Invest; *and* —Knokke-Heist Support Corporation Management. 121 Paul Parmentierlaan, Knokke-Heist, 8300, Belgium; *and* 4 Nyckeestraat, Knokke-Heist, 8300, Belgium.	For all items subject to the EAR (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
	* *	*	* *	*
CHINA, PEOPLE'S REPUBLIC OF.	* *	*	* *	*
	Planet Technology, a.k.a., the following five aliases: —Planet Technology (Hong Kong) Ltd.; —Planet Technologies; —Planetec; —Stellar Technology (Hong Kong) Co., Ltd.; *and* —Pailai (Shanghai) Trading Co., Ltd.	For all items subject to the EAR. (See §§ 734.9(g),[3] 746.8(a)(3), and 744.21(b) of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.

Country	Entity	License requirement	License review policy	**Federal Register** citation
	15th Floor, New Times Center, 391–407 Jaffe Road, Wanchai, Hong Kong; *and* Room 2116, 21st Floor, Elevator No. 12, East District, Huaneng Building, No. 2068, Shennan Middle Road, Huaqiangbei Street, Futian District, Shenzhen, Guangdong, China; *and* Room 1604, West Tower, Zhongrong Hengrui Building, No. 560 Zhangyang Road, Pudong, Shanghai, China; *and* Room 2002, Wuxing Nianhua Business Building, No. 139 Hanzhong Road, Qinhuai District, Nanjing City, Jiangsu Province, China; *and* Room 805, Block 1, Guanghua Chang'an Building, No. 7 Jianguomen Inner Street, Dongcheng District, Beijing, China; *and* Room 13–2–407, Phase III, New Territories, No. 85, East 3rd Street, Taipingyuan, Wuhou District, Chengdu City, Sichuan Province, China.			
*	* *	*	* *	*
CYPRUS	Alexander Nikolayevich Vadyunin, Flat 202, Block 7 Kings Palace, 106 Tomb of the Kings Road, Paphos, 8015, Cyprus. (See alternate addresses under Russia)	For all items subject to the EAR (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
	* *	*	* *	*
	Eriner Limited, a.k.a., the following one alias: —Eriner LTD. Inomenon Ethon 44, Orthodoxou Tower 3, 3rd floor, Larnaca 6042, Cyprus.	For all items subject to the EAR (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
	* *	*	* *	*
	OOO Aviation Service Int'l, a.k.a., the following two aliases: —Aviation Services Int'l; *and* —Aviation Service International. 106 Tomb of the Kings Road, Flat 202, Block 7 Kings Palace, Paphos, 8015, Cyprus. (See alternate addresses under Russia)	For all items subject to the EAR (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
	* *	*	* *	*
	The Mother Ark., Inomenon Ethon 44, Orthodoxou Tower 3, 3rd floor Larnaca, 6042, Cyprus.	For all items subject to the EAR (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
	* *	*	* *	*
GERMANY	* *	*	* *	*
	FTL GmBH, a.k.a., the following one alias: —Fast Transport Logistics GmBH. Konrad-Zuse-Ring 15A, Schoneck, 61137, Germany.	For all items subject to the EAR (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
	* *	*	* *	*
KAZAKHSTAN	* *	*	* *	*
	Elem Group, LLC, a.k.a. the following one alias: —Elem Group. 8 Nauryzbai Batyr Street Almaty, 050004, Kazakhstan; *and* 98 Panfilov St., Almaty, 050000, Kazakhstan.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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NETHERLANDS	* *	*	* *	*
	Hasa Nederland B.V., a.k.a., the following one alias: —European Trading Technology BV. Nieuwstraat 56F, 4524 EG Sluis, Netherlands.	For all items subject to the EAR (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.

Country	Entity	License requirement	License review policy	**Federal Register** citation
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RUSSIA	* *	*	* *	*
	Aircompany North-West LLC, a.k.a. the following two aliases: —North-West Airlines; *and* —North-West Aircompany. West Park Business Center, Highway Ochakovskoe 34, Office 201, Moscow, 119530, Russia; *and* Konstitutsii Square 7, Building A Office 71H, Saint Petersburg, 196191, Russia.	For all items subject to the EAR (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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	Alexander Nikolayevich Vadyunin, 154 Block 1 Building 57, Privolnaya Street, Moscow, 109453, Russia; *and* #301, Building 15, B. Dimitrovka St, Moscow, 125009, Russia; *and* #313, Block 11 Building 1, Partiyny Pereulok, Moscow, 125009, Russia; *and* #603, Block 1 Building 8A, Ryazanski Prospekt, Moscow, Russia; *and* Privolnaya St., Dom 57, Kor 1, Moscow, Russia. (See alternate address under Cyprus)	For all items subject to the EAR (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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	AO Geomir, a.k.a., the following five aliases: —Inzhenemy Tsentr Geomir, AO; —Inzhenerny Center Geomir; —ZAO Inzhenemyy Tsentr Geomir; —CJSC Engineering Center Geomir; *and* —JSC Geomir. 50 Olimpiyskiy Prospekt, Mytishchi, Moscow Oblast, 141006, Russia; *and* 24 Mel'nichnyy pereulok, Voronezh, 394030, Russia; *and* 249 Krasnykh Partizan St., Office 209/2, Krasnodar, 350047, Russia; *and* 39 Molodogvardeysky Lane, Office 2, Rostov-on-Don, 344029, Russia.	For all items subject to the EAR (See §§ 734.9(g)[3], 746.8(a)(3), and 744.2l(b) of the EAR).	Policy of denial for all items subject to the EAR apart from food and medicine designated as EAR99, which will be reviewed on a case-by-case basis. See §§ 746.8(b) and 744.21(e).	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
	* *	*	* *	*
	AO SET–1, a.k.a., the following three aliases: —AO Set–1; —Set–1 JSC; *and* —Cet–1 JSC. 38A 2nd Khutorskaya St., Bldg. 1, office 614, Moscow, 127287, Russia; *and* St. Pervomaiskaya Verkhn, 43, Moscow, 105264, Russia.	For all items subject to the EAR (See §§ 734.9(g)[3], 746.8(a)(3), and 744.2l(b) of the EAR).	Policy of denial for all items subject to the EAR apart from food and medicine designated as EAR99, which will be reviewed on a case-by-case basis. See §§ 746.8(b) and 744.21(e).	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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	Argussoft Company LLC, 35 Bolshaya Yakimanka Street, Floor 1, Room 5/II/1–2, Moscow, 119049, Russia; *and* 9 Godovikova, Street, Building 2, Floor 1, Room IX, Moscow, 129085, Russia; *and* 104 Pervomayskaya Street, Office 206/3, Floor 2, Yekaterinburg, 620990, Russia.	For all items subject to the EAR. (See §§ 734.9(g),[3] 746.8(a)(3), and 744.21(b) of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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	AST Components, 56 Entuziastov Highway, Str 32, Floor 2, Rooms 219,221, Moscow, 111123, Russia; *and* 11 Kasatkina Street, Building 2, Moscow 129301, Russia.	For all items subject to the EAR. (See §§ 734.9(g),[3] 746.8(a)(3), and 744.21(b) of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
	ATB Electronica LLC, a.k.a. the following three aliases: —ATB Electronica; —ATB ELEKTRONICA; *and* —ATB Electronics.	For all items subject to the EAR. (See §§ 734.9(g),[3] 746.8(a)(3), and 744.21(b) of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.

Country	Entity	License requirement	License review policy	**Federal Register** citation
	2 24 Pravdy Street, Building 7, Floor 1, Premises X, Room 12, Moscow, 125124, Russia; *and* Building 2, 11 Kasatkina St., Moscow, 129301, Russia.			
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	Digicom, LTD.,16–Ya Parkovaya Street, Building 26, K 1 Office 4201, Moscow, 105484, Russia.	For all items subject to the EAR. (See §§ 734.9(g),[3] 746.8(a)(3), and 744.21(b) of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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	Dolphin Alabuga LLC, a.k.a., the following two aliases: —OOO Dolphin Alabuga; *and* —Delfin Alabuga LLC. SEZ Alabuga, Yelabuga, Tatarstan, Russia.	For all items subject to the EAR (See §§ 734.9(g)[3], 746.8(a)(3), and 744.2l(b) of the EAR).	Policy of denial for all items subject to the EAR apart from food and medicine designated as EAR99, which will be reviewed on a case-by-case basis. See §§ 746.8(b) and 744.21(e).	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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	Elektrokom VPK, a.k.a. the following one alias: —Electrocom VPK. 99 Prosveshcheniya Avenue, Letter A, Room 180N, Office 1, Saint Petersburg, 195299, Russia; *and* Building 2, 11 Kasatkina St., Moscow, 129301, Russia.	For all items subject to the EAR. (See §§ 734.9(g),[3] 746.8(a)(3), and 744.21(b) of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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	Inelso LLC, 3 Gelsingforsskaya Street, Letter Z, Room 412, Sampsonievsk Municipal Okrug, Saint Petersburg, 194044, Russia; *and* Serpukhov Dvor Business Center, 2Y Roshchinskiy Proyezd, 8, Moscow, 115419, Russia.	For all items subject to the EAR. (See §§ 734.9(g),[3] 746.8(a)(3), and 744.21(b) of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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	Intekh LLC, a.k.a., the following one alias: —Aspectriym Limited Trade Development. 9 Svyazistov Street, Office 4, Krasnoznamensk, Moscow Oblast, 143090, Russia.	For all items subject to the EAR. (See §§ 734.9(g),[3] 746.8(a)(3), and 744.21(b) of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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	JSC Yue Complex Service Solutions, a.k.a., the following one alias: —OOO YE KSR. 70 Obukhovskoy Oborony Avenue, Building 3A Saint Petersburg, 192029, Russia; *and* 34 Entuziastov Highway, Office D–2–1, Moscow, 105118, Russia.	For all items subject to the EAR. (See §§ 734.9(g),[3] 746.8(a)(3), and 744.21(b) of the EAR.).	Policy of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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	North-West Technics LLC, West Park Business Center, Highway Ochakovskoe 34, Office 201, Moscow, Russia 119530; *and* Konstitutsii Square 7, Building A Office 71H, Saint Petersburg, 196191, Russia.	For all items subject to the EAR (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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	OOO Alabuga-Volokno, a.k.a., the following one alias: —Alabuga-Fibre LLC. Territoriya Oez Alabuga, Ul. Sh–2 Korp. 4/1, Yelabuga 423600, Russia; *and* Ul. Sh–2 Oez Alabuga Terr. Str 11/9, Volga 423601, Russia; *and* Ul. Krzhizhanovskogo D. 14, Korp. 3, Moscow, 117218, Russia.	For all items subject to the EAR (See §§ 734.9(g)[3], 746.8(a)(3), and 744.2l(b) of the EAR).	Policy of denial for all items subject to the EAR apart from food and medicine designated as EAR99, which will be reviewed on a case-by-case basis. See §§ 746.8(b) and 744.21(e).	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.

Country	Entity	License requirement	License review policy	**Federal Register** citation
	OOO Albatross, a.k.a., the following two aliases: —OOO Albatros; *and* —Albatross LLC. Sh–1 St., Building 8/1, SEZ Alabuga, Yelabuga, Tatarstan, Russia; *and* Sh–1 St., Building 4/1 First Floor, SEZ Alabuga, Yelabuga, Tatarstan, Russia; *and* Sh–1 St., Building 5/2 Room 253, SEZ Alabuga, Yelabuga, Tatarstan, Russia; *and* Bldg. 34 St. Mykluho-Maklay Moscow, 117229, Russia.	For all items subject to the EAR (See §§ 734.9(g)[3], 746.8(a)(3), and 744.2l(b) of the EAR).	Policy of denial for all items subject to the EAR apart from food and medicine designated as EAR99, which will be reviewed on a case-by-case basis. See §§ 746.8(b) and 744.21(e).	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
	OOO Alb.Aero a.k.a., the following one alias: —Alb.Aero LLC. 29A, Building 17 Floor 2 Room 1, M.K. Tikhonravova St., Yubileiny Microdistrict, Korolyov, Russia.	For all items subject to the EAR (See §§ 734.9(g)[3], 746.8(a)(3), and 744.2l(b) of the EAR).	Policy of denial for all items subject to the EAR apart from food and medicine designated as EAR99, which will be reviewed on a case-by-case basis. See §§ 746.8(b) and 744.21(e).	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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	OOO Assistagro, a.k.a., the following one alias: —Assistagro LLC. 35 Valovaya Street, Room 256, Wall Street Business Center, Moscow, 115054, Russia.	For all items subject to the EAR (See §§ 734.9(g)[3], 746.8(a)(3), and 744.2l(b) of the EAR).	Policy of denial for all items subject to the EAR apart from food and medicine designated as EAR99, which will be reviewed on a case-by-case basis. See §§ 746.8(b) and 744.21(e).	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
	OOO Aviation Service Int'l, a.k.a., the following two aliases: —Aviation Services Int'l; *and* —Aviation Service International. 154 Block 1 Building 57, Privolnaya Street, Moscow, Russia 109453; *and* #301, Building 15, B. Dimitrovka St, Moscow, 125009, Russia; *and* #313, Block 11 Building 1, Partiyny Pereulok, Moscow, 125009, Russia; *and* #603, Block 1 Building 8A, Ryazanski Prospekt, Moscow, Russia; *and* Privolnaya Str., Dom 57, Kor 1, Moscow, Russia. (See alternate address under Cyprus)	For all items subject to the EAR (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
	OOO Druzhba,Ul. Profsoyuznaya d.3 Balei,Zabaikalski Kr., 673450, Russia; *and* Ul. Golosova, 30, Kv. 59, Toliatti, Samara Oblast, 445021, Russia; *and* 114 Ul. Nikolaia Gogolia, Bugulma, R–N Bugulminskii, Republic of Tatarstan, 433230, Russia; *and* D. 440 Kv. 41, Ul. Karla Marksa Izhevsk, Udmurtia Republic 426011, Russia.	For all items subject to the EAR (See §§ 734.9(g)[3], 746.8(a)(3), and 744.2l(b) of the EAR).	Policy of denial for all items subject to the EAR apart from food and medicine designated as EAR99, which will be reviewed on a case-by-case basis. See §§ 746.8(b) and 744.21(e).	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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	OOO Geomiragro, 5 Kolontsova St., Premises 302, Mytishchi, Moscow Oblast, 141009, Russia.	For all items subject to the EAR (See §§ 734.9(g)[3], 746.8(a)(3), and 744.2l(b) of the EAR).	Policy of denial for all items subject to the EAR apart from food and medicine designated as EAR99, which will be reviewed on a case-by-case basis. See §§ 746.8(b) and 744.21(e).	88 FR [INSERT FR PAGE NUMBE] 12/7/2023.
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Country	Entity	License requirement	License review policy	**Federal Register** citation
	OOO SMU5, Kosmonavtov, D. 9 Kv., Korolev St., Moscow, 141075, Russia.	For all items subject to the EAR (See §§ 734.9(g)[3], 746.8(a)(3), and 744.2l(b) of the EAR).	Policy of denial for all items subject to the EAR apart from food and medicine designated as EAR99, which will be reviewed on a case-by-case basis. See §§ 746.8(b) and 744.21(e).	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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	OOO Ural-Trast, 440 Karla Marksa St., Apt. 41, Izhevsk, Udmurt Republic, 426011, Russia.	For all items subject to the EAR (See §§ 734.9(g)[3], 746.8(a)(3), and 744.2l(b) of the EAR).	Policy of denial for all items subject to the EAR apart from food and medicine designated as EAR99, which will be reviewed on a case-by-case basis. See §§ 746.8(b) and 744.21(e).	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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	PF RIELTA LLC, 34B Petrogradskaya Embankment, Letter B Room 1–N, Room 208V, Posadsky Municipal District, St. Petersburg, 197046, Russia.	For all items subject to the EAR. (See §§ 734.9(g),[3] 746.8(a)(3), and 744.21(b) of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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	Prius Electronics LLC, 44. Bolshaya Akademicheskaya St., Building 2, Floor 9, POM 15, Room 6, 6A, Timiryazevsky Municipal District, Moscow, 127434, Russia.	For all items subject to the EAR. (See §§ 734.9(g),[3] 746.8(a)(3), and 744.21(b) of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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	PT Air, 6B Ivana Fomina Street, Room 340, Saint Petersburg, 194295, Russia; *and* St. Rossolimo, 17, Building 5, Office 521b, St. Petersburg, 119021, Russia.	For all items subject to the EAR. (See §§ 734.9(g),[3] 746.8(a)(3), and 744.21(b) of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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	RosAero JSC, a.k.a. the following three aliases: —AeroGeoTech; —AeroGeoTech-ROSAERO; *and* —AGT RosAero. Mikhalkovskaya 63B, St. 1, Moscow, 125438, Russia; *and* 24, Smolnaya Street, Office 1417, Moscow, 125445, Russia.	For all items subject to the EAR (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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	YE-International AO, 70 Obukhovskoy Oborony Avenue, Building 3A, St. Petersburg, 192029, Russia; *and* 34 Entusiastov Street, Office B.4.1, Moscow, 105118, Russia; *and* 55 Kuybysheva Street, Office 503, Ekaterinburg, 620144, Russia; *and* 166 Gagarina Prospect, Office 203, Nizhny Novgorod, 603009, Russia; *and* 40 Kommunisticheskaya Street, Office 501, Novosibirsk, 630007, Russia.	For all items subject to the EAR. (See §§ 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.
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UNITED ARAB EMIRATES.	* *	*	* *	*
	RosAero FZC, a.k.a. the following two aliases: —AGT SP Trading FZE; *and* —AGT Trading.	For all items subject to the EAR (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 12/7/2023.

Country	Entity	License requirement	License review policy	**Federal Register** citation
	R2, Sharjah Airport Free Zone Street, Office 806, Sharjah, United Arab Emirates; *and* PO Box 120683, Saif-Zone, Sharjah, United Arab Emirates; *and* . SM-Office E1–1414D, Ajman Free Zone, Ajman, United Arab Emirates.			
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Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 2023–26935 Filed 12–5–23; 11:15 am]

BILLING CODE 3510–33–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 404

Federal Old-Age, Survivors and Disability Insurance (1950–)

CFR Correction

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

■ In Title 20 of the Code of Federal Regulations, Parts 400 to 499, revised as of April 1, 2023, in Appendix I to Subpart P of Part 404, in Part B, section 101.00, revise the first sentence of paragraph C.7.c. to read as follows:

Appendix 1 to Subpart P of Part 404—Listing of Impairments

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Part B

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101.00 Musculoskeletal Disorders.

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C. * * *

7. * * *

c. For 101.15, 101.16, 101.17, 101.18, 101.20C, 101.20D, 101.22, and 101.23, all of the required criteria must be present simultaneously, or within a close proximity of time, to satisfy the level of severity needed to meet the listing. * * *

[FR Doc. 2023–26983 Filed 12–6–23; 8:45 am]

BILLING CODE 0099–10–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA–1036]

Schedules of Controlled Substances: Placement of Nine Specific Fentanyl-Related Substances in Schedule I

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Final rule.

SUMMARY: With the issuance of this final rule, the Drug Enforcement Administration places nine fentanyl-related substances, as identified in this final rule, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers whenever the existence of such isomers, esters, ethers, and salts is possible, in schedule I of the Controlled Substances Act. These nine fentanyl-related substances are currently listed in schedule I pursuant to a temporary scheduling order. This action makes permanent the imposition of the regulatory controls and administrative, civil, and criminal sanctions applicable to schedule I controlled substances on persons who handle (manufacture, distribute, import, export, engage in research, conduct instructional activities or chemical analysis with, or possess), or propose to handle these nine specific fentanyl-related controlled substances.

DATES: *Effective date:* December 7, 2023.

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

SUPPLEMENTARY INFORMATION: In this rule, the Drug Enforcement Administration (DEA) is permanently scheduling the following nine controlled substances including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers whenever the existence of such isomers, esters, ethers, and salts is possible, in schedule I of the Controlled Substances Act (CSA):

- *meta*-fluorofentanyl (*N*-(3-fluorophenyl)-*N*-(1-phenethylpiperidin-4-yl)propionamide),
- *meta*-fluoroisobutyryl fentanyl (*N*-(3-fluorophenyl)-*N*-(1-phenethylpiperidin-4-yl)isobutyramide),
- *para*-methoxyfuranyl fentanyl (*N*-(4-methoxyphenyl)-*N*-(1-phenethylpiperidin-4-yl)furan-2-carboxamide),
- 3-furanyl fentanyl (*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylfuran-3-carboxamide),
- 2′,5′-dimethoxyfentanyl (*N*-(1-(2,5-dimethoxyphenethyl)piperidin-4-yl)-*N*-phenylpropionamide),
- isovaleryl fentanyl (3-methyl-*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylbutanamide),
- *ortho*-fluorofuranyl fentanyl (*N*-(2-fluorophenyl)-*N*-(1-phenethylpiperidin-4-yl)furan-2-carboxamide),
- *alpha′*-methyl butyryl fentanyl (2-methyl-*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylbutanamide), and
- *para*-methylcyclopropyl fentanyl (*N*-(4-methylphenyl)-*N*-(1-phenethylpiperidin-4-yl)cyclopropanecarboxamide).

Legal Authority

The CSA provides that proceedings for the issuance, amendment, or repeal of the scheduling of any drug or other substance may be initiated by the Attorney General (1) on his own motion; (2) at the request of the Secretary of the Department of Health and Human Services (HHS); [1] or (3) on the petition of any interested party.[2] This action was initiated on the Attorney General's own motion, as delegated to the Administrator of the DEA (Administrator), and is supported by, *inter alia,* a recommendation from the Assistant Secretary for Health of HHS

[1] As discussed in a memorandum of understanding entered into by the Food and Drug Administration (FDA) and the National Institute on Drug Abuse (NIDA), FDA acts as the lead agency within HHS in carrying out the Secretary's scheduling responsibilities under the CSA, with the concurrence of NIDA. 50 FR 9518, Mar. 8, 1985. The Secretary of HHS has delegated to the Assistant Secretary for Health of HHS the authority to make domestic drug scheduling recommendations. 58 FR 35460, July 1, 1993.

[2] 21 U.S.C. 811(a).

(Assistant Secretary) and an evaluation of all relevant data by DEA. This action continues the imposition of the regulatory controls and administrative, civil, and criminal sanctions of schedule I controlled substances on any person who handles or proposes to handle *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha′*-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl.

Background

On February 6, 2018, DEA published an order in the **Federal Register** (FR) (83 FR 5188) amending 21 CFR 1308.11(h), temporarily placing fentanyl-related substances, as defined in that order, in schedule I of the CSA based upon a finding that these substances pose an imminent hazard to the public safety and pursuant to the temporary scheduling provisions of 21 U.S.C. 811(h). The nine substances named in this final rule meet the existing definition of fentanyl-related substances, as they are not otherwise controlled in any other schedule (i.e., not included under another DEA Controlled Substance Code Number) and are structurally related to fentanyl by one or more of the five modifications listed under the definition. That temporary scheduling order was effective on the date of publication and was based on findings by the former Acting Administrator that the temporary scheduling of these substances was necessary to avoid an imminent hazard to the public safety pursuant to 21 U.S.C. 811(h)(1). Pursuant to 21 U.S.C. 811(h)(2), the temporary control of fentanyl-related substances, a class of substances as defined in the order, as well as these nine specific substances already covered by that order, was set to expire on February 6, 2020. However, on February 6, 2020, as explained in DEA's April 10, 2020, correcting amendment (85 FR 20155), Congress extended that expiration date until May 6, 2021, by enacting the Temporary Reauthorization and Study of the Emergency Scheduling of Fentanyl Analogues Act (Pub. L. 116–114, sec. 2, 134 Stat. 103). This temporary order was subsequently extended multiple times, most recently on December 29, 2022, through the Consolidated Appropriations Act, 2023, which extended the order until December 31, 2024.

Comment: One commenter stated that fentanyl and the list of related substances is a hazard due to the overdose deaths that have been occurring. This commenter also referenced the National Institute on Drug Abuse, stating that fentanyl-related overdoses have been increasing in the United States. Lastly, this commenter stated that permanently placing fentanyl and the list of related substances in schedule I would improve public health and allow for regulation of these substances.

DEA Response: DEA appreciates the comments in support of this rulemaking. One clarification to note is that fentanyl remains a schedule II substance. This final rule only applies to the fentanyl-related substances that are listed in this final order.

Comment: One commenter stated the proposed rule would make it more difficult to produce and distribute these dangerous fentanyl-related substances, which would help combat the opioid epidemic in the United States. This commenter also referenced a news article by National Public Radio, stating that these nine fentanyl-related substances are not currently classified as controlled substances, making it easy to produce and distribute these substances without legal consequences. Lastly, this commenter recognized that this proposal could have significant impacts on the healthcare industry, such as increased oversight and regulation of fentanyl-related substances, which could prevent their misuse and abuse.

DEA Response: DEA appreciates the comments in support of this rulemaking. One clarification to note based on the comment above is that, by temporary order on February 6, 2018, DEA placed these nine fentanyl-related substances under schedule I. 83 FR 5188. That temporary order defined a fentanyl-related substance to mean any substance not otherwise controlled in any schedule (*i.e.,* not listed under another DEA Controlled Substance Code Number), and for which no exemption or approval is in effect under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355), that is structurally related to fentanyl by one or more of five specified structural modifications. Therefore, these nine fentanyl-related substances are in fact already schedule I controlled substances.

The final rule being issued today applies to nine fentanyl-related substances that were the subject of a February 6, 2018, temporary scheduling order. These nine substances will now be listed in 21 CFR 1308.11(b), as specified in the text of the rule that appears below. This final rule should not have a significant impact on the healthcare industry because these nine fentanyl-related substances have no medical use and they have already been added as schedule I controlled substances since 2018.

Comment: One commenter discussed the direct and indirect effects on federal and state healthcare from this regulation. The commenter suggested that this regulation will boost federal oversight of manufacturing and disseminating harmful chemicals. In addition, this regulation would limit availability and expected use, ensure protection of residents, and increases confidence in the medical field. In addition, the commenter stated that is critical to restrict the use of ''fentanyl replicates'' to those who may need them for medical conditions. Lastly, the commenter stated that raising awareness of the risks of abusing these drugs benefits their prevention.

DEA Response: DEA appreciates the comments in support of this rulemaking. As mentioned previously, FDA has not approved a marketing application for a drug product containing any of these nine substances for any therapeutic indication. These substances have no medical use in the United States.

Comment: One commenter stated that this rule will affect federal healthcare because many federal agencies are trying to tackle the opioid crisis. The commenter discussed the rising number of pediatric deaths from fentanyl in 2021 and the surge in 2018 of fentanyl overdoses among older adolescents as well as in children younger than five. The commenter agrees with this final rule to schedule these fentanyl-related substances. The commenter also stated that fentanyl is highly addictive and that while fentanyl is prescribed for chronic pain or major surgery, it should be a last resort.

DEA Response: DEA appreciates the comments in support of this rulemaking.

Comment: One commenter agreed with this final rule to make permanent these nine specific fentanyl-related substances rather than continuing multiple temporary extensions. Once finalized, the commenter stated that the federal government could act against anyone handling these substances since over 150 people die each day from a fentanyl-related drug overdose.

DEA Response: DEA appreciates the comments in support of this rulemaking. Again, DEA notes that fentanyl is a schedule II controlled substance that can be prescribed for approved medical uses. However, the nine fentanyl-related substances addressed in this rule are already

schedule I controlled substances and none of them have any medical use in the United States.

Comment: One commenter stated that fentanyl should be placed in schedule I. The commenter compared this substance to marijuana, which is a schedule I drug and thought it was mind-blowing that fentanyl was not a schedule I substance. It was suggested that the rising number of deaths, the risk to public health, abuse potential, and dependency should classify fentanyl as a schedule I.

DEA Response: DEA appreciates this comment. As stated previously, fentanyl remains a schedule II substance. Fentanyl has approved medical uses in the United States. This final rule only applies to the fentanyl-related substances that are listed in this final order.

Scheduling Conclusion

After consideration of the relevant matter presented through public comments, the scientific and medical evaluation and accompanying recommendation of HHS, and after its own eight-factor evaluation, DEA finds that these facts and all other relevant data constitute substantial evidence of the potential for abuse of *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl. DEA is permanently scheduling these nine fentanyl-related substances as schedule I controlled substances under the CSA.

Determination of Appropriate Schedule

The CSA establishes five schedules of controlled substances known as schedules I, II, III, IV, and V. The CSA also specifies the findings required to place a drug or other substance in any particular schedule.[3] After consideration of the analysis and recommendation of the Assistant Secretary for HHS and review of all other available data, the Administrator, pursuant to 21 U.S.C. 811(a) and 812(b)(1), finds the following:

(1) The abuse potential of *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl is associated with each substance's pharmacological similarity to other schedule I and II mu-opioid receptor agonist substances which have a high potential for abuse. Similar to morphine (schedule II), fentanyl (schedule II), and several schedule I opioid substances that are structurally related to fentanyl, these nine fentanyl-related substances have been shown to bind and act as mu-opioid receptor agonists;

(2) *meta*-Fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl, have no currently accepted medical use in treatment in the United States; [4] and

(3) There is a lack of accepted safety for use of *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl under medical supervision.

Based on these findings, the Administrator concludes that *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers whenever the existence of such isomers, esters, ethers, and salts is possible, warrant control in schedule I of the CSA.[5]

This final rule does not affect the scheduling of fentanyl itself, which remains a schedule II controlled substance.

Requirements for Handling Meta-Fluorofentanyl, Meta-Fluoroisobutyryl Fentanyl, Para-Methoxyfuranyl Fentanyl, 3-Furanyl Fentanyl, 2′,5′-Dimethoxyfentanyl, Isovaleryl Fentanyl, Ortho-Fluorofuranyl Fentanyl, Alpha′-Methyl Butyryl Fentanyl, and Para-Methylcyclopropyl Fentanyl

Meta-Fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl will continue, on a permanent basis,[6] to be subject to the CSA's schedule I regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, dispensing, importing, exporting, research, and conduct of instructional activities, including the following:

1. *Registration.* Any person who handles (manufactures, distributes, dispenses, imports, exports, engages in research, or conducts instructional activities or chemical analysis with, or possesses) *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl, or who desires to handle these nine substances, is required to 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. Retail sales of schedule I controlled substances to the general public are not allowed under the CSA. Possession of any quantity of these substances in a manner not authorized by the CSA is unlawful and those in possession of any quantity of these substances may be subject to prosecution pursuant to the CSA.

2. *Disposal of stocks. meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-

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[3] 21 U.S.C. 812(b).

[4] Although there is no evidence suggesting that *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl have a currently accepted medical use in treatment in the United States, it bears noting that a drug cannot be found to have such medical use unless DEA concludes that it satisfies a five-part test. Specifically, with respect to a drug that has not been approved by FDA, to have a currently accepted medical use in treatment in the United States, all of the following must be demonstrated:

i. The drug's chemistry must be known and reproducible;

ii. there must be adequate safety studies;

iii. there must be adequate and well-controlled studies proving efficacy;

iv. the drug must be accepted by qualified experts; and

v. the scientific evidence must be widely available.

57 FR 10499 (1992).

[5] 21 U.S.C. 812(b)(1).

[6] *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and/or *para*-methylcyclopropyl fentanyl have been subject to schedule I controls on a temporary basis, pursuant to 21 U.S.C. 811(h), by virtue of the February 6, 2018 temporary scheduling order (83 FR 5188) and the subsequent statutory extension of that order through December 31, 2024 (Pub. L. 117–328, Division O, Title VI, Sec. 601).

dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl must be disposed of in accordance with 21 CFR part 1317, in addition to all other applicable federal, state, local, and tribal laws.

3. *Security. meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl are subject to schedule I security requirements and must be handled and stored pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.71–1301.76. Non-practitioners handling these nine substances must also comply with the employee screening requirements of 21 CFR 1301.90–1301.93.

4. *Labeling and Packaging.* All labels and labeling for commercial containers of *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl, must be in compliance with 21 U.S.C. 825, and be in accordance with 21 CFR part 1302.

5. *Quota.* Only registered manufacturers are permitted to manufacture *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl in accordance with a quota assigned pursuant to 21 U.S.C. 826 and in accordance with 21 CFR part 1303.

6. *Inventory.* Any person registered with DEA to handle *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl must have an initial inventory of all stocks of controlled substances (including these substances) 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.

After the initial inventory, every DEA registrant must take a new inventory of all stocks of controlled substances (including *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl) on hand every two years pursuant to 21 U.S.C. 827 and 958(e), and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11.

7. *Records and Reports.* Every DEA registrant must maintain records and submit reports with respect to *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl, pursuant to 21 U.S.C. 827 and 958(e), and in accordance with 21 CFR parts 1301.74(b) and (c), 1301.76(b), 1307.11 and parts 1304, 1312, and 1317. Manufacturers and distributors must submit reports regarding these substances to the Automation of Reports and Consolidated Order System pursuant to 21 U.S.C. 827 and in accordance with 21 CFR parts 1304 and 1312.

8. *Order Forms.* Every DEA registrant who distributes *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl must continue to comply with the order form requirements, pursuant to 21 U.S.C. 828 and in accordance with 21 CFR part 1305.

9. *Importation and Exportation.* All importation and exportation of *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl must comply with 21 U.S.C. 952, 953, 957, and 958, and in accordance with 21 CFR part 1312.

10. *Liability.* Any activity involving *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl 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

Executive Orders (E.O.) 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 14094 (Modernizing Regulatory Review)

This action is not a significant regulatory action as defined by Executive Order (E.O.) 12866 (Regulatory Planning and Review), section 3(f), and the principles reaffirmed in E.O. 13563 (Improving Regulation and Regulatory Review); and, accordingly, this action has not been reviewed by the Office of Management and Budget (OMB). This action makes no change in the status quo, as *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl are already listed as a schedule I controlled substances.

Executive Order 12988, Civil Justice Reform

This action 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 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. 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.

Regulatory Flexibility Act

The Administrator, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601–602, has reviewed this final rule and, by approving it, certifies that it will not have a significant economic impact on a substantial number of small

entities. On February 6, 2018, DEA published an order to temporarily place fentanyl-related substances in schedule I of the CSA pursuant to the temporary scheduling provisions of 21 U.S.C. 811(h). DEA estimates that all entities handling or planning to handle *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl have already established and implemented the systems and processes required to handle these substances.

As discussed in the NPRM, there are 108 registrations authorized to handle one or more of the following substances: *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl, as well as a number of registered analytical labs that are authorized to handle schedule I controlled substances generally. These 108 registrations represent a maximum of 95 small entities. Therefore, DEA conservatively estimates as many as 95 small entities are affected by this rule.

A review of the 108 registrations indicates that all entities that currently handle *meta*-fluorofentanyl, *meta*-fluoroisobutyryl fentanyl, *para*-methoxyfuranyl fentanyl, 3-furanyl fentanyl, 2′,5′-dimethoxyfentanyl, isovaleryl fentanyl, *ortho*-fluorofuranyl fentanyl, *alpha*′-methyl butyryl fentanyl, and *para*-methylcyclopropyl fentanyl, also handle other schedule I controlled substances and have established and implemented (or maintain) the systems and processes required to handle these substances. Therefore, DEA anticipates that this final rule will impose minimal or no economic impact on any affected entities, and, thus, will not have a significant economic impact on any of the small entities. Therefore, DEA has concluded that this final rule will not have a significant economic impact on a substantial number of small entities.

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 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 million 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.

Paperwork Reduction Act of 1995

This final rule does not impose a new collection or modify an existing collection of information under the Paperwork Reduction Act of 1995. 44 U.S.C. 3501–3521. Also, this final rule does not impose new or modify existing recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. However, this final rule does require compliance with the following existing OMB collections: 1117–0003, 1117–0004, 1117–0006, 1117–0008, 1117–0009, 1117–0010, 1117–0012, 1117–0014, 1117–0021, 1117–0023, 1117–0029, and 1117–0056. 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.

Congressional Review Act

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

Determination To Make Rule Effective Immediately

As indicated above, this rule finalizes the schedule I control status of nine substances that has already been in effect. These nine substances all fall within the definition of fentanyl-related substances set forth in the February 6, 2018, temporary scheduling order (83 FR 5188). Through the Temporary Reauthorization and Study of the Emergency Scheduling of Fentanyl Analogues Act, which became law on February 6, 2020, Congress extended the temporary control of fentanyl-related substances until May 6, 2021. This temporary order was subsequently extended multiple times, most recently on December 29, 2022, through the Consolidated Appropriations Act, 2023, which extended the order until December 31, 2024.[7] The February 2018 order was effective on the date of publication, and was based on findings by the then-Acting Administrator that the temporary scheduling of the fentanyl-related substances was necessary to avoid an imminent hazard to the public safety pursuant to 21 U.S.C. 811(h)(1). Because this rule finalizes the control status of nine substances that has already been in effect, it does not alter the legal obligations of any person who handles these substances. Rather, it merely makes permanent the current scheduling status and corresponding legal obligations. Therefore, since this rule does not change the current scheduling status and corresponding legal obligations, DEA is making the rule effective on the date of publication in the **Federal Register**, as any delay in the effective date is unnecessary and would be contrary to the public interest.

[7] Public Law 117–328, Division O, Title VI, Sec. 601.

Signing Authority

This document of the Drug Enforcement Administration was signed on November 29, 2023, by Administrator Anne Milgram. That document with the original signature and date is maintained by DEA. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DEA Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of DEA. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

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, 21 CFR part 1308 is amended 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 § 1308.11:

■ a. Redesignate paragraphs (b)(10) through (94) to read as follows:

Old paragraph	New paragraph
(b)(10) through (33)	(b)(11) through (34).
(b)(34) through (43)	(b)(36) through (45).
(b)(44) through (47)	(b)(47) through (50).
(b)(48) through (50)	(b)(52) through (54).
(b)(51) through (66)	(b)(57) through (72).
(b)(67) through (74)	(b)(74) through (81).
(b)(75) through (94)	(b)(84) through (103).

■ b. Add new paragraphs (b)(10), (35), (46), (51), (55), (56), (73), (82), and (83);

The additions to read as follows:

§ 1308.11 Schedule I.

* * * * *

(b) * * *

* * * * * * *

(10) *alpha'*-Methyl butyryl fentanyl (2-methyl-*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylbutanamide) 9864

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(35) 2',5'-Dimethoxyfentanyl (*N*-(1-(2,5-dimethoxyphenethyl)piperidin-4-yl)-*N*-phenylpropionamide) 9861

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(46) 3-Furanyl fentanyl (*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylfuran-3-carboxamide) 9860

* * * * * * *

(51) Isovaleryl fentanyl (3-methyl-*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylbutanamide) 9862

* * * * * * *

(55) *meta*-Fluorofentanyl (*N*-(3-fluorophenyl)-*N*-(1-phenethylpiperidin-4-yl)propionamide) 9857
(56) *meta*-Fluoroisobutyryl fentanyl (*N*-(3-fluorophenyl)-*N*-(1-phenethylpiperidin-4-yl)isobutyramide) 9858

* * * * * * *

(73) *ortho*-Fluorofuranyl fentanyl (*N*-(2-fluorophenyl)-*N*-(1-phenethylpiperidin-4-yl)furan-2-carboxamide) 9863

* * * * * * *

(82) *para*-Methoxyfuranyl fentanyl (*N*-(4-methoxyphenyl)-*N*-(1-phenethylpiperidin-4-yl)furan-2-carboxamide 9859
(83) *para*-Methylcyclopropyl fentanyl (*N*-(4-methylphenyl)-*N*-(1-phenethylpiperidin-4-yl)cyclopropanecarboxamide) 9865

* * * * *

[FR Doc. 2023–26694 Filed 12–6–23; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF STATE

22 CFR Part 42

[Public Notice: 12224]

RIN 1400–AE83

Immigrant Visas

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: The Department of State (''Department'') is amending its regulation governing immigrant visas by removing the section which allows a consular officer to conduct an informal evaluation of the family members of an immigrant visa applicant to identify potential grounds of ineligibility. The existing regulation was promulgated in 1952, at a time when a consular officer could more readily assess a family member's potential qualification for a visa without a formal visa application. Assessing eligibility for an immigrant visa is now a more complex task and not one which can be accomplished accurately with an informal evaluation.

DATES: This final rule is effective on January 8, 2024.

FOR FURTHER INFORMATION CONTACT: Claire Kelly, Office of Visa Services, Bureau of Consular Affairs, Department of State; telephone (202) 485–7586, *VisaRegs@state.gov.*

SUPPLEMENTARY INFORMATION: The Department published a notice of proposed rulemaking, Public Notice 11604 at 88 FR 16384 (Mar. 17, 2023) (hereafter ''proposed rule''), with a request for comments, proposing to amend Part 42 of Title 22 of the Code of Federal Regulations. The rule will eliminate 22 CFR 42.68 in its entirety. The regulatory amendment was discussed in detail in the proposed rule, and that discussion is adopted by reference in this final rule. The Department received two responsive comments, both in support of eliminating 22 CFR 42.68. The Department is now promulgating a final rule with no changes from the proposed rule. This rule results in no change for applicants, as the authority granted by 22 CFR 42.68 was no longer used by consular officers.[1]

Analysis of Comments

The proposed rule was published in the **Federal Register** on March 17, 2023. The comment period closed May 16, 2023. The Department received two responsive comments, both in favor of the proposed elimination of 22 CFR 42.68, and one non-responsive comment.

One of the two responsive comments advocated for replacing 22 CFR 42.68 with ''supportive and accessible eligibility screenings for noncitizens seeking visas,'' while the other comment only expressed its support for the proposed elimination. The Department has considered these comments. Considering the complexity required to evaluate a noncitizen's eligibility for a visa, and limited resources to reliably assess eligibility absent a visa application, the Department is unable to offer any eligibility screenings. Noncitizens who wish to receive a nonimmigrant or immigrant visa must formally apply for a visa to allow a consular officer to assess their eligibility for the visa.

[1] *See* the proposed rule for further discussion.

Regulatory Findings

A. Administrative Procedure Act

As this rule involves amending visa policy, which is a foreign affairs function of the United States, it is exempt from both the delayed effective date and notice and comment requirements of 5 U.S.C. 553 per subsection (a)(1). Notwithstanding the applicability of the foreign affairs exception to this rule, the Department, for its own benefit, sought public comment on the proposed elimination of 22 CFR 42.68. *See, e.g., Hoctor* v. *U.S. Dep't of Agric.,* 82 F.3d 165, 171–72 (7th Cir. 1996) (observing that there is nothing in the APA that forbids an agency's use of notice-and-comment procedures even if not required under the APA, and that courts should attach no weight to an agency's varied approaches involving similar rules). Though this rule is not subject to 5 U.S.C. 553(d), the Department is also choosing to delay the effective date of this rule for 30 days.

B. Regulatory Flexibility Act

As this rulemaking is not required to be published for notice and comment under 5 U.S.C. 553, it is exempt from the regulatory flexibility analysis requirements set forth by the Regulatory

Flexibility Act. Nonetheless, as this rule eliminates a currently unused authority, the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities.

C. Congressional Review Act

This rule is not a major rule as defined by the Congressional Review Act (5 U.S.C. 801 *et seq.*). This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and import markets.

D. Executive Orders 12866, 13563, and 14094

Notwithstanding that the policies of the Secretary of State in exercising their authority to conduct international affairs through the granting or refusal of visas to foreign nationals is a foreign affairs function, the Department has submitted this rule to OIRA for review and OIRA has deemed this rule to be not significant. The Department has also considered this final rule in light of E.O. 13563 and E.O. 14094 and affirms that this rule is consistent with the guidance therein.

As noted in the NPRM, the Visa Office consulted with management in the immigrant visa units of five of the largest-volume immigrant visa processing posts: Ciudad Juarez, Manila, Santo Domingo, Mumbai, and Dhaka. Each of the five posts reported they do not provide this service. Given that these five posts process 32 percent of the immigrant visas worldwide, and they have no information regarding the provision of this service, we are confident that eliminating this regulation will not result in significant impacts.

E. Executive Order 13175

The Department has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

F. Paperwork Reduction Act

This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

G. Other

The Department has also considered this rule under the Unfunded Mandates Reform Act of 1995 and Executive Orders 12372, 13132, and 13272 and affirms this rule is consistent with the applicable mandates or guidance therein.

List of Subjects in 22 CFR Part 42

Immigration, Passports, Visas.

Accordingly, for the reasons set forth in the preamble, 22 CFR 42 is amended as follows:

PART 42—VISAS: DOCUMENTATION OF IMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED

■ 1. The authority citation for part 42 continues to read as follows:

Authority: 8 U.S.C. 1104 and 1182; Pub. L. 105–277, 112 Stat. 2681; Pub. L. 108–449, 118 Stat. 3469; The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (done at the Hague, May 29, 1993), S. Treaty Doc. 105–51 (1998), 1870 U.N.T.S. 167 (Reg. No. 31922 (1993)); 42 U.S.C. 14901–14954 (Pub. L. 106–279, 114 Stat. 825); 8 U.S.C. 1101 (Pub. L. 111–287, 124 Stat. 3058); 8 U.S.C. 1154 (Pub. L. 109–162, 119 Stat. 2960); 8 U.S.C. 1201 (Pub. L. 114–70, 129 Stat. 561).

§ 42.68 [Removed and reserved]

■ 2. Remove and reserve § 42.68.

Julie M. Stufft,

Deputy Assistant Secretary for Visa Services, Consular Affairs, Department of State.

[FR Doc. 2023–26907 Filed 12–6–23; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[USCG–2023–0899]

Special Local Regulations; Marine Events Within the Captain of the Port Charleston

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

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the special local regulation for the Charleston Parade of Boats on December 9, 2023, to provide for the safety of life on navigable waterways during this event. Our regulation for marine events within the Captain of the Port Charleston identifies the regulated area for this event in Charleston, SC. During the enforcement period, no person or vessel may enter, transit through, anchor in, or remain within the regulated area unless authorized by the Coast Guard Patrol Commander or a designated representative.

DATES: The regulations in 33 CFR 100.704 will be enforced from 4 p.m. through 8 p.m. on December 9, 2023, for the location identified in paragraph (d), Item 10 in table 1 to § 100.704.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call or email Lieutenant James Sullivan, Sector Charleston Waterways Management Division, U.S. Coast Guard; telephone 843–740–3184, email *James.P.Sullivan2@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulation in 33 CFR 100.704 for the Charleston Parade of Boats regulated area identified in table 1 to § 100.704, paragraph (d), Item 10, from 4 p.m. until 8 p.m. on December 9, 2023. This action is being taken to provide for the safety of life on navigable waterways during this event. Our regulation for recurring marine events, Captain of the Port Charleston, § 100.704, paragraph (d), Item 10, specifies the location of the regulated area for the Charleston Parade of Boats, which encompasses portions of the Charleston Harbor located in Charleston, SC, including Anchorage A, Shutes Folly, Bennis Reach, Horse Reach, Hog Island Reach, Town Creek Lower Reach, and Ashley River. Under the provisions of 33 CFR 100.704, all persons and vessels are prohibited from entering the regulated area, except those persons and vessels participating in the event, unless they receive permission to do so from the Coast Guard Patrol Commander, or designated representative.

Spectator vessels may safely transit outside the regulated area, but may not anchor, block, loiter in, impede the transit of festival participants or official patrol vessels or enter the regulated area without approval from the Coast Guard Patrol Commander or a designated representative. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation. In addition to this notice of enforcement in the **Federal Register**, the Coast Guard will provide notice of the regulated area via Local Notice to Mariners, Marine Safety Information Bulletins, Broadcast Notice to Mariners, and on-scene designated representatives.

Dated: November 27, 2023.

F.J. Delrosso,

Captain, U.S. Coast Guard, Captain of the Port Charleston.

[FR Doc. 2023–26844 Filed 12–6–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2022–0222]

Drawbridge Operation Regulation; Okeechobee Waterway, Stuart, FL

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

ACTION: Notice of temporary deviation from regulations; modification.

SUMMARY: The Coast Guard is modifying a temporary deviation from the operating schedule that governs the Florida East Coast (FEC) Railroad Bridge, across the Okeechobee Waterway (OWW), mile 7.41, at Stuart, Florida. This modification extends the period the drawbridge may operate under the temporary deviation to the drawbridge operating schedule. This modification will allow the Coast Guard to review public comments and will provide continuity in the operation of the drawbridge until a determination is made if this temporary deviation will meet the reasonable needs of competing modes of transportation.

DATES: This deviation is effective from 12:01 a.m. on December 18, 2023, through 11:59 p.m. on February 11, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type the docket number (USCG–2022–0222) in the ''SEARCH'' box and click ''SEARCH''. In the Document Type column, select ''Supporting & Related Material''.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email Ms. Jennifer Zercher, Bridge Management Specialist, Seventh Coast Guard District; telephone 305–415–6740, email *Jennifer.N.Zercher@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Florida East Coast (FEC) Railroad Bridge across the Okeechobee Waterway (OWW), mile 7.41, at Stuart, Florida, is a single-leaf bascule bridge with a six-foot vertical clearance at mean high water in the closed position. The normal operating schedule for the bridge is found in 33 CFR 117.317(c).

On August 11, 2023, the Coast Guard published a temporary deviation entitled ''Drawbridge Operation Regulation; Okeechobee Waterway, Stuart, FL'' in the **Federal Register** (88 FR 54487). That temporary deviation, effective from 12:01 a.m. on August 15, 2023, through 11:59 p.m. on December 17, 2023, allows the drawbridge to operate on a more predictable schedule due to the significant increase in railway activity.

On November 7, 2023, the Coast Guard published a notice reopening the comment period until November 30, 2023, because service was delayed on the passenger train (88 FR 76666).

The Coast Guard has determined an extension of the temporary deviation is necessary to allow for the review of public comments, while providing continuity in the operation of the drawbridge until a determination is made if this temporary deviation will meet the reasonable needs of competing modes of transportation.

Under this temporary deviation modification from 12:01 a.m. on December 18, 2023, through 11:59 p.m. on February 11, 2024, the FEC Railroad Bridge will be maintained in the fully open-to-navigation position, except during periods when it is closed for the passage of train traffic, to conduct inspections, and to perform maintenance and repairs authorized by the Coast Guard. However, the bridge will not be closed for more than 50 consecutive minutes in any given hour during daytime operations (6 a.m. to 10 p.m.) and for more than 8 total hours during daytime operations (6 a.m. to 10 p.m.).

Notwithstanding the above paragraph, the drawbridge will open and remain open to navigation for a fixed 10-minute period at the top of each hour from 6 a.m. to 10 p.m. In addition, the drawbridge will open and remain open to navigation for a fixed 15-minute period as outlined in the table below:

TABLE 1

Monday through Friday:
8:55 a.m. through 9:10 a.m.
Saturday and Sunday:
8:55 a.m. through 9:10 a.m.
9:55 a.m. through 10:10 a.m.
10:55 a.m. through 11:10 a.m.
12:55 p.m. through 1:10 p.m.
4:55 p.m. through 5:10 p.m.

From 10:01 p.m. until 5:59 a.m. daily, the drawbridge will remain in the fully open-to-navigation position, except during periods when it is closed for the passage of train traffic, to conduct inspections, and to perform maintenance and repairs authorized by the Coast Guard. The drawbridge will not be closed more than 60 consecutive minutes.

If a train is in the track circuit at the start of a fixed opening period, the opening may be delayed up to, but not more than, five minutes. Once the train has cleared the circuit, the bridge must open immediately for navigation to begin the fixed opening period.

In the event of a drawbridge operational failure, or other emergency circumstances impacting normal drawbridge operations, the drawbridge owner will immediately notify the Coast Guard Captain of the Port Miami and provide an estimated time of repair and return to normal operations.

The drawbridge will be tended from 6 a.m. to 10 p.m., daily. The bridge tender will monitor VHF–FM channels 9 and 16 and will provide estimated times of drawbridge openings and closures, or any operational information requested. Operational information will be provided 24 hours a day by telephone at (772) 403–1005.

The drawbridge owner will maintain a mobile application. The drawbridge owner will publish drawbridge opening times, and the drawbridge owner will provide timely updates to schedules, including but not limited to, impacts due to emergency circumstances, inspections, maintenance, and repairs authorized by the Coast Guard.

Signs will be posted and visible to marine traffic, displaying VHF radio contact information, application information, and the telephone number for the bridge tender.

A drawbridge logbook will be maintained including the date and time of each closing and opening of the draw. The drawbridge logbook will also include all maintenance opening, closings, malfunctions, or other comments. During the temporary deviation, a copy of the drawbridge logbook for the previous week will be provided to the Seventh Coast Guard District Bridge Manager by 4:00 p.m. each Monday.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedules immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulation is authorized pursuant to 33 CFR 117.35(a).

Dated: December 3, 2023.

Douglas M. Schofield,

Rear Admiral, U.S. Coast Guard, Commander, Coast Guard Seventh District.

[FR Doc. 2023–26850 Filed 12–6–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2023–0938]

Safety Zone; Sausalito Lighted Boat Parade Fireworks Display, Richardson Bay, Sausalito, CA

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

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the safety zone in the navigable waters of Richardson Bay, off Sausalito, CA, in support of the Sausalito Lighted Boat Parade Fireworks Display. This safety zone is necessary to protect personnel, vessels, and the marine environment from the dangers associated with pyrotechnics. During the enforcement period, unauthorized persons or vessels are prohibited from entering into, transiting through, or remaining in the safety zone, unless authorized by the designated Patrol Commander (PATCOM) or other Federal, state, or local agencies on scene to assist the Coast Guard in enforcing the regulated area.

DATES: The regulations in 33 CFR 165.1191, will be enforced for the location in Table 1 to § 165.1191, Item number 30, from 7:15 p.m. through 9 p.m. on December 9, 2023.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call or email LT William Harris, U.S. Coast Guard Sector San Francisco Waterways Management Division; telephone 415–399–7443, email *SFWaterways@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone established in 33 CFR 165.1191, Table 1, Item number 30, for the Sausalito Lighted Boat Parade Fireworks on December 9, 2023. The Coast Guard will enforce a 600-foot safety zone around the fireworks vessel from 7:15 through 9 p.m. on December 9, 2023, while at the launch site off Sausalito Point. Beginning at 7:15 p.m. on December 9, 2023, 30 minutes prior to the commencement of the 15-minute fireworks display, the safety zone will encompass all navigable waters, from surface to bottom, surrounding the fireworks vessel near Sausalito Point in Sausalito, CA within a radius of 600 feet from approximate position 37°51′30.66″ N, 122°28′27.29″ W (NAD 83) for the Sausalito Lighted Boat Parade Fireworks Display as set forth in 33 CFR 165.1191, Table 1, Item number 30. The safety zone will be enforced from 7:15 p.m. through 9 p.m. on December 9, 2023.

In addition to this notification of enforcement in the **Federal Register**, the Coast Guard plans to provide notification of this enforcement period via the Local Notice to Mariners and Marine Information Broadcast.

Under the provisions of 33 CFR 165.1191, unauthorized persons or vessels are prohibited from entering into, transiting through, or anchoring in the safety zone during all applicable effective dates and times, unless authorized to do so by the PATCOM or other Official Patrol defined as Federal, State, or local law enforcement agency on scene to assist the Coast Guard in enforcing the regulated area. Additionally, each person who received notice of a lawful order or direction issued by the PATCOM or Official Patrol shall obey the order or direction. The PATCOM or Official patrol may, upon request, allow the transit of commercial vessels through regulated areas when it is safe to do so.

If the Captain of the Port determines that the regulated area need not be enforced for the full duration stated in this notice, a Marine Information Broadcast, an entry in the Local Notice to Mariners, or actual notice may be used to grant permission to enter the regulated area.

Dated: November 30, 2023.

Taylor Q. Lam,

Captain, U.S. Coast Guard, Captain of the Port San Francisco.

[FR Doc. 2023–26796 Filed 12–6–23; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2019–0212; FRL–10997–02–R6]

Air Plan Disapproval; Louisiana; Excess Emissions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is disapproving a State Implementation Plan (SIP) revision submitted by the State of Louisiana, through the Louisiana Department of Environmental Quality (LDEQ), on November 20, 2016, and supplemented on June 9, 2017. The submittals were in response to the EPA's national SIP call on June 12, 2015, concerning excess emissions during periods of Startup, Shutdown, and Malfunction (SSM). EPA is finalizing a determination that the revision to the SIP in the submittals does not correct the deficiency with the Louisiana SIP identified in the June 12, 2015 SIP call. We are taking this action in accordance with section 110 of the Act.

DATES: This rule is effective on January 8, 2024.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2019–0212. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet. Publicly available docket materials are available electronically through *https://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Mr. Alan Shar, Regional Haze and SO_2 Section, EPA Region 6 Office, 1201 Elm Street, Suite 500, Dallas, Texas 75270, (214) 665–6691, *Shar.alan@epa.gov*. Please call or email the contact listed above if you need alternative access to material indexed but not provided in the docket.

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

I. Background

The background for this action is discussed in detail in our June 13, 2023 (88 FR 38448) proposal where we proposed to disapprove a revision to the Louisiana SIP, which requested the removal of section LAC 33:III.2201.C.8 and approval of a new section, LAC 33:III.2201.K, titled Startup and Shutdown, in its place.[1] LAC

[1] LAC 33:III.2201.K Startup and Shutdown

"1. For affected point sources that are shut down intentionally more than once per month, the owner or operator shall include NO_X emitted during periods of start-up and shutdown for purposes of determining compliance with the emission factors set forth in Subsection D of this Section, or with

33:III.2201.K would require affected Nitrogen Oxides (NO_X) point sources to comply with either: (1) the applicable emission limitations and standards at all times, including periods of startup and shutdown; or (2) the applicable emission limitations and standards at all times, except during periods of startup and shutdown covered by work practice standards permissible under the rule. Thus, owners and operators of sources that choose not to comply with the numeric emission limitations during periods of startup and shutdown would be allowed to comply with alternative work practice standards. The owner or operator would not have to select the same method of compliance (option) for every affected point source and would be allowed to revise its selection of the method of compliance for one or more affected point sources by means of a permit modification. Any noncompliance with the emission limitations or with the alternative plan would be submitted in writing within 90 days of the end of each ozone season (May 1–September 30, inclusive) to the administrative authority. The affected NO_X point sources of concern are electric power generating system boilers, industrial boilers, process heaters and furnaces, stationary gas turbines, and stationary internal combustion engines in the Baton Rouge ozone nonattainment area and its Region of Influence (ROI). The Baton Rouge ozone nonattainment area consists of five parishes: Ascension, East Baton Rouge, Iberville, Livingston, and West Baton Rouge, and the ROI is an area to the north of the Baton Rouge ozone nonattainment area that encompasses affected facilities in the attainment parishes of East Feliciana, Pointe Coupee, St. Helena, and West Feliciana.[2]

an alternative plan approved in accordance with Paragraph E.1 or 2 of this Section.

2. For all other affected point sources, effective May 1, 2017, the owner or operator shall either comply with Paragraph K.1 of this Section or the work practice standards described in Paragraph K.3 of this Section during periods of start-up and shutdown. If the owner or operator chooses to comply with work practices standards, the emission factors set forth in Subsection D of this Section shall not apply during periods of start-up and shutdown.

3. Work Practice Standards

a. The owner or operator shall operate and maintain each affected point source, including any associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions.

b. Coal-fired and fuel oil-fired electric power generating system boilers and fuel oil-fired stationary gas turbines shall use natural gas during start-up. Start-up ends when any of the steam from the boiler or steam turbine is used to generate electricity for sale over the grid or for any other purpose (including on-site use). If another fuel must be used to support the shutdown process, natural gas shall be utilized.

c. Engage control devices such as selective catalytic reduction (SCR) or selective non-catalytic reduction (SNCR) as expeditiously as possible, considering safety and manufacturer recommendations. The department shall incorporate into the applicable permit for each affected facility appropriate requirements describing the source-specific conditions or parameters identifying when operation of the control device shall commence.

d. Minimize the start-up time of stationary internal combustion engines to a period needed for the appropriate and safe loading of the engine, not to exceed 30 minutes.

e. Maintain records of the calendar date, time, and duration of each start-up and shutdown.

f. Maintain records of the type(s) and amount(s) of fuels used during each start-up and shutdown.

g. The records required by Subparagraphs K.3.e and f of this Section shall be kept for a period of at least five years and shall be made available upon request by authorized representatives of the department.

4. On or before May 1, 2017, the owner or operator shall notify the Office of Environmental Services whether each affected point source will comply with Paragraph K.1 or K.3 of this Section during periods of start-up and shutdown.

a. The owner or operator does not have to select the same option for every affected point source.

b. The department shall incorporate into the applicable permit for each affected facility the provisions of Paragraph K.1 and/or K.3 of this Section, as appropriate. The owner or operator may elect to revise the method of compliance with Subsection K of this Section for one or more affected point sources by means of a permit modification.''

In the June 13, 2023 (88 FR 38448) notice, we proposed to determine that the SIP revision (the November 20, 2016 submittal, and its June 9, 2017 supplement) does not correct substantial inadequacies identified in the June 12, 2015 SIP call (hereinafter referred to as the ''2015 SSM SIP Action'').[3] The proposal did not reopen the 2015 SSM SIP Action and only took comment on whether the proposed Louisiana SIP revision is consistent with CAA requirements and whether it addressed the substantial inadequacy identified in the 2015 SSM SIP Action for LAC 33:III.2201.C.8 of the Louisiana SIP.

II. Summary of Comments

The public comment period for our proposed disapproval and determination ended on July 13, 2023, and we received comments from Sierra Club, LDEQ, industry groups, and one anonymous commenter.

In general, Sierra Club expressed support for the proposed disapproval. LDEQ disagreed with EPA's conclusions and believed that the work practice standards under LAC 33:III.2201.K are consistent with the CAA and the 2015 SSM SIP policy. The Louisiana Chemical Association and the Louisiana Mid-Continent Oil & Gas Association (hereinafter ''Industry commenters'') stated that EPA's proposed disapproval is unwarranted and arbitrary and capricious; thus, they requested that EPA withdraw its proposed disapproval. Finally, an anonymous commenter questioned the relevance of detailed demographic information and Environmental Justice (EJ) considerations with respect to the proposal and the 2015 SSM SIP Action. The full text of all the comments received is in the docket for this action. A summary of the comments and EPA's responses are provided in the next section.

[2] See LAC 33:III.2201.A(1).

[3] 80 FR 33840 (June 12, 2015), State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction; Final Rule.

III. Response to Comments

A. Industry and LDEQ Comments

Comment 1: Industry commenters stated that the addition of the excess emissions provisions in LAC 33:III.2201.K does not render Louisiana's SIP ''substantially inadequate.'' The commenters asserted that EPA's proposed disapproval of the State's SIP submittal (requesting the addition of LAC 33:III.2201.K to the Louisiana SIP) is based on policy preferences published as recommendations and that EPA is using its recommendations as rigid requirements to disapprove Louisiana's excess emissions SIP provisions. The commenters specifically noted that the EPA does not demonstrate that the SIP is inadequate to protect air quality, pointing to declines in NO_X emissions and the 8-hour ozone design value of the Baton Rouge area.

Response: EPA is cognizant of and appreciates LDEQ's efforts in reducing ozone National Ambient Air Quality Standards (NAAQS) design values in the Baton Rouge area.[4] Evidence that NO_X emissions and ozone concentrations have decreased, though, is not by itself a sufficient basis to find that a potential revision to the SIP meets all CAA requirements for SIPs (*e.g.,* the CAA requirement that SIPs include enforceable emission limitations that limit emissions on a continuous basis). Also, as stated in the 2015 SSM SIP Action, even if historically excess emissions have not caused or contributed to an exceedance or a violation, this would not mean that they could not do so at some time in the

[4] It is worth noting that the decline in design values of ozone presented by the commenter covers a period before the effective date of LAC 33:III.2201.K.

future. In addition, given that there are many locations where air quality is not monitored such that a NAAQS exceedance or violation due to excess emissions could be observed, the inability to demonstrate that such excess emissions have not caused or contributed to an exceedance or violation would not be proof that they have not.[5]

Section LAC 33:III.2201.C.8 was identified as substantially inadequate because this provision allowed for automatic exemptions for certain sources in the Baton Rouge ozone nonattainment area during startup and shutdowns from otherwise applicable NO_X emission limitations and such exemptions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k).[6] Accordingly, in the 2015 SSM SIP Action, EPA found that the exemption provision in LAC 33:III.2201.C.8 is substantially inadequate to meet CAA requirements and issued a SIP call with respect to this provision.[7] The removal of the exemption provision of LAC 33:III.2201.C.8 from the Louisiana SIP is consistent with CAA requirements; however, for the reasons discussed in our proposal and this final rule, the alternative emissions limit provisions of LAC 33:III.2201.K do not meet the CAA requirements for SIPs and the requirements of CAA section 110(l) for EPA approval of a revision to a SIP.

Regarding the comment concerning EPA's alleged use of recommendations as requirements, we believe the commenter is referring to the seven criteria for the development of Alternative Emission Limitations (AELs) applicable during startup and shutdown events.[8] In the context of making *recommendations* to states for how to address emissions during startup and shutdown, the EPA recommended seven criteria for states to evaluate in establishing appropriate alternative emission limitations. Among the purposes for these recommendations was the need to take into account technological limitations that might prevent compliance with the otherwise applicable emission limitations, while ensuring that those alternative limitations complied with the continuity and enforceability requirements of the CAA.[9] In its 2015 SSM SIP Action,[10] comment letters to the State,[11] and the proposal notice for this action,[12] EPA has referred to and identified these seven criteria as recommendations to be given consideration for developing AELs in SIP provisions that apply during startups and shutdowns. To be clear, our disapproval of Louisiana's SIP submittals is not based solely upon the recommended criteria but upon the statutory requirements and the applicable court decision discussed herein.[13] In particular, EPA's final disapproval action is based on the fact that Louisiana's submissions have failed to correct the ''substantial inadequacy'' of the Louisiana SIP as identified in the 2015 SSM SIP Action.[14]

Comment 2: Following the prior comment from the Industry commenters that the excess emission provisions in LAC 33:III.2201.K do not render Louisiana's SIP ''substantially inadequate,'' commenters then discussed EPA's seven recommended criteria to consider in establishing AELs set forth in the 2015 SSM SIP Action.[15] First, the Industry commenters argued that the work practice standards in LAC 33:III.2201.K are limited to specific, narrowly defined source categories using specific control strategies, satisfying EPA's first recommended criterion. The commenters noted that LAC 33:III.2201.K.3.c addresses ''specific control strategies'' and requires affected point sources to engage control devices as expeditiously as possible. The commenters, citing to LDEQ's comments, also alleged that LAC 33:III.2201.K.3.c is potentially applicable to each category of point sources regulated under LAC 33:III.Chapter 22.

Response: In the example provided in the 2015 SSM SIP Action for the first AEL criterion, EPA lists an affected source category as ''cogeneration facilities burning natural gas and using Selective Catalytic Reduction (SCR).'' This example specifies a subset of power generation facilities (cogeneration facility), identifies a certain fuel capability (natural gas), and narrows the number of affected sources to ones with a specific type of post combustion control device (SCR). Contrary to EPA's recommendation that AELs be limited to narrowly defined sources categories, LDEQ's November 20, 2016, and June 9, 2017 submittals define the affected sources covered by the new rule as a *collection of groups of categories* of sources to include electric power generating system boilers, industrial boilers, process heaters and furnaces, stationary gas turbines, and stationary internal combustion engines. These affected sources constitute a diverse array of NO_X emitting source categories within the Baton Rouge ozone nonattainment area and its ROI. These sources can be located in any of the nine parishes (Ascension, East Baton Rouge, Iberville, Livingston, West Baton Rouge, East Feliciana, Pointe Coupee, St. Helena, and West Feliciana).[16]

In addition, the following three examples demonstrate that the affected source categories are indeed broad in type, size, age, and are not narrowly defined. In the first example, the work practice requirements of LAC 33:III.2201.K apply to affected electric power generating system boilers which are defined as units used to generate electric power and can be owned or operated by a municipality, an electric cooperative, an independent power producer, a public utility, or a Louisiana Public Service Commission regulated utility company, or any of its successors.[17] The subject boilers can be coal-fired, number 6 fuel oil-fired, or burn gaseous or liquid as fuel, and located in either the Baton Rouge ozone nonattainment area or its ROI.[18] In addition, these boilers are not restricted to a specific construction, reconstruction, or equipment modification date. Another example of an affected point source category covered by LAC 33:III.2201.K is stationary gas turbines that are defined as units that can be of peaking service type or, either fuel-oil fired or gas fired, can be located in any of the nine parishes, and are not restricted to a specific construction, reconstruction, or equipment modification date.[19] Finally, stationary internal combustion engines, also covered by LAC 33:III.2201.K, are defined as units classified either as rich

[5] 80 FR 33840, 33947.

[6] 78 FR 12460, 12522 (February 22, 2013).

[7] 80 FR 33840, 33968.

[8] See *id.* at 33980.

[9] *Id.* at 33912.

[10] *Id.* at 33980.

[11] See Enclosures to EPA's August 3, 2016, and December 16, 2016 comment letters to Deidra Johnson of LDEQ.

[12] Section II.A, June 13, 2023 (88 FR 38450).

[13] See CAA sections 110(a)(2)(A), 110(a)(2)(C), also 88 FR 38451.

[14] See 78 FR at 12521–12522, and 80 FR at 33967–33968 for a thorough description of why Louisiana's SIP is substantially inadequate because it ''did not comply with any requirement of'' the CAA.

[15] 80 FR 33914.

[16] See Applicability LAC 33:III.2201.A.1.

[17] See Definitions LAC 33:III.2201.B.1.

[18] See NO_X Emission Factors for Sources in the Baton Rouge Nonattainment Area Table D–1A, and NO_X Emission Factors for Sources in the Region of Influence Table D–1B, Section LAC 33:III.2201.D.

[19] See NO_X Emission Factors for Sources in the Baton Rouge Nonattainment Area Table D–1A, and NO_X Emission Factors for Sources in the Region of Influence Table D–1B, Section LAC 33:III.2201.D.

burn[20] or lean burn,[21] are either gas and/or liquid fuel fired, and are either attached to a foundation or portable.[22] These stationary internal combustion engines can be located in any of the nine parishes and are not restricted to a specific construction, reconstruction, or equipment modification date.

The effect of such a broadly-applicable rule covering a diverse array of source categories is that the work practices set forth in LAC 33:III.2201.K.3 during periods of startup and shutdown cannot be sufficiently tied to particular, specific categories of affected sources to ensure the work practices serve to limit emissions from the particular category and are practically enforceable. For example, startup and shutdown emissions from affected industrial boilers and process heaters/furnaces that do not utilize a control device to comply with the SIP rule have no specifically applicable work practice standards; they are governed only by the general duty provision in LAC 33:III.2201.K.3.a. As is discussed at length in the 2015 SSM SIP Action, such general duty provisions are not practically enforceable.

Louisiana has made conclusory and nonspecific claims that the work practice requirements of LAC 33:III.2201.K.3.c (relating to the use of control devices such as SCR) are ''potentially applicable'' to all affected source categories covered under LAC 33:III.2201.K.3. Louisiana, however, has not clearly demonstrated that every source in every covered point source category would be required to comply with the more specific work practice standards laid out in LAC 33:III.2201.K.3.b–d in addition to the general duty provision in LAC 33:III.2201.K.3.a. In fact, it is likely that certain boilers, furnaces, and process heaters comply with the LAC 33:III.Chapter 22 requirements during steady-state operations by utilizing low NO_X burners rather than controls such as Selective Non-Catalytic Reduction (SNCR) or SCR and thus would only be subject to the general duty provisions of LAC 33:III.2201.K.3.a, if selecting the LAC 33:III.2201.K.3 compliance option. Therefore, in such instances, LAC 33:III.2201.K.3 may be read so as to create situations wherein startup and shutdown emissions are functionally exempt, thereby creating a non-continuous emissions limitation that is inconsistent with CAA requirements for SIPs. The framework established in Chapter 22 thus continues to violate CAA requirements, including the requirement that emissions limitations be continuous and practicably enforceable. See CAA sections 110 and 302(k). Additional concerns related to other CAA requirements are discussed below, including the requirement that the work practice requirements in the AEL (LAC 33:III.2201.K.3) must provide RACT-level controls during periods of startup and shutdown.

Comment 3: LDEQ also provided comments stating its belief that it had appropriately considered EPA's first recommended criterion in its development of the AELs contained in LAC 33:III.2201.K.3b–3.d. More specifically, LDEQ asserted that since LAC 33:III.2201.K.3.b targets fuel selection, the ''specific control strategies'' aspect of the first criterion is not relevant. Also, since LAC 33:III.2201.K.3.c targets post-combustion control of NO_X, LDEQ claimed that the ''specific, narrowly defined source categories'' aspect of the first criterion is not relevant. Finally, LDEQ noted that LAC 33:III.2201.K.3.d applies only to rich-burn and lean-burn spark-ignition[23] stationary internal combustion engines.

Response: EPA finds that the AELs contained in sections LAC 33:III.2201.K.3.b, 3.c, and 3.d cover such a broad range of sources that they do not comport with EPA's recommendation that AELs be limited to specific, narrowly defined source categories using specific control strategies, thereby leading to difficulties in determining compliance with the applicable SIP emissions limitations.

LAC 33:III.2201.K.3.b applies to coal-fired and fuel oil-fired electric power generating system boilers and fuel oil-fired stationary gas turbines. EPA believes that the requirement under LAC 33:III.2201.K.3.b to use natural gas during startup until ''any of the steam from the boiler or steam turbine is used to generate electricity for sale over the grid or for any other purpose (including on-site use)'' could be an acceptable component of an AEL, provided it is associated with appropriate and enforceable recordkeeping and reporting requirements. Note, since the boiler type (wall-fired, tangentially-fired, dry bottom or wet bottom) and boiler age are not specified, we assume that the work practice requirement to use natural gas during startups and applicable shutdowns applies to all such boilers. However, natural gas fired electric power generating system boilers not equipped with a SCR or SNCR only appear to be subject to the general duty provision of LAC 33:III.2201.K.3.a which, as discussed in our response to Comment 4, is problematic for enforcement and compliance determination purposes.

With respect to the work practice requirement that applies to sources with control devices, LAC 33:III.2201.K.3.c requires affected sources to engage control devices as expeditiously as possible. The term ''expeditiously as possible'' is undefined and creates enforceability problems. Also, the term ''engage control devices'' in LAC 33:III.2201.K.3.c is not defined and could allow control devices to operate at much lower levels of removal efficiency than the equipment is capable of achieving. As written, section LAC 33:III.2201.K.3.c is unclear which source categories are required to use the control devices, the timing of their use, and their control efficiency, thereby creating problems with enforceability.[24]

Regarding LDEQ's comment that LAC 33:III.2201.K.3.d is only applicable to rich-burn and lean-burn spark-ignition stationary internal combustion (IC) engines, we note that although it may appear these IC engines are narrowly defined, LAC 33:III.2201.K.3.d does not identify whether these spark ignition engines are of the 2-stroke[25] or the 4-stroke[26] type; these engines can burn either gas and or liquid fuel and do not have to be attached to a foundation (can be portable at a site for longer than 6 months).[27] Stationary Reciprocating Internal Combustion Engines (RICE) use either Compression Ignition (CI) or Spark Ignition (SI) in order to induce combustion within the cylinders. CI

[20] Rich burn engine means any 4-stroke spark ignited engine where the manufacturer's recommended operating air/fuel ratio divided by the stoichiometric air/fuel ratio at full load conditions is less than or equal to 1.1, see 40 CFR 60.4248 ''Rich burn engine''.

[21] Lean burn engine means any 2-stroke or 4-stroke spark ignited engine that does not meet the definition of a rich burn engine, see 40 CFR 60.4248 ''Lean burn engine''.

[22] See Definitions LAC 33:III.2201.B.1.

[23] Spark ignition means a gasoline-fueled engine; or any other type of engine with a spark plug (or other sparking device) and with operating characteristics significantly similar to the theoretical Otto combustion cycle. Spark ignition engines usually use a throttle to regulate intake air flow to control power during normal operation, see 40 CFR 60.4248 ''Spark ignition''.

[24] See response to Comment 5 concerning the use and effectiveness of SCR and SNCR.

[25] 2-stroke engine means a type of engine which completes the power cycle in single crankshaft revolution by combining the intake and compression operations into one stroke and the power and exhaust operations into a second stroke. This system requires auxiliary scavenging and inherently runs lean of stoichiometric, see 40 CFR 60.4248 ''Two-stroke engine''.

[26] 4-stroke engine means any type of engine which completes the power cycle in two crankshaft revolutions, with intake and compression strokes in the first revolution and power and exhaust strokes in the second revolution, see 40 CFR 60.4248 ''Four-stroke engine''.

[27] LAC 33:III.2201.B Definitions.

RICE typically run on diesel fuel, while SI RICE typically operate on lighter fuels such as gasoline, propane, natural gas, landfill gas. While LDEQ's comment letter discusses work practice measures for spark ignition reciprocating IC engines, LAC 33:III.2201.K.3.d does not identify a specific work practice measure(s) for the CI RICE type units. In addition, this provision fails to identify the use of propane or landfill gas by such sources. As written, LAC 33:III.2201.K.3.d appears to apply to both CI RICE and SI RICE, contrary to LDEQ's comment. Since these work practice measures apply to all of the types of engines, and this provision fails to identify the use of propane or landfill gas by such sources, EPA does not view these AELs as narrowly tailored. This conflict (lack of restriction) could lead to a misunderstanding of the applicability of LAC 33:III.2201.K.3.d and create compliance and enforcement difficulties.

Comment 4: The Industry commenters also noted the concerns expressed in our proposal notice that improper consideration of EPA's first recommended criterion could lead to AELs that present additional SIP approvability difficulties, including a demonstration that the work practice requirements in LAC 33:III.2201.K.3 met other CAA requirements for SIPs, including those related to Reasonably Available Control Technology (RACT). These commenters stated that LDEQ identified work practice standards that function to minimize emissions of NO_X based on review of applicable New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) provisions, relevant EPA Control Technique Guidelines (CTG) and Alternative Control Techniques (ACT), non-CTG/ACT documents, and EPA guidance. The Industry commenters concluded that because the review of the aforementioned sources did not identify control measures beyond what is included in LAC 33:III.2201.K, then those work practice requirements meet all applicable requirements for SIPs, including the imposition of enforceable RACT-level controls, for all the affected point sources subject to LAC 33:III.2201.K. In a similar manner, LDEQ's comments included a discussion of its evaluation of the documents referenced by the Industry commenters above and provides a table of the requirements in LAC 33:III.2201.K.3 which identifies the federal NSPS and NESHAP provisions upon which they are based. Like the Industry commenters, LDEQ concluded that the work practice requirements established in LAC 33:III.2201.K.3 for emissions during startup and shutdown constitute RACT and meet all other applicable CAA requirements. LDEQ also clarified that LAC 33:III.2201.K.3.a should not be considered an AEL but rather a general duty provision.

Response: As stated in our response to Comment 2, the work practice requirements in LAC 33:III.2201.K.3 apply to a broad category of sources and fail to satisfy the CAA requirements for continuous emission limitations and practical enforceability. With respect to the CAA requirements concerning RACT as mentioned by the commenters, EPA first notes that RACT is defined as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility.[28] LAC 33:III.Chapter 22 Control of Emissions of Nitrogen Oxides was developed with the purpose of establishing RACT for point sources of NO_X in the Baton Rouge ozone nonattainment area and its ROI. Therefore, in its development of AELs to apply during periods of startup and shutdown of Chapter 22-affected point sources, LDEQ examined several different resources in its search for work practices that would be considered appropriate replacements for the numerical emission limitations representing RACT found in the Chapter 22 rules of the existing Louisiana SIP.

We appreciate LDEQ's efforts in searching NSPS and NESHAP rules in its attempt to develop RACT-level work practice requirements applicable to startups and shutdowns of the affected point source categories. The EPA agrees that states may adopt work practice standards to address periods of startup and shutdown as a component of a SIP emission limitation that applies continuously. As stated in the 2015 SSM SIP Action, the adoption of work practice standards from a NESHAP or NSPS as a component of an emission limitation to satisfy SIP requirements was only a recommended approach that states may use if they choose to incorporate an AEL and needed assistance in identifying potential options that might work for their specific situation. The EPA stated that it cannot foretell the extent to which this optional approach of adopting other existing standards to satisfy SIP requirements may benefit an individual state. For a state choosing to use this approach, such work practice standards must meet the otherwise-applicable CAA requirements (*e.g.,* be a RACT-level control for the source as part of an attainment plan requirement) and have the necessary parameters to make it legally and practically enforceable (*e.g.,* have adequate monitoring, recordkeeping and reporting requirements to assure compliance). However, it cannot automatically be assumed that emission limitation requirements in recent NESHAP and NSPS constitute RACT for all sources regulated by SIPs.[29] The universe of sources regulated under the federal NSPS and NESHAP programs is not identical to the universe of sources regulated by states for purposes of the NAAQS. Moreover, the pollutants regulated under the NESHAP (*i.e.,* hazardous air pollutants) are in many cases different than those that would be regulated for purposes of attaining and maintaining the NAAQS, protecting Prevention of Significant Deterioration (PSD) increments, improving visibility, and meeting other CAA requirements.[30] The 2015 SSM SIP Action also states that EPA *encourages* states *to explore* these approaches, as well as any other relevant information available, in determining what is appropriate for revised SIP provisions.[31] It is clear that EPA did not mandate these approaches. As stated earlier, adoption of NSPS or NESHAP work practice standards by the states does not mean an automatic approval of a proposed rule revision, especially when other applicable CAA requirements (*e.g.,* RACT-level control for startup and shutdown, enforceability, and/or SIP public notice and comment) are not adhered to.

With respect to the CTGs reviewed by LDEQ, we note that CTGs are used to help determine Volatile Organic Compounds (VOC) RACT, not NO_X RACT. Also, while LDEQ's review of ACTs may provide background information on available NO_X control technologies and their respective cost effectiveness,[32] ACTs do not establish

[28] ''NO_X Supplement'' FR titled, ''State Implementation Plans; Nitrogen Oxides Supplement to the General Preamble; Clean Air Act Amendments of 1990 Implementation of Title I; Proposed Rule,'' November 25, 1992 (57 FR 55620). Also, see September 17, 1979 (44 FR 53762).

[29] 80 FR at 33916.

[30] *Id.,* n. # 257, while some HAPs are also VOCs or particulate matter, many HAPs are not. Moreover, there are many VOCs and types of particulate matter that are not HAPs and thus are not regulated under the MACT [Maximum Achievable Control Technology] standards. The MACT standards also do not address other criteria pollutants or pollutant precursors from sources that may be relevant for SIP purposes.

[31] *Id.* at 33916–33917 (emphasis added).

[32] Control Techniques Guidelines and Alternative Control Techniques Documents for Reducing Ozone-Causing Emissions, see *https://www.epa.gov/*

work practice standards that function as RACT in minimizing emissions of NO_X.

Although included in LAC 33:III.2201.K.3—Work Practice Standards, we agree with LDEQ's clarification comment that LAC 33:III.2201.K.3.a is a general duty provision, not an AEL. EPA supports the inclusion of general duty provisions as separate additional requirements in SIPs in certain instances—for example, to ensure that owners and operators act consistent with reasonable standards of care. However, as is discussed at length in the 2015 SSM SIP Action, a general duty provision such as LAC 33:III.2201.K3.a., standing alone, cannot be considered an ''enforceable emission limitation'' under CAA section 110(a)(2). As such, LAC 33:III.2201.K.3.a cannot and does not provide the necessary RACT-level control during periods of startup and shutdown.[33] We reject the claim that since the State's document review failed to identify any reasonably available control technologies for certain source categories, then there is no feasible and practical lowest emission limitation that these source categories would be capable of meeting during periods of startup and shutdown (*i.e.,* the NO_X RACT level of emissions control is zero control) and the general duty provision of LAC 33:III.2201.K.3.a is the only SIP requirement to control NO_X emissions during startups and shutdowns for some source categories covered by LAC 33:III.2201.K.3.

Overall, we find that the administrative record accompanying Louisiana's SIP submittals does not sufficiently demonstrate that the generic work practice standards adopted in LAC 33:III.2201.K.3 for each of the affected source categories represent RACT-level controls for periods of startup and shutdown. In correcting this deficiency, LDEQ could identify *each* affected point source category (*e.g.,* gas-fired stationary gas turbines in peaking service) and discuss/analyze all the potential control technologies that might constitute RACT during periods of startup and shutdown. The age, design, and configuration of the affected sources may affect the determination of what constitutes RACT and should be accounted for in the analysis as well. The RACT analysis should consider the full range of control techniques (and associated emissions limitations) that may be applicable during startup and shutdown for each affected point source category (*e.g.,* industrial boilers of 40 MMBtu/Hour and above).[34] For certain categories, this additional review will likely identify techniques beyond those found in the particular EPA rules and other documents examined by LDEQ.

While we acknowledge that, in certain cases, emissions limits applicable to normal operation may not be achievable during startup and shutdown, we also note that without further state review and analysis, it is impossible for EPA to assess at this time whether the work practices set forth in LAC 33:III.2201.K.3 as AELs constitute RACT-level controls for all the affected sources during startup and shutdown. Of course, the adopted work practices must also be analyzed to ensure compliance with all other CAA requirements governing SIPs, including CAA sections 110(a)(2)(A), 110(a)(2)(C), 110(k), 110(l), and 193, as discussed in EPA's 2015 SSM SIP Action.

Comment 5: The Industry commenters next discussed the EPA's second criterion for developing AELs as outlined in the 2015 SSM SIP Action, taking issue with the EPA-identified deficiency concerning whether use of the selected control strategy for the source category is technically infeasible during startup or shutdown periods.[35] Industry commenters stated that LDEQ had justified its inclusion of work practice standards during periods of startup and shutdown based on technical infeasibility of other control measures during such periods. In its comments, LDEQ stated the constraints of SCR and SNCR and their effectiveness during periods of startup and shutdown have been well documented. LDEQ also noted with examples that the need to account for transient conditions (*e.g.,* startups and shutdowns) for the affected NO_X sources is not limited to sources with post-combustion controls. Also, LDEQ stated that there is a need to recognize this infeasibility and that limitations in both control technologies and test methods render work practice standards preferable to numerical emission limitations during periods of startup and shutdown.

Response: As noted previously, EPA recognizes that there are instances where compliance with a SIP emissions limitation for an affected source category using a specific control technology may be infeasible during certain modes of operation, such as during startup and shutdown. We also recognize that during those times, work practice requirements may be preferable to numerical emission limits and that such work practice requirements may be an important component of enforceable emission limitations covering all periods of operation for affected sources under a SIP rule, such as LAC 33:III.Chapter 22. For certain sources and source categories subject to LAC 33:III.Chapter 22, however, demonstrating compliance with the existing numerical emissions limitation in LAC 33:III.2201.D may be achievable during all modes of operation. In those situations, compliance with that degree of emission control (LAC 33:III.2201.D), as stated in 2015 SSM SIP Action,[36] needs to be on a continuous or regular basis.

In evaluating a state's promulgation of rules creating AELs in the form of work practice requirements and their review as a SIP revision, EPA must ensure that the new work practices comply with all CAA requirements for SIPs, including the necessity that the emissions associated with such work practice requirements be legally and practically enforceable (with appropriate monitoring, recordkeeping and reporting), meet other applicable requirements (*e.g.,* applicable RACT/Reasonably Available Control Measures (RACM) requirements), and not interfere with the attainment or maintenance of the NAAQS, as required by CAA section 110(l). Without further State review and analysis, it is impossible for EPA to assess at this time whether the work practices set forth in LAC 33:III.2201.K.3 as AELs properly consider technical infeasibility of controls for all affected sources and, for example, constitute RACT-level controls for all the affected sources during startup and shutdown. For the reasons stated elsewhere in this rulemaking action, EPA is determining that Louisiana's SIP submittal falls short of these requirements and fails to fully correct to deficiency with the Louisiana SIP identified in the 2015 SSM SIP Action.

Comment 6: The Industry commenters move to the fourth recommended criterion for the development of AELs as listed in the 2015 SSM SIP Action.[37]

ground-level-ozone-pollution/control-techniques-guidelines-and-alternative-control-techniques (Url dated August 2, 2023).

[33] See also comment #4 and comment #5 of our December 16, 2016, comment letter to Deidra Johnson of LDEQ as made available in the Docket.

[34] LAC 33:III.2201.D Table D1–A.

[35] 88 FR 38448, 38451 (June 13, 2023).

[36] 80 FR 33979.

[37] Industry commenters noted that in EPA's proposal notice, the Agency did not allege any specific deficiencies with criterion 3 (frequency and duration of operation in startup and shutdown modes are minimized, criterion 6 (the facility is operated in a manner consistent with good air pollution control practices for minimizing emissions), and criterion 7 (actions during startup and shutdown are properly documented). The June 13, 2023 proposal did not identify deficiencies with respect to these criteria.

These commenters objected to the EPA-identified deficiency that the State air agency, as part of its justification for the proposed SIP revision, failed to properly analyze the potential worst-case emissions that could occur during startup and shutdown based on the applicable AEL.[38] These commenters stated that when compared to the SIP-called exemption in LAC 33:III.2201.C.8 of the Louisiana SIP, the additional controls imposed by LAC 33:III.2201.K.3 can only serve to improve ambient air quality. Industry commenters asserted that a worst-case emissions scenario would be reflected in an (overly conservative) assumption that the removal of the startup and shutdown exemption and the imposition of the additional work practice requirements in LAC 33:III.2201.K.3 have no effect on air quality. The Industry commenters then referred to the State's meeting of the ozone NAAQS in recent years as the reason or justification to refute EPA's stated deficiency in LDEQ's analysis. In its response to this EPA-identified deficiency, LDEQ noted that LAC 33:III.919 (Emission Inventory) requires sources quantify and separately report emissions during startups and shutdowns. Similar to the Industry comments and the overly conservative assumption that the work practice requirements in LAC 33:III.2201.K.3 have no demonstrable impact on NO_X emissions, LDEQ stated that a better representation of the potential ''worst-case'' scenario would be the historical emissions data from the sources covered by LAC 33:III.Chapter 22. LDEQ then noted the decline in the design values for the 8-hour ozone NAAQS during the time period that the SIP-called exemption in LAC 33:III.2201.C.8 was in effect and that historical actual NO_X emissions from sources subject to LAC 33:III.Chapter 22 have declined 47.9 percent from 2005 to 2022.

Response: EPA is cognizant and appreciative of LDEQ's efforts in reducing ozone concentrations to the benefit of public health in the Baton Rouge area. We also note that the ozone pollution control strategy is a complex function of meteorology, VOC and NO_X emissions controls. Federal rules, including the Cross-State Air Pollution Rule, the Tier 3 Vehicle Emissions and Fuels Standards, and mobile source fleet turnover also play a significant role in reducing ozone-forming pollution.

We note that EPA's 2015 SIP call for LAC 33:III.2201.C.8 of the Louisiana SIP was not based on specific demonstrated air quality concerns, but rather on EPA's interpretation of the CAA that emission limitations in SIPs cannot include exemptions for emissions during periods of startup and shutdown. In addition, the LDEQ statement that historical excess emissions associated with the exemption provided by LAC 33:III.2201.C.8 have not caused or contributed to an exceedance or violation of a NAAQS does not mean that such emissions could not do so at some time in the future. Also, as stated in the 2015 SSM SIP Action, given that there are many locations where air quality is not monitored such that a NAAQS exceedance or violation could be detected, the inability to demonstrate that such excess emissions have not caused or contributed to an exceedance or violation of a NAAQS would not be proof that they have not.[39]

Although an affected point source may not have in fact emitted sufficient NO_X to exceed a NAAQS during past periods during which it was subject to the impermissible exemption provided by LAC 33:III.2201.C.8 for NO_X emissions during periods of startups and shutdowns, the SIP does not prevent the source from doing so in the future (for example if circumstances arise that necessitate such emissions) under the work practice requirements provided by LAC 33:III.2201.K.3. Such NO_X emissions may be significantly higher than historical actual emissions, especially for those sources (*e.g.,* process heaters and furnaces without a control device required under a SIP rule) where the only requirements during startup and shutdown under LAC 33:III.2201.K.3 are the unenforceable ''general duty'' provisions of LAC 33:III.2201.K.3.a. As stated in EPA's 2015 SSM SIP Action, AELs applicable during startup and shutdown cannot allow an inappropriately high level of emissions or an effectively unlimited or uncontrolled level of emissions, as those would constitute impermissible de facto exemptions for emissions during certain modes of operation.[40]

Had LDEQ simply removed the impermissible exemption in LAC 33:III.2201.C.8, it would likely have been approvable, but here, the EPA must also evaluate whether the AELs (developed to replace the removed exemption) meet CAA requirements; we cannot presume that the SIP is sufficient solely because it contains some kind of AEL requirement where previously there was none. For example, the AEL may allow for emissions that are functionally equivalent to an impermissible exemption. Finally, we also note that the removal of the exemption in LAC 33:III.2201.C.8 and the addition of LAC 33:III.2201.K is not an severable piece of the submission that EPA can approve without taking action on the AEL Without the State's consent, the proposed disapproval of the addition of LAC 33:III.2201.K to the Louisiana SIP with approval of the removal of LAC 33:III.2201.C.8 from the SIP would make the SIP more stringent than Louisiana anticipated or intended.[41]

Comment 7: The Industry commenters then move to the fifth recommended criterion for consideration in the development of AELs, as listed in the 2015 SSM SIP Action—namely, that AELs should include a requirement that ''all possible steps are taken to minimize the impact of emissions during startup and shutdown on ambient air quality.'' [42] Industry commenters reject as unnecessary EPA's recommended language that could be used to meet the fifth criterion. In addition, the Industry commenters, as well as LDEQ in its comments, stated that frequency and duration of startup and shutdown events are addressed in LAC 33:III.2201.K.1 and LAC 33:III.2201.K.3.a, respectively; thus, the requirement to take all possible steps to minimize impacts of emissions during startups and shutdowns on ambient air quality is met.

Response: The failure to include EPA's recommended language in LAC 33:III.2201.K is not a basis for our disapproval. By recommending a revision to LAC 33:III.2201.K that would require the owner or operator to take all possible steps so that NAAQS or PSD increments are not exceeded as a result of emission events from these sources, EPA suggested language that might be viewed as addressing the deficiency identified in the proposal notice with respect to proper consideration of the fifth recommended criterion.

Under LAC 33:III.2201.K.1, affected point sources that are shut down intentionally more than once per month are excluded from the option of choosing to comply with the work practice standards in LAC 33:III.2201.K.3 in lieu of complying with the emission factors in LAC 33:III.2201.D. While this exclusion limits the number of sources that may elect to comply with the work practice requirements in LAC 33:III.2201.K.3, there is no evidence in the record establishing that these work practices

[38] *See* 88 at 38452.

[39] 80 FR at 33947.

[40] *Id.* at 33980.

[41] See *Bethlehem Steel Corp.* v. *Gorsuch,* 742 F.2d 1028, 1036–37 (7th Cir. 1984); see also 88 FR at 38452, n. 30.

[42] 80 FR at 33865.

require such sources to take all possible steps to minimize the *impacts* of emissions during startups and shutdowns on ambient air quality. Likewise, there is no evidence in the record establishing that the unenforceable ''good air pollution control practices'' requirement in LAC 33:III.2201.K.3.a by itself constitutes taking all possible steps to minimize the *impact* of emissions during startup and shutdown on ambient air quality. Moreover, neither LAC 33:III.2201.K.1 nor LAC 33:III.2201.K.3.a provide for making work practice-related information available, nor do these provisions address if or how the duration and frequency of startup and shutdown events are being accounted for, monitored, recorded, reported, enforced, or modeled to show the impact of NO_X emissions from these events on ambient air quality is minimized in corresponding air permits issued by LDEQ.

Comment 8: In addition to disagreeing with the concerns noted above related to the adequacy of LDEQ's consideration of the recommended criteria for the development of AELs for periods of startup and shutdown, the Industry commenters also disagreed with several other EPA-identified deficiencies described in the June 13, 2023, proposed disapproval notice (including use of a permit-based approach to establish components of the AELs, reliance upon a permit mechanism to specify flue gas temperatures for engaging control devices such as SCR and SNCR under LAC 33:III.2201.K.3.c, and creating a non-SIP mechanism for amending compliance obligations selected under LAC 33:III.2201.K.4.b). The Industry commenters believed that these deficiencies are misplaced because the permitting contemplated under the work practice standards in LAC 33:III.2201.K.3.c and K.4.b through the modification of an affected facility's permit are not SIP revisions under the Act. Similar to the Industry commenters, LDEQ also objected to EPA's alleged deficiencies related to the use of the air permitting program as referenced in LAC 33:III.2201.K.3.c and LAC 33:III.2201.K.4.b. and EPA's concerns related to the NAAQS and the PSD increment. LDEQ also referred to EPA's letter to LDEQ, dated August 3, 2016, comment 3.f, to justify its use of its air permitting program to implement the control obligations imposed by LAC 33:III.2201.K.3.c.

Response: Both the Industry commenters and LDEQ disagreed with EPA's concerns related to the use of permitting mechanism referenced in LAC 33:III.2201.K.3.c and LAC 33:III.2201.K.4.b. We will address the comments and our concerns with each of these provisions separately. LDEQ comments concerning NAAQS and the PSD increment as they relate to the two provisions above are addressed in our response to Comment 11 below.

a. Concerns With LAC 33:III.2201.K.3.c

LAC 33:III.2201.K.3.c requires control devices such as SCR or SNCR be ''engaged . . . as expeditiously as possible considering safety and manufacturer recommendations.'' This rule goes on to say that the ''appropriate requirements describing source-specific conditions or parameters'' will be incorporated into the affected source's permit. There are two primary problems with the approval of LAC 33:III.2201.K.3.c as an alternative emission limitation during startup and shutdown into the SIP. First, in addition to its imprecise and vague terms creating enforcement concerns, there is no language in LAC 33:III.2201.K.3.c which actually requires the use of a control device by any affected source or source category under LAC 33:III.2201.K. That is, the work practice requirement to engage control devices as expeditiously as possible is not linked to any specific source or source category. Presumably, the requirement for and use of a control device is contained in the source's air permit. The second problem with LAC 33:III.2201.K.3.c then arises when it references such permits as the vehicle to be used to establish source-specific conditions and parameters for the commencement of operation of the control device. As LDEQ concedes in its comments, the establishment of both the obligation to use a control device and the establishment of source-specific conditions associated with use of a control device are occuring outside the SIP rule itself.

CAA section 110(a)(2)(A) requires that SIPs include enforceable emission limitations, including during periods of startup and shutdown. Establishing control device obligations and associated conditions in a source's permit rather than the SIP rule (*e.g.,* LAC 33:III.2201.K.3.c) does not satisfy the enforceable emission limitations requirement for SIP rules, as set forth in CAA section 110.

The fact that EPA has approved a state's air permitting program itself into the SIP does not mean that EPA has approved the *actual contents* of each permit issued or has made such contents an approved part of the SIP.[43] While inclusion of these components of the AEL in a permit issued under an EPA-approved SIP permitting program makes the requirements federally enforceable, the State rules do *not* provide a SIP mechanism for assuring those requirements are permanent and would not be changed without first going through the CAA's SIP revision process, as required by section 110 of the Act. For example, there is nothing in LAC 33:III.2201.K that prohibits an affected source from amending its air permit to revoke or revise its obligation to install a control device; the language in LAC 33:III.2201.K.3.c applies only *if* a source is required to have a control device, presumably under some other provision of State law or regulation. Such untethered obligations do not meet the CAA requirements for ''enforceable emission limitations'' in SIPs. Furthermore, use of a permit-based approach when establishing essential components of an alternative work practice standard outside of the SIP process (including public notice and comment) circumvents EPA's role in reviewing and approving permanent SIP emission limitations to ensure that AELs are ''enforceable,'' as required by CAA section 110(a)(2)(A) and 110(a)(2)(C). This non-SIP mechanism also creates the potential for confusion because conditions and obligations of the AEL would not be contained in the SIP, allowing for the possibility that conditions and obligations of non-SIP AELs might conflict with the work practice requirements in the SIP. Moreover, it does so without the opportunity for EPA review or disapprove where the AEL fails to meet CAA requirements for SIPs.

Finally, in the context of emission limitations contained in a SIP, EPA views the approach of establishing AELs through a permit program that does not involve submitting the relevant permit requirements to the EPA for inclusion in the SIP as a form of ''director's discretion,'' a type of provision that, as explained in the 2015 SSM SIP Action, is inconsistent with CAA requirements because it would allow the state permitting authority to create alternatives to SIP emission limitations without complying with the CAA's SIP revision requirements.

In addition to the concerns noted above and in response to LDEQ's comment regarding EPA's August 3, 2016 comment letter (comment 3.f), we note that this document (EPA's 2016 comment letter) is made available in docket for this rulemaking action. The August 3, 2016, comment 3.f reads:

''The EPA encourages the operation and maintenance of control devices in accordance

[43] 80 FR at 33915–33916 and 33922.

with safety and manufacturer recommendations, as required by proposed rule LAC 33:III.2201.K.3.c; however, for enforceability purposes, we believe that the rule should make clear that the source's Title V operating permit will include specific conditions that identify/detail when safe operation of control devices (including SCR/SNCR) will begin.''

Comment 3.f was intended to assure consistency between the proposed SIP revision and the specific conditions and contents of a modified Title V permit of the affected NO_X point source and to facilitate enforceability and compliance determinations. Nothing in the August 3, 2016, comment 3.f states, or should be construed to mean, that EPA is advocating or suggesting circumvention or bypassing of the CAA's SIP revision process, or allowing LDEQ to employ an air permitting program as a substitute for SIP revision requirements through LAC 33:III.2201.K.3.c. Moreover, EPA in comment 3.f is not suggesting that the Title V permit be the only place that contains these specific conditions.

b. Concerns with LAC 33:III.2201.K.4.b

We now turn to the objections by the Industry commenters and LDEQ to EPA's concerns with the approvability of LAC 33:III.2201.K.4.b which requires the incorporation of the provisions of LAC 33:III.2201.K.1 and/or K.3 into the applicable permit for each affected facility. LAC 33:III.2201.K.4.b also states that the owner or operator may elect to revise the method of compliance with LAC 33:III.2201.K for one or more affected point sources by means of a permit modification.

In its comments, LDEQ noted that the only options available to the owner or operator of an affected point source are to comply with the emission factors set forth in LAC 33:III.2201.D or with the work practice standards in LAC 33:III.2201.K.3. The Industry commenters asserted that CAA section 110 does not require EPA to approve each permit modification that changes the compliance option selected under LAC 33:III.2201.K.4.b and to submit it as a SIP revision because such changes are not, in fact, SIP revisions.

In response to these comments, we first note that here the ''compliance options'' are different emission limitations and not merely how to comply with a single limit. We agree with the commenters that the decision by a source to choose one of two different emission limitations need not be treated as a revision to the SIP, provided EPA has previously reviewed and approved *both* emission limitations as meeting CAA requirements and incorporated both limitations into the SIP. As stated earlier, LAC 33:III.2201.K.4 provides that for periods of startup and shutdown of affected point sources, the source owner or operator is required to notify LDEQ by May 1, 2017, of its choice of whether the source will comply with LAC 33:III.2201.K.1 or LAC 2201.K.3 during periods of startup and shutdown. Also, LAC 33:III.2201.K.4b requires LDEQ to incorporate the option chosen into the applicable permit for each affected facility, and the source may modify its permit (after notice and comment) and choose the other option in the future.

The option of complying with the emissions limitations in LAC 33:III.2201.K.1 incorporates the requirements of LAC 33:III.2201.D and LAC 33:III.2201.E which have been previously approved into the Louisiana SIP; however, the other option of complying alternative emissions limitations developed pursuant to LAC 33:III.2201.K.3 is not part of the EPA-approved Louisiana SIP. For the reasons discussed in this rulemaking action, the alternative work practice requirements of LAC 33:III.2201.K.3 do not satisfy the CAA requirements for SIPs; consequently, LAC 33:III.2201.K.4.b cannot be approved into the Louisiana SIP at this time.

B. Comments by Sierra Club and the Anonymous Commenter

Comment 9: Sierra Club expressed support for the proposed disapproval and thanked EPA for a thorough evaluation in this rulemaking.

Response: EPA acknowledges the support.

Comment 10: Sierra Club requested that EPA finalize its disapproval and promulgate a Federal Implementation Plan (FIP) that corrects the deficiencies with LAC 33:III.2201.C.8, as identified in the 2015 SSM SIP Action. In promulgating a FIP, the commenter goes on to recommend that the EPA simply remove LAC 33:III.2201.C.8 from the Louisiana SIP without attempting to create impractical and unenforceable work practice standards.

Response: CAA section 110(c)(1) requires EPA to promulgate a FIP within two years of the effective date of this final disapproval action, unless EPA first approves a complete SIP revision that corrects the deficiency with LAC 33:III.2201.C.8 as identified in the 2015 SSM SIP Action. EPA intends to work in partnership with the State to resolve this issue in an equitable manner consistent with the CAA requirements and court rulings. EPA is hopeful that Louisiana will submit a revision that corrects the deficiency and a FIP will not be necessary as a result of this disapproval. EPA notes that states are not required to adopt and submit to EPA SIP revisions creating AELs for periods of SSM. States may choose to remove SSM provisions providing for exemptions (whether automatic or discretionary) or affirmative defense provisions altogether, rather than developing AELs for periods of SSM. For example, following this disapproval, Louisiana could elect not to create new AEL regulations such as LAC 33:III.2201.K and instead remove LAC 33:III.2201.C.8 in its entirety and rely upon their enforcement discretion should a source exceed an emission limit which is part of the EPA-approved SIP. Finally, it is outside the scope of this rulemaking to address contents of a future rule (FIP), should one become necessary.

Comment 11: Sierra Club expressed a belief that the work practices (in LAC 33:III.2201.K) are too vague and ambiguous to be enforceable and that they do not reflect adequate consideration of the seven specific criteria in EPA's guidance by which AELs for startup and shutdown should be developed. Sierra Club outlined the reasons why LDEQ's proposed reliance on these SSM work practice standards would be inappropriate. Specifically, Sierra Club states that Louisiana's SIP submittals fail to demonstrate that the work practice standards in LAC 33:III.2201.K: (1) are narrowly tailored to defined source categories using specific control strategies or that the use of the control strategy is ''technically infeasible'' during startup and shutdown; (2) would not violate the NAAQS or PSD increments; and (3) require that the actions during startup and shutdown are properly documented or that the work practice standards are enforceable.

Response: As outlined in our proposal notice, Louisiana's SIP submittals do not demonstrate LDEQ's proper application and consideration of certain criteria recommended by EPA for a state's development of the alternative work practice requirements, such as those in LAC 333:III.2201.K. Our assessment of the SIP submittals with respect to the first criterion (*i.e.,* that AELs should apply to specific, narrowly tailored source categories using specific control technologies) is fully addressed in our responses to Comments 2, 3, and 4. Likewise, our response to Comment 5 provides our assessment of the AELs in LAC 33:III.2201.K.3 with respect to the recommendation in criterion 2 (*i.e.,* that use of the control strategy for the specific source category is technically infeasible). With respect to Sierra Club's concern that LDEQ failed to

demonstrate that the work practice standards in LAC 33:III.2201.K would not violate NAAQS or PSD increments, we note that states have a statutory duty to develop and submit SIPs and SIP revisions, as appropriate, that provide for the attainment, maintenance and enforcement of the NAAQS, as well as meeting many other CAA requirements and objectives (*e.g.,* protecting PSD increments). The specific procedural and substantive requirements that states must meet for SIPs are set forth in CAA section 110(a)(1) and section 110(a)(2), other more specific requirements throughout the CAA (*e.g.,* the attainment plan requirements for each of the NAAQS as specified in CAA Title I, Part D), and EPA regulations. It is important to note, however, that EPA's 2015 SIP call for LAC 33:III.2201.C.8 of the Louisiana SIP was not based on demonstrated air quality concerns, but rather on EPA's interpretation of the CAA that emission limitations in SIPs cannot include exemptions for emissions during periods of startup and shutdown. LDEQ has removed the exemption and adopted LAC 33:III.2201.K. in its place, including the work practice standards applicable to periods of startup and shutdown contained in LAC 33:III.2201.K.3. As stated in response to Comment 6 above, some affected sources may emit more NO_X under the work practice requirements provided by LAC 33:III.2201.K.3 and such emissions may be significantly higher than historical actual emissions for such sources. Notwithstanding the concerns expressed by Sierra Club with respect to the NAAQS and PSD increment, EPA concludes that the SIP submittals do not correct the deficiency in the Louisiana SIP, as identified in Louisiana SIP the 2015 SSM SIP call for the reasons discussed in our proposal action, this notice, and the 2015 SSM SIP Action.

Finally, with respect to Sierra Club's comment claiming that the work practice standards in LAC 33:III.2201.K.3 fail to ensure the actions during startup and shutdown are properly documented or that the work practice standards are enforceable, we note that section LAC 33:III.2201.K.3.e requires a source to ''maintain records of the calendar date, time, and duration of each startup and shutdown'' and section LAC 33:III.2201.K.3.f requires a source to ''maintain records of the type(s) and amount(s) of fuels used during each start-up and shutdown.'' However, the required records of LAC 33:III.2201.K.3.e and LAC 33:III.2201.K.3.f are *only* made available upon request by authorized representatives of LDEQ, per LAC 33:III.2201.K.3.g. As discussed in our response to Comment 12 below, EPA generally agrees that SIP provisions must include adequate monitoring, recordkeeping, and reporting requirements, as appropriate, to be legally and practically enforceable; however, EPA has determined the provisions of LAC 33:III.2201.K do not meet minimum CAA requirements for AELs for reasons unrelated to the issue of recordkeeping or reporting, and thus is disapproving the provision for those reasons.

Comment 12: As part of its comments, Sierra Club attached and incorporated its August 3, 2016, letter to LDEQ that contains a discussion of its concerns with the State's proposed adoption of LAC 33:III.2201.K. Expanding upon the comments submitted to EPA on the enforceability of LAC 33:III.2201.K, Sierra Club noted a lack of reporting requirements in LAC 33:III.2201.K. Sierra Club also claimed that the work practice requirements set forth in LAC 33:III.2201.K do not meet the CAA section 110(a) enforceability requirement because: (1) the work practice requirements in LAC 33:III.2201.K do not limit emissions on a continuous basis; (2) alternative limits or work practices must be incorporated through the SIP amendment process, allowing for public notice and comment and EPA approval; and (3) source-specific alternative limits work practices are generally not proper at all, and source-specific alternative plans under LAC 33:III.2201.E.1 and E.2 do not comport with the CAA requirements for SIP revisions (including public comment).

Response: EPA supports the use of properly developed and enforceable AELs for modes of operation during which otherwise applicable emission limitations cannot be met, as may be the case during startup or shutdown. These AELs, whether a numerical limitation, technological control requirement or work practice requirement, would apply during a specific mode of operation as a component of the continuously applicable emission limitation. All components of the resulting emission limitation must meet the substantive requirements applicable to the type of SIP provision at issue, must meet the applicable level of stringency for that type of emission limitation, and must be legally and practically enforceable.[44]

EPA notes that Sierra Club also commented that LAC 33:III.2201.K lacks sufficient reporting requirements to support enforcement of the work practice standards. The commenter suggested that the state should require at least quarterly reporting by sources concerning their compliance with the AELs. EPA generally agrees that SIP provisions must include adequate monitoring, recordkeeping, and reporting requirements, as appropriate, to be legally and practically enforceable. As described in the proposal notice and in this final rulemaking, EPA has determined the provisions of LAC 33:III.2201.K do not meet minimum CAA requirements for AELs for reasons unrelated to the issue of reporting, and thus is disapproving the provision for those reasons. Should Louisiana make a new SIP submission containing AELs, we encourage the State to consider whether the reporting requirements are adequate to make the AELs legally and practically enforceable. Because the work practice standards in LAC 33:III.2201.K.3 are intended to be components of a continuous SIP emissions limitation, the provision and associated reporting requirements must meet all applicable CAA requirements for SIPs, including CAA sections 110(a)(2), 113, 302(k), and 304, as well as applicable regulatory requirements including 40 CFR 51.211.

Turning to Sierra Club's comment that the work practice requirements set forth in LAC 33:III.2201.K do not meet the CAA section 110(a) enforceability requirement because they do not limit emissions on a continuous basis, we previously noted in our response to Comments 3 and 8 that the work practice standards in LAC 33:III.2201.K.3.c are not sufficiently tied to any particular source or source category under the SIP to ensure their enforceability. In addition, as Sierra Club correctly noted, the imprecise and vague language in LAC 33:III.2201.K.3.c (*e.g.,* ''as expeditiously as possible, considering safety and manufacturer recommendations'' and ''engage'') may be read so as to create situations wherein startup and shutdown emissions are functionally exempt, thereby creating a non-continuous emissions limitation that is inconsistent with CAA requirements for SIPs. EPA also agrees with Sierra Club's suggestion that certain control technologies may be employed in different manners at different times resulting in great variation in the amount of emission control and thus the requirements should be described in more defined terms than currently required by LAC 33:III.2201.K.3.c. In addition, this information should have been considered by LDEQ to ensure the development of enforceable work

[44] 80 FR at 33913.

practice requirements that would provide RACT-level controls during the entire duration of startup and shutdown periods.[45]

Next, we address Sierra Club's comment that alternative emission limits or work practices must be incorporated through the SIP process and allow for public notice/comment and EPA approval. Sierra Club noted that, during periods of startup and shutdown, LAC 33:III.2201.K provides certain affected sources with the option of complying with the LAC 33:III.2201.K.1 (and existing emission factors in LAC 33:III.2201.D or an alternative plan approved under LAC 33:III.2201.E.1 or E.2) or the work practice standards under LAC 33:III.2201.K.3. Sierra Club asserted that any choice by a particular source to use an alternative plan or the work practice standards should be incorporated into the Louisiana SIP after public comment and EPA approval as a SIP revision. As stated earlier, review of Louisiana's SIP submittals included an evaluation and determination of whether they corrected the Louisiana SIP deficiency identified in the 2015 SSM SIP Action. Since we are determining in this rulemaking that the alternative emission limitations in Louisiana's SIP submittals do not correct that deficiency, we do not need to address the issue raised by the Sierra Club that a SIP cannot provide equally approvable options that provide for continuous and enforceable emission limitations meeting all substantive CAA requirements. We note, however, that under LAC 33:III.2201.K.4, owners and operators were required to notify LDEQ by May 1, 2017, whether each affected point source will comply with LAC 33:III.2201.K.1 or LAC 33:III.2201.K.3 during periods of startup and shutdown. As noted in our response to Comment 8, had the requirements of LAC 33:III.2201.K satisfied all other applicable requirements for SIPs including being continuous and practically enforceable, met applicable stringency requirements, and required appropriate monitoring, recordkeeping and reporting, EPA believes that the mechanism set forth in LAC 33:III.2201.K.4 may have been acceptable under the CAA; also, the selection or revision of which approved emission limitation option a particular source chose to comply with would not necessitate a SIP revision. We are noting a difference between using a permit to incorporate a selected approved compliance option versus the use of the permitting process to *establish* necessary elements of emission limitations, the latter of which, as discussed in our response concerning LAC 33:III.2201.K.3.c, is not appropriate. For the reasons discussed elsewhere in this rulemaking action, LAC 33:III.2201.K does not meet all CAA SIP requirements.

Finally, Sierra Club claimed that source-specific alternative limits and work practices are generally not proper at all (and source-specific alternative plans under LAC 33:III.2201.E.1 and E.2 do not comport with the CAA requirements for SIP revisions). Since EPA is determining that the Louisiana SIP submittals do not correct the deficiency in the Louisiana SIP as identified in the 2015 SSM SIP Action for all the reasons discussed elsewhere in this rulemaking action, there is no need for an additional response to Sierra Club's concern at this time.

Comment 13: The anonymous commenter, referencing the 2008 Sierra Club case opinion by the D.C. Circuit court, claimed the court held that a general duty to minimize emissions is not a CAA section 112-compliant standard. Considering that states have the responsibility of developing plans that best suit their needs, the commenter remarked that EPA should explain how it reached the conclusion that a general duty to minimize emissions in LAC 33:III.2201.K.3.a during SSM is not a section 110-compliant standard.

Response: We believe commenter's reference to the 2008 D.C. Circuit case is *Sierra Club* v. *Johnson,* 551 F.3d 1019, 1021 (D.C. Cir. 2008) (interpreting the definition of emission limitation in section 302(k) and section 112 of the CAA). The commenter noted that LAC 33:III.2201.K.3.a is a general duty provision requiring the affected point sources to minimize emissions. As discussed in our proposed action, standing alone, the general duty provision in LAC 33:III.2201.K.3.a does not comply with section 110 CAA requirements for SIPs. For example, it is unclear how the general duty to utilize "good air pollution control practices" required by LAC 33:III.2201.K.3.a, would be practically enforceable and serve as a sufficient limitation on emissions (as defined in 42 U.S.C. 7602(k)) to satisfy applicable SIP requirements (*e.g.,* ensure the application of RACT-level controls during startup and shutdown). Additional concerns to LAC 33:III.2201.K.3.a are discussed elsewhere herein, including our response to Comment 4. In addition, the 2015 SSM SIP Action discussed at length why general duty provisions in SIPs cannot constitute practically enforceable, continuous emissions limitations as required by the CAA.

Comment 14: Finally, the anonymous commenter claimed being misled by the notice, stating it appears that the Environmental Justice (EJ) concerns are now described as the purpose of the SSM policy and the 2015 SSM SIP Action. Although the commenter expresses agreement with EPA for having concern for protection of overburdened communities, it questions the need for the EJ and the detailed-demographic survey and its relationship to the basis of the June 13, 2023, proposed action.

Response: EPA acknowledges the commenter's statement of support for the protection of overburdened communities, as neighborhoods in close proximity of industrial sources may be vulnerable and subject to disproportionate environmental impacts caused by excess emissions during SSM events. With respect to the question of the relationship between EJ and the detailed demographic analysis and the basis for the proposed action, we note that the opening statement in section IV of the proposal notice stated, "For informational and transparency purposes only, the EPA is providing additional analysis of environmental justice associated with this proposed action for the purpose of providing information to the public."[46] In addition, in section V.J of the proposal notice, EPA specifically wrote that the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. While EPA performed an environmental justice and demographic analysis, the EJ "analysis was done for the purpose of providing additional context and information about this rulemaking to the public, not as a basis of the action."[47]

Based on the above responses to comments received and the identified deficiencies described in section II.B at 88 FR 38450–38452 of our proposal notice, we disagree with the Industry commenters' statement characterizing our June 13, 2023 proposal as unwarranted, arbitrary and capricious. Therefore, we are finalizing the action as proposed.

IV. Final Action

The EPA is disapproving the revision to the Louisiana SIP submitted by LDEQ

[45] See Sierra Club comment letter to LDEQ dated August 3, 2016, pages 9–10, included in the docket for this action.

[46] 88 FR at 38453, Section IV Environmental Justice Considerations.

[47] *Id.* at 38455, Section V Statutory and Executive Order Reviews, Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations.

on November 20, 2016, and supplemented on June 9, 2017, in response to EPA's 2015 SSM SIP Action concerning excess emissions during periods of SSM. In accordance with section 110 of the Act, we are finalizing disapproval of the revision to the Louisiana SIP that would repeal LAC 33:III.2201.C.8 and add a new section LAC 33:III.2201.K Startup and Shutdown in its place. The EPA is also making a determination that this SIP revision fails to correct deficiencies identified in the June 12, 2015 SIP Action related to the above-referenced provisions.

CAA section 110(c)(1) requires EPA to promulgate a FIP within 24 months of the effective date of this final disapproval action, unless EPA first approves a complete SIP revision that corrects the deficiency with LAC 33:III.2201.C.8 as identified in the 2015 SSM SIP Action. In addition, this final disapproval triggers mandatory sanctions under CAA section 179 and 40 CFR 52.31 unless the State submits, and EPA approves, a complete SIP revision that corrects the identified deficiencies within 18 months of the effective date of the final disapproval action.[48]

V. Environmental Justice Considerations

EPA provided an environmental justice analysis associated with this action for the purpose of providing information to the public in our July 22, 2022 (87 FR 43760) proposal. As discussed in the proposed action, we believe that this final action will be beneficial to all population groups within Louisiana and may reduce impacts. Exemptions for excess emissions during periods of SSM undermine the ability of the SIP to attain and maintain the NAAQS, to protect Prevention of Significant Deterioration increments, to improve visibility and to meet other CAA requirements. Such exemption provisions have the potential to lessen the incentive for development of control strategies that are effective at reducing emissions during certain modes of sources' operations such as startups and shutdowns or to take prompt steps to rectify malfunctions. Removal of these exemption provisions from the Louisiana SIP will bring the treatment of excess emissions in the SIP into line with CAA requirements; thus, sources in the State will no longer be able to use the repealed exemptions and will have greater incentives to control their air emissions. We therefore determine that this rule will not have disproportionately high or adverse human health or environmental effects on communities with environmental justice concerns.

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to review state choices, and approve those choices if they meet the minimum criteria of the Act. Accordingly, this final action disapproving Louisiana's excess emissions-related rule as a SIP revision merely ascertains that this State law does not meets Federal requirements and therefore does not impose additional requirements beyond those imposed by State law. Additional information about these statutes and Executive orders can be found at *www.epa.gov/laws-regulations/laws-and-executive-orders.*

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

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

B. Paperwork Reduction Act (PRA)

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

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This SIP disapproval does not in-and-of itself create any new requirements but simply disapproves certain pre-existing State requirements for inclusion in the SIP.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action does not impose additional requirements beyond those imposed by state law. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, will result from this action.

E. Executive Order 13132: Federalism

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

F. Executive Order 13175: Coordination With Indian Tribal Governments

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

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per

[48] Consistent with our proposal (88 FR at 38453, footnote 31), EPA has evaluated the geographic scope of potential sanctions under CAA section 179(b) resulting from our disapproval of Louisiana's November 20, 2016, and June 9, 2017, SIP submittals concerning LAC 33:III.2201.C.8 and LAC 33:III.2201.K. We note that the provisions of LAC 33:III.Chapter 22 Control of Emissions of Nitrogen Oxides (NO_X) of the EPA-approved Louisiana SIP are considered elements of an implementation plan required under Part D of Title I of the Act. One provision in the Chapter 22 rules—namely, LAC 33:III.2201.C.8—provides an exemption from otherwise applicable and continuous NO_X emission limitations from affected point sources subject to Chapter 22. Since such exemption provisions are inconsistent with CAA requirements for SIPs, EPA issued a SIP call in 2015, and Louisiana submitted the proposed revisions that are the subject of our disapproval action. With respect to the geographic scope of potential sanctions under CAA section 179 triggered by our disapproval, we note that "the EPA interprets the section 179 sanctions to apply only in the area or areas of the state that are subject to or required to have in place the deficient SIP and for the pollutant or pollutants that the specific SIP element addresses." 80 FR 33840, 33930 (June 12, 2015). See also 40 CFR 52.31 and 59 FR 39832, 39835 (August 4, 1994). Here, the pollutant controlled by the Chapter 22 rules is NO_X, a precursor of ozone, and it is the only pollutant that is the subject of the disapproval. There are no areas in Louisiana that are currently designated as nonattainment for ozone and thus there are no potential CAA section 179 sanctions triggered by our disapproval action, at this time.

the definition of ''covered regulatory action'' in section 2–202 of the Executive order. This action is not subject to Executive Order 13045 because this SIP disapproval does not in-and-of itself create any new regulations, but simply disapproves certain pre-existing State requirements for inclusion in the SIP.

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

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

I. National Technology Transfer and Advancement Act (NTTAA)

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

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

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

The air agency did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA performed an environmental justice analysis, described in the section titled, ''Environmental Justice Considerations'' of the June 13, 2023 (88 FR 38448) proposal. The analysis was done for the purpose of providing additional context and information about this rulemaking to the public, not as a basis of the action. Due to the nature of the action being taken here, this final action is expected to have a neutral to positive impact on the air quality of the previously designated Baton Rouge ozone nonattainment area and its Region of Influence. In addition, there is no information in the record upon which this final action is based inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples. This final action simply disapproves a SIP submission as not meeting CAA requirements for SIPs.

K. Congressional Review Act (CRA)

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

L. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 5, 2024. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action pertaining to the disapproval of Louisiana's November 20, 2016, and June 9, 2017 SIP submittals may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: November 30, 2023.

Earthea Nance,

Regional Administrator, Region 6.

[FR Doc. 2023–26753 Filed 12–6–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R05–OAR–2023–0283; FRL–11127–02–R5]

Air Plan Approval; Indiana; Municipal Solid Waste Landfill State Plan Approval for Designated Facilities and Pollutants

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving Indiana's state plan to control air pollutants from Municipal Solid Waste (MSW) Landfills. The Indiana Department of Environmental Management (IDEM) submitted the state plan on March 20, 2023. The Indiana MSW landfill state plan was submitted to fulfill the state's obligations under section 111(d) of the Clean Air Act (CAA) to implement and enforce the requirements under the MSW Landfills Emission Guidelines (EG). EPA is approving the state plan.

DATES: This final rule is effective on January 8, 2024.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2023–0283. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either through *www.regulations.gov* or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19. We recommend that you telephone Melissa Hulting, Clean Air Strategies Section Supervisor, at (312) 886–2265 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Margaret Sieffert, Clean Air Strategies Section, Air Toxics Branch (AT–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–1151, *sieffert.margaret@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever

''we,'' ''us,'' or ''our'' is used, we mean EPA.

I. Background

IDEM initially submitted a MSW landfill state plan on September 30, 1999. EPA approved the state plan, and it became effective on May 30, 2000 (65 FR 1632). In order to fulfill obligations under CAA section 111(d) to submit a revised state plan to reflect amendments to the MSW landfill EG at 40 CFR part 60, subpart Cf. IDEM submitted a revised MSW landfill state plan on March 20, 2023, 326 Indiana Administrative Code (IAC) 8–8.2. In this regulation, IDEM incorporated by reference the Federal plan located at 40 CFR part 62, subpart OOO to use as the underlying rule which implements and enforces the applicable provisions under the MSW landfill EG.

On July 19, 2023, EPA published a proposed approval of Indiana's MSW landfill state plan (88 FR 46123). The specific details of Indiana's 111(d) state plan submittal and the rationale for EPA's proposed approval are discussed in the proposal and technical support document and will not be restated here.

II. Response to Public Comments

EPA provided a 30-day review and comment period for the July 19, 2023, proposed rule. The comment period ended on August 18, 2023. We received one adverse comment. The comment is summarized and addressed below.

Comment: The commenter states that it is hard to determine what steps the state is planning to take. The commentor also asserts that the specifics of the plan need to be discussed in more detail explaining the potential environmental impacts or benefits of the implementation, and that the proposal does not explain what will be expected with this approval.

Response: After EGs are promulgated, EPA or the state and local regulatory agencies need a Federal plan promulgated under 40 CFR part 62, or a state plan approved under 40 CFR part 62 to implement and enforce the requirements. Under CAA section 111, EPA is authorized to transfer primary implementation and enforcement authority for most of the Federal standards to state or local regulatory agencies upon submittal of a state plan. There are two methods for transferring implementation and enforcement authorities to state or local agencies: (1) EPA approval of a state plan; and (2) a Memorandum of Agreement between EPA and the state which delegates the authority to implement and enforce certain portions of the Federal plan. Both actions are approved in the **Federal Register** and codified into 40 CFR part 62.

Currently, the Federal plan located at 40 CFR part 62, subpart OOO applies to all MSW landfills in Indiana that meet the applicability requirements. Indiana is seeking implementation and enforcement authority through this CAA section 111(d) state plan submittal. No additional environmental impacts or benefits will be expected beyond those previously described in the Regulatory Impact Analysis for the EG which can be found in Docket ID EPA–HQ–OAR–2014–0451. The docket can be found on the *www.regulations.gov* web site. Upon approval of this delegation, Indiana becomes the primary implementation and enforcement authority for the rule, excluding those authorities specifically retained by EPA.

III. Final Action

EPA is approving Indiana's MSW landfill state plan and amending 40 CFR part 62 to reflect this approval. EPA received Indiana's MSW landfill state plan on March 20, 2023. In this action, EPA is finalizing its approval. EPA is also revising 40 CFR part 63.3630, 62.3631, and 62.3632 to reflect these changes.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a CAA section 111(d) submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7411(d); 42 U.S.C. 7429; 40 CFR part 60, subparts B and Cf; and 40 CFR part 62, subparts A and OOO. Thus, in reviewing CAA section 111(d) state plan submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

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

In addition, the CAA 111(d) state plan is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

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

EPA believes that this action is not likely to change existing disproportionate and adverse effects on people of color, low-income populations and/or Indigenous peoples. This action approves IDEM's rule to implement and enforce EPA's MSW landfill Federal plan that has been in effect for MSW landfills since June 21, 2021. EPA

previously conducted an EJ analysis as part of the revised MSW landfill regulations, and determined that the MSW Federal plan increased the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority, low-income, or indigenous populations. To the extent that any minority, low income, or Indigenous subpopulation is disproportionately impacted by landfill gas emissions due to the proximity of their homes to sources of these emissions, that subpopulation also stands to see increased environmental and health benefit from the emission reductions under the Federal plan. The results of the demographic analysis are presented in the EJ Screening Report for Municipal Solid Waste Landfills, July 2016, a copy of which is available in the 2016 MSW Landfills EG Docket (Docket ID Item No. EPA–HQ–OAR–2014–0451–0223).

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 5, 2024. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 62

Environmental protection, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements, Waste treatment and disposal.

Dated: November 21, 2023.

Debra Shore,

Regional Administrator, Region 5.

For the reasons stated in the preamble, title 40 CFR part 62 is amended as follows:

PART 62—APPROVAL AND PROMULGATION OF STATE PLANS FOR DESIGNATED FACILITIES AND POLLUTANTS

■ 1. The authority citation for part 62 continues to read as follows:

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

Subpart P—Indiana

■ 2. Amend §§ 63.3630, 62.3631, and 62.3632 to read as follows:

* * * * *

§ 62.3630 Identification of plan.

On March 20, 2023, Indiana submitted a revised CAA section 111(d) state plan for implementing the revised emission guidelines for Municipal Solid Waste (MSW) Landfills. The enforceable mechanism for this state plan is a state rule codified in 326 Indiana Administrative Code (IAC) 8–8.2. The rule was adopted on September 14, 2022, and became effective on March 10, 2023.

§ 62.3631 Identification of sources.

The Indiana CAA section 111(d) state plan for existing MSW landfills applies to all MSW landfills for which commenced construction on or before July 17, 2014, and have not been modified or reconstructed since July 17, 2014.

§ 62.3632 Effective Date.

The Federal effective date of the Indiana CAA Section 111(d) state plan for existing MSW landfills is January 8, 2024.

[FR Doc. 2023–26490 Filed 12–6–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 97

[WT Docket No. 16–239; FCC 23–93; FR ID 188673]

Amateur Radio Service Rules To Permit Greater Flexibility in Data Communications

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (FCC or Commission) amends its amateur radio rules to eliminate the limitations on the symbol rate (also known as baud rate)—the rate at which the carrier waveform amplitude, frequency, and/or phase is varied to transmit information—applicable to data emissions in certain amateur bands. In place of the baud rate, the Commission sets a bandwidth limitation of 2.8 kilohertz in the respective amateur bands, consistent with the Commission's treatment of other wireless radio services, which also have service-specific bandwidth limitations. This bandwidth limitation will promote continued sharing in these amateur bands.

DATES: Effective January 8, 2024.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Nellie Foosaner of the Wireless Telecommunications Bureau, Mobility Division, at (202) 418–2925 or *nellie.foosaner@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order, in WT Docket No. 16–239; FCC 23–93, adopted and released on November 13, 2023. The full text of this document is available online at *https://docs.fcc.gov/public/attachments/FCC-23-93A1.pdf*. The Commission will send a copy of this Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

Synopsis

1. In this Report and Order, the Commission removes limitations on the symbol rate (also known as baud rate)—the rate at which the carrier waveform amplitude, frequency, and/or phase is varied to transmit information—applicable to data emissions in certain amateur bands. The Commission removes this outdated restriction to allow the amateur radio community to operate more efficiently, including in support of emergency situations when appropriate. Bands with a 300 baud rate limitation that the Commission eliminates in this Report and Order are: 160 meter band; 80 meter band; 40 meter band segments 7.000–7.100 MHz and 7.100–7.125 MHz; 30 meter band; 20 meter band segment 14.00–14.15 MHz; 17 meter band segment 18.068–18.110 MHz; 15 meter band segment 21.0–21.2 MHz; 12 meter band segment 24.89–24.93 MHz. The 10 meter band segment 28.0–28.3 MHz has a 1200 baud rate limitation that the Commission eliminates in this Report and Order. The Commission adopts a 2.8 kilohertz bandwidth limitation in place of the baud rate limitation applicable to the following amateur radio bands: 160 meter band; 80 meter band; 40 meter band, segments 7.000–7.100 MHz and 7.100–7.125 MHz; 30 meter band; 20 meter band, segment 14.00–14.15 MHz; 17 meter band, segment 18.068–18.110

MHz; 15 meter band segment 21.0–21.2 MHz; 12 meter band segment 24.89–24.93 MHz; and 10 meter band, segment 28.0–28.3 MHz. The Report and Order finds that without a baud rate or bandwidth limit, data stations using a large amount of spectrum for a single emission could do so to the detriment of simultaneous use by other stations using narrowband emission modes. The Report and Order also makes non-substantive edits to the two rule sections the Commission is otherwise revising, §§ 97.305 and 97.307, to conform to the current stylistic requirements of the Federal Register Document Drafting Handbook.

Procedural Matters

2. *Regulatory Flexibility Certification.* The Regulatory Flexibility Act of 1980, as amended (RFA) requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

3. As required by the RFA, an Initial Regulatory Flexibility Certification (IRFC) was incorporated in the Notice of Proposed Rulemaking (NPRM) in this proceeding. In the NPRM, the Commission certified that because the proposed amendments to amateur service rules changing a technical rule applicable to data emissions that an amateur radio operator may use in his or her communications with other amateur radio operators applied exclusively to individuals holding certain Commission authorizations, rather than ''small entities,'' as defined in the RFA, the NPRM would not have a significant economic impact on a substantial number of small entities. The Commission sought written public comment on the proposals in the NPRM including comment on the IRFC. No comments were filed addressing the IRFC. The two statutorily-mandated criteria to be applied in determining the need for an RFA analysis are: (1) whether the proposed rules, if adopted, would have a *significant economic effect;* and (2) if so, whether the economic effect would directly affect *a substantial number of small entities.* In the Report and Order, the Commission amends the amateur service rules to change the technical rules applicable to data emissions an amateur radio operator may use in his or her communications with other amateur radio operators. The RFA's definition of ''small entities,'' does not include a ''person'' or an individual, as the terms are used in this proceeding. As a result, the rules do not apply to ''small entities,'' but instead apply exclusively to individuals who hold certain Commission authorizations. Accordingly, based on the Commission's application of the statutorily-mandated criteria it concludes, and therefore certifies in this Final Regulatory Flexibility Certification, that the rules adopted in this Report and Order will not have a significant economic impact on a substantial number of small entities.

4. The Commission will send copies of the Report and Order, including copies of the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the SBA. The Final Regulatory Flexibility Certification will also be published in the **Federal Register**.

5. *Paperwork Reduction Act.* This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506©(4).

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

Ordering Clauses

7. Accordingly, *it is ordered* that, pursuant to sections 4(i), 5, 303(r), and 403 of the Communications Act of 1934, 47 U.S.C. 154(i), 155, 303(r), and 403 of the Commission's rules, that this Report and Order *is hereby adopted*. Proceeding RM–11708 is *terminated*.

8. Accordingly, *it is ordered* that, pursuant to sections 4(i), 5, 303(r), and 403 of the Communications Act of 1934, 47 U.S.C. 154(i), 155, 303(r), and 403 of the Commission's rules, that this Report and Order *is hereby adopted*. Proceeding RM–11708 is *terminated*.

9. *It is further ordered* that part 97 of the Commission's rules IS AMENDED as set forth in the Appendix, effective 30 days after publication in the **Federal Register**.

10. *It is further ordered* that the Office of the Managing Director, Performance Program Management, *shall send* a copy of this Report & Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A).

11. *It is further ordered* that the Office of the Secretary, Reference Information Center, *shall send* a copy of the Report and Order including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

12. *It is further ordered* that part 97 of the Commission's rules *is amended* as set forth in the Appendix, effective 30 days after publication in the **Federal Register**.

13. *It is further ordered* that the Office of the Managing Director, Performance Program Management, *shall send* a copy of this Report & Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A).

14. *It is further ordered* that the Office of the Secretary, Reference Information Center, *shall send* a copy of the Report and Order including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 97

Radio.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 97 as follows:

PART 97—AMATEUR RADIO SERVICE

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

Authority: 47 U.S.C. 151–155, 301–609, unless otherwise noted.

■ 2. Section 97.305 is amended by revising paragraph (c) to read as follows:

§ 97.305 Authorized emission types.

* * * * *

(c) A station may transmit the following emission types on the frequencies indicated, as authorized to the control operator, subject to the standards specified in § 97.307(f):

Wavelength band	Frequencies	Emission types authorized	Standards see § 97.307, paragraph(s):
(1) LF:			
(i) 2200 m	Entire band	RTTY, data	(f)(3).
(ii) 2200 m	Entire band	Phone, image	(f)(1), (2).
(2) MF:			
(i) 630 m	Entire band	RTTY, data	(f)(3).
(ii) 630 m	Entire band	Phone, image	(f)(1), (2).
(iii) 160 m	Entire band	RTTY, data	(f)(3).
(iv) 160 m	Entire band	Phone, image	(f)(1), (2).
(3) HF:			
(i) 80 m	Entire band	RTTY, data	(f)(3), (9).
(ii) 75 m	Entire band	Phone, image	(f)(1), (2).
(iii) 60 m	5.332, 5.348, 5.3585, 5.373 and 5.405 MHz	Phone, RTTY, data	(f)(14).
(iv) 40 m	7.000–7.100 MHz	RTTY, data	(f)(3), (9).
(v) 40 m	7.075–7.100 MHz	Phone, image	(f)(1), (2), (9), (11).
(vi) 40 m	7.100–7.125 MHz	RTTY, data	(f)(3), (9).
(vii) 40 m	7.125–7.300 MHz	Phone, image	(f)(1), (2).
(viii) 30 m	Entire band	RTTY, data	(f)(3).
(ix) 20 m	14.00–14.15 MHz	RTTY, data	(f)(3).
(x) 20 m	14.15–14.35 MHz	Phone, image	(f)(1), (2).
(xi) 17 m	18.068–18.110 MHz	RTTY, data	(f)(3).
(xii) 17 m	18.110–18.168 MHz	Phone, image	(f)(1), (2).
(xiii) 15 m	21.0–21.2 MHz	RTTY, data	(f)(3), (9).
(xiv) 15 m	21.20–21.45 MHz	Phone, image	(f)(1), (2).
(xv) 12 m	24.89–24.93 MHz	RTTY, data	(f)(3).
(xvi) 12 m	24.93–24.99 MHz	Phone, image	(f)(1), (2).
(xvii) 10 m	28.0–28.3 MHz	RTTY, data	(f)(3).
(xviii) 10 m	28.3–28.5 MHz	Phone, image	(f)(1), (2), (10).
(xix) 10 m	28.5–29.0 MHz	Phone, image	(f)(1), (2).
(xx) 10 m	29.0–29.7 MHz	Phone, image	(f)(2).
(4) VHF:			
(i) 6 m	50.1–51.0 MHz	MCW, phone, image, RTTY, data	(f)(2), (5).
(ii) 6 m	51.0–54.0 MHz	MCW, phone, image, RTTY, data, test	(f)(2), (5), (8).
(iii) 2 m	144.1–148.0 MHz	MCW, phone, image, RTTY, data, test	(f)(2), (5), (8).
(iv) 1.25 m	219–220 MHz	Data	(f)(13).
(v) 1.25m	222–225 MHz	RTTY, data, test MCW, phone, SS, image	(f)(2), (6), (8).
(5) UHF:			
(i) 70 cm	Entire band	MCW, phone, image, RTTY, data, SS, test	(f)(6), (8).
(ii) 33 cm	Entire band	MCW, phone, image, RTTY, data, SS, test, pulse.	(f)(7), (8), and (12).
(iii) 23 cm	Entire band	MCW, phone, image, RTTY, data, SS, test	(f)(7), (8), and (12).
(iv) 13 cm	Entire band	MCW, phone, image, RTTY, data, SS, test, pulse.	(f)(7), (8), and (12).
(6) SHF:			
(i) 5 cm	Entire band	MCW, phone, image, RTTY, data, SS, test, pulse.	(f)(7), (8), and (12).
(ii) 3 cm	Entire band	MCW, phone, image, RTTY, data, SS, test	(f)(7), (8), and (12).
(iii) 1.2 cm	Entire band	MCW, phone, image, RTTY, data, SS, test, pulse.	(f)(7), (8), and (12).
(7) EHF:			
(i) 6 mm	Entire band	MCW, phone, image, RTTY, data, SS, test, pulse.	(f)(7), (8), and (12).
(ii) 4 mm	Entire band	MCW, phone, image, RTTY, data, SS, test, pulse.	(f)(7), (8), and (12).
(iii) 2.5 mm	Entire band	MCW, phone, image, RTTY, data, SS, test, pulse.	(f)(7), (8), and (12).
(iv) 2 mm	Entire band	MCW, phone, image, RTTY, data, SS, test, pulse.	(f)(7), (8), and (12).
(v) 1 mm	Entire band	MCW, phone, image, RTTY, data, SS, test, pulse.	(f)(7), (8), and (12).
(vi) 1 mm	Above 275 GHz	MCW, phone, image, RTTY, data, SS, test, pulse.	(f)(7), (8), and (12).

■ 3. Section 97.307 is amended by:

■ a. Revising paragraph (f)(3);

■ b. Removing and reserving paragraph (f)(4);

■ c. Revising the heading to the table in paragraph (f)(14)(i); and

■ d. Removing the text ''of this part'' wherever it appears.

The revisions read as follows:

§ 97.307 Emission standards.

* * * * *

(f) * * *

(3) Only a RTTY or data emission using a specified digital code listed in § 97.309(a) may be transmitted. The authorized bandwidth is 2.8 kHz except in the 2200 m band and 630 m band. In the 2200 m band and the 630 m band the symbol rate must not exceed 300 bauds, or for frequency-shift keying, the frequency shift between mark and space must not exceed 1 kHz.

* * * * *

(14) * * *

(i) * * *

Table 1 to Paragraph (f)(14)(i)—60 M Band Emission Requirements

* * * * *

[FR Doc. 2023–26770 Filed 12–6–23; 8:45 am]

BILLING CODE 6712–01–P

Federal Register

Vol. 88, No. 234

Thursday, December 7, 2023

Proposed Rules

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 AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 929 and 926

[Doc. No. AMS–SC–23–0047]

Cranberries Grown in Massachusetts, et al.; Termination of Marketing Order and Data Collection Requirements for Cranberries Not Subject to the Marketing Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed action invites comments on the proposed termination of the Federal marketing order regulating the handling of cranberries grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York and the rules and regulations issued thereunder (Marketing Order No. 929). The data collection, reporting and recordkeeping requirements applicable to cranberries not subject to the cranberry marketing order would also be terminated.

DATES: Comments must be received by February 5, 2024.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposed rule. Comments can be sent to the Docket Clerk, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or internet: *https://www.regulations.gov.* Comments should reference the document number and the date and page number of this issue of the **Federal Register** and can be viewed at: *https://www.regulations.gov.* All comments submitted in response to this proposal 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 the comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Jennie M. Varela, Marketing Specialist, or Christian D. Nissen, Chief, Southeast Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324–3375 or Email: *Jennie.Varela@usda.gov* or *Christian.Nissen@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–8085 or Email: *Richard.Lower@usda.gov.*

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, proposes the termination of regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposed rule is issued under Marketing Order No. 929, as amended (7 CFR part 929), regulating the handling of cranberries grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York. Part 929 referred to as the ''Order'' is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The Cranberry Marketing Committee (Committee) locally administers the Order and is comprised of producers operating within the production area and a public member.

This proposed rule is also issued under section 8d of the Act (7 U.S.C. 608d(3)), which authorizes the collection of cranberry and cranberry product information from producer-handlers, second handlers, processors, brokers, and importers including those not subject to regulation under the Order.

The United States Department of Agriculture (USDA) is issuing this proposed rule in conformance with Executive Orders 12866, 13563, and 14094. Executive Orders 12866, and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 reaffirms, supplements, and updates Executive Order 12866 and further directs agencies to solicit and consider input from a wide range of affected and interested parties through a variety of means. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

In addition, this proposed rule has been reviewed under Executive Order 13175—Consultation and Coordination with Indian Tribal governments, which requires agencies to consider whether their rulemaking actions would have Tribal implications. Agricultural Marketing Service (AMS) has determined this proposed 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.

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to a marketing order may file with the USDA a petition stating that the marketing order, any provision of the marketing order, or any obligation imposed in connection with the marketing order is not in accordance with law and request a modification of the marketing order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

The Order has been in effect since 1962 and regulates the handling of

cranberries grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York. The Order provides the cranberry industry with authority for production research, marketing promotion and development, to include paid advertising, as well as authority for volume regulation through producer allotments or handler withholding. The Order also authorizes reporting and recordkeeping functions required for operation of the program. The Committee, which locally administers the Order, is funded by assessments imposed on handlers.

This rule proposes termination of the Order and the rules and regulations thereunder. This action is based on the results of a continuance referendum in which producers failed to support continuation of the Order. USDA believes termination of this program would be appropriate as the Order is no longer favored by industry producers.

Section 929.69 of the Order states USDA shall conduct a referendum during the month of May 1975 and every fourth year thereafter to ascertain whether continuance is favored by producers. Under this section, USDA shall terminate the Order if termination is favored by a majority of the growers, and that this majority has, during the current fiscal year, produced more than 50 percent of the cranberries produced in the production area. As required by the Order, USDA held a continuance referendum among cranberry producers from June 9 through June 30, 2023, to determine if they favored continuation of the program.

USDA mailed ballots to 944 producers in the production area. Those producers cast 366 valid ballots. The results indicate 73.5 percent of cranberry growers, who produced 79.9 percent of the production volume, voted in the referendum and favored termination of the program. Consequently, the vote met the Order's criteria for termination, demonstrating a lack of the producer support needed to carry out the objectives of the Act.

Section 608c(16)(A) of the Act provides that USDA shall terminate or suspend the operation of any order whenever the order or any provision thereof obstructs or does not tend to effectuate the declared policy of the Act. Based on the foregoing, and pursuant to section 608c(16)(A) of the Act and § 929.69 of the Order, USDA is considering termination of the Order. If USDA decides to terminate the Order, trustees would be appointed to conclude and liquidate the affairs of the Committee and would continue in that capacity until discharged by USDA. In addition, USDA would notify Congress of USDA's intent to terminate the Order not later than 60 days before the Order is terminated pursuant to section 608c(16)(A) of the Act.

A notice announcing the results of the referendum was issued on August 16, 2023. On October 25, 2023, USDA suspended collection of assessments and all reporting requirements under the Order while the proposed termination of the program is being processed. All other provisions, including promotion and research, would remain in effect until the Order is terminated.

Section 608d(3) of the Act authorizes the collection of cranberry and cranberry product information from producer-handlers, second handlers, processors, brokers, and importers. This data collection is codified in 7 CFR part 926, Data Collection, Reporting and Recordkeeping Requirements Applicable to Cranberries Not Subject to the Cranberry Marketing Order, establishing reporting requirements for cranberry and cranberry products not subject to the Order and how they were to be reported to the Committee. Section 926.21 states this part shall be suspended or terminated whenever there is no longer a Federal cranberry marketing order in effect. This proposal would also terminate part 926 which has been suspended since December 28, 2006.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), USDA has considered the economic impact of this proposed rule on small entities. Accordingly, USDA has prepared this initial regulatory flexibility analysis.

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. Marketing orders issued pursuant to the Act are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 950 cranberry growers in the regulated area and approximately 45 cranberry handlers subject to regulation under the Order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than $3,750,000, (North American Industry Classification System (NAICS) code 111334) and small agricultural service firms are defined as those whose annual receipts are less than $34,000,000 (NAICS code 115114) (13 CFR 121.201).

According to the National Agricultural Statistics Service (NASS), the average grower price for U.S. cranberries during the 2022–23 season was $36.60 per barrel and utilized production was 8,010,070 barrels. The value for cranberries that year totaled $293,168,562, ($36.60 per barrel multiplied by 8,010,070 barrels). Taking the total value of production for cranberries and dividing it by the total number of cranberry growers provides an average return per grower of $308,598. Using the average price and utilization information, and assuming a normal distribution, the majority of cranberry growers receive less than $3,750,000 annually.

According to USDA's Market News retail averages report, the price per pound of fresh cranberries on average was $1.64 in December of 2022. On average, NASS reports that grower prices for fresh cranberries are almost double (199 percent) grower prices for processed cranberries. Dividing the average fresh retail price as reported by Market News ($1.64) by 1.99 calculates to an estimated average retail processed price of $0.82 per pound. There are 100 pounds of cranberries per barrel so the average retail price for a barrel of cranberries would be $82. Multiplying the average retail price by total utilization of 8 million barrels results in an estimated cranberry retail value of $656 million. Dividing this figure by the number of handlers (45) yields an estimated average annual handler receipts of $14.6 million, which is below the SBA threshold for small agricultural service firms. Therefore, the majority of producers and handlers of cranberries may be classified as small entities.

This rule proposes to terminate the Order, and the rules and regulations issued thereunder. Termination would remove the Order from the Code of Federal Regulations. Section 929.69 of the Order provides that USDA shall conduct a referendum during the month of May 1975 and every fourth year thereafter to ascertain whether continuance is favored by producers. The section states USDA shall terminate the Order if termination is favored by a majority of the growers, and if that majority has, during the current fiscal year, produced more than 50 percent of the cranberries produced in the production area. The results of a continuance referendum held from June 9 through June 30, 2023, indicate 73.5 percent of cranberry growers, who produced 79.9 percent of the production

volume, voted in the referendum and favored termination of the program. Consequently, the vote met the Order's criteria for termination, indicating continuance of the program is no longer favored by industry producers. Consequently, USDA is considering termination of the Order. This proposed rule would also terminate part 926, the suspended data collection requirements for cranberries not covered under the Order.

Marketing orders provide industries with tools to assist producers and handlers in addressing challenges facing the industry. These tools include establishing minimum grade, size, quality, and maturity requirements, setting size, capacity, weight, dimensions or pack of the containers, collecting and publishing market information useful to producers and handlers, conducting research and promotions, and establishing volume control requirements. Each marketing order is different, with the industries deciding the authorities needed and the scope of their marketing order. Marketing orders are approved by producers through referenda and regulate handlers to ensure compliance with all requirements. The authority of a marketing order allows each industry to create a local administrative committee that is made up of growers and/or handlers that work collectively to solve industry problems.

The Order has been in effect since 1962 and provides the cranberry industry with authority for production research, marketing promotion and development, to include paid advertising, as well as authority for volume regulation through producer allotments or handler withholding. The Order also authorizes reporting and recordkeeping functions required for operation of the program. The Committee, which locally administers the Order, is funded by assessments imposed on handlers. As this change would terminate the Order and all the rules and regulations issued thereunder, the perceived benefits correlated with the Order would be lost. However, there would also be savings by eliminating costs associated with the Order, which include the payment of assessments and costs related to reporting and occasional volume regulation.

A review of the referendum results shows that producers failed to reach the necessary threshold for the vote to pass by either vote or by volume as specified in the Order, indicating that voting producers believe the benefits of the program no longer outweigh the costs to handlers and producers. Although marketing order requirements are applied to handlers, the costs of such requirements are often passed on to producers. Termination of the Order, and the resulting regulatory relaxation, could therefore be expected to reduce costs for both producers and handlers.

An alternative to this action would be to maintain the Order and its current provisions. However, the Order requires that a continuance referendum be conducted every fourth year to determine industry support for the program. The results of a recently held producer continuance referendum on the cranberry program indicated a lack of producer support, indicating that the Order no longer meets the needs of producers and handlers. Therefore, this alternative was rejected, and USDA is considering terminating the Order and removing the suspended data collection requirements in part 926.

This proposed rule is intended to solicit input and other available information from interested parties on whether the Order should be terminated. USDA will evaluate all available information prior to making a final determination on this matter.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581–0189 Fruit Crops. Termination of the Order, and the reporting requirements prescribed therein, would reduce the reporting burden by 1,265 hours. Handlers would no longer be required to file forms with the Committee, which is expected to reduce industry expenses. This rulemaking would not impose any additional reporting or recordkeeping requirements on either large or small cranberry handlers.

This rulemaking would effectuate the removal of reporting and recordkeeping requirements on cranberry handlers, both small and large. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule.

USDA is committed to complying with the E-Government Act, to promote 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.

The producer referendum was well publicized in the production area, and referendum ballots were provided to all known producers. As such, producers of U.S. cranberries had an opportunity to indicate their continued support for the Order. Further, interested persons are invited to submit comments on this proposed rule, including the regulatory and information collection impacts of this proposed action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *https://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

This rule invites comments on the proposed termination of Marketing Order No. 929, which regulates the handling of cranberries grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York. A 60-day comment period is provided to allow interested persons to respond to this proposal. All written comments timely received will be considered before a final determination is made on this matter.

Based on the foregoing, and pursuant to section 608c(16)(A) of the Act and § 929.69 of the Order, USDA is considering termination of the Order. If USDA decides to terminate the Order, trustees would be appointed to conclude and liquidate the Committee affairs and would continue in that capacity until discharged by USDA. In addition, USDA would notify Congress 60 days in advance of termination pursuant to section 608c(16)(A) of the Act.

List of Subjects

7 CFR Part 926

Cranberries, Reporting and recordkeeping requirements.

7 CFR Part 929

Acreage allotments, Cranberries, Marketing agreements, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, and under the authority of 7 U.S.C. 601–674, the Agricultural Marketing Service proposes to amend title 7, chapter IX of the Code of Federal Regulations by removing parts 926 and 929.

PART 926—[REMOVED]

PART 929—[REMOVED]

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2023–26887 Filed 12–6–23; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–2269; Airspace Docket No. 23–ASO–4]

RIN 2120–AA66

Amendment of Jet Routes and Domestic Very High Frequency Omnidirectional Range (VOR) Federal Airways and Revocation of Jet Route; Eastern United States

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend six jet routes and six domestic Very High Frequency Omnidirectional Range (VOR) Federal airways in the eastern United States. In addition, this action proposes to revoke one existing jet route. These actions support the Little Rock, AR (LIT), VOR/Tactical Air Navigation (VORTAC) relocation project.

DATES: Comments must be received on or before January 22, 2024.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–2269 and Airspace Docket No. 23–ASO–4 using any of the following methods:

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

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

FAA Order JO 7400.11H, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Brian Vidis, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends the route structure to maintain the efficient flow of air traffic within the National Airspace System (NAS).

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one time if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Availability of Rulemaking Documents

An electronic copy of this document may be downloaded through the internet at *www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Operations office (see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, Room 210, 1701 Columbia Avenue, College Park, GA 30337.

Incorporation by Reference

Jet routes are published in paragraph 2004 and domestic VOR Federal airways are published in paragraph 6010(a) of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. These updates would be published in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

FAA Order JO 7400.11H lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

This action is proposed due to the Little Rock, AR (LIT), VORTAC relocation project. The land where the Little Rock VORTAC resides is being sold which requires its relocation. The Little Rock VORTAC is be planned to be relocated in September 2024 from its current location, ''lat. 34°40′39.62″ N, long. 092°10′–49.90″ W'', to approximately 8.06 nautical miles (NM) north, ''lat. 34°48′36.36″ N, long. 092°09′07.44″ W''. The facility identification will remain unchanged. The magnetic variation for the current Little Rock VORTAC is 5°E and will change to 0°E after the relocation. The route modifications proposed would realign the airway structure resulting from relocating the Little Rock VORTAC.

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 to amend J–6, J–14, J–66, J–101, J–131, J–180, V–54, V–74, V–124, V–305, V–532, and V–573, and to revoke V–534 to support the Little Rock, AR (LIT), VORTAC relocation project and Next Generation Air Transportation System (NextGen), which provides a modern United States Air Navigation (RNAV) route structure to improve the efficiency of the National Airspace System (NAS). The proposed changes are described below.

J–6: J–6 currently extends between the Salinas, CA (SNS), VORTAC and the Little Rock, AR (LIT), VORTAC, and between the Charleston, WV (HVQ), VOR/Distance Measuring Equipment (VOR/DME) and the Albany, NY (ALB), VORTAC. The FAA proposes to remove the airway segment between the Will Rogers, OK (IRW), VORTAC and the Little Rock VORTAC as this segment is not needed due to redundant navigation capability provided by jet route J–14. As amended, the airway would extend between the Salinas VORTAC and the Will Rogers VORTAC, and between the Charleston VOR/DME and the Albany VORTAC.

J–14: J–14 currently extends between the Panhandle, TX (PNH), VORTAC and the Vulcan, AL (VUZ), VORTAC. The FAA proposes to add the KOMMA, OK, Fix, and the JMUCK, MS, Fix to the part 71 description as it would be a turn of more than one degree. The JMUCK Fix is defined by the intersection of the relocated Little Rock, AR (LIT), VORTAC 105°True (T)/ 105°Magnetic(M) and the Vulcan VORTAC 284°T/282°M radials.

J–66: J–66 currently extends between the Newman, TX (EWM), VORTAC and the Rome, GA (RMG), VORTAC. The FAA proposes to add the MEEOW, AR, Fix to the part 71 description as it would be a turn of more than one degree.

J–101: J–101 currently extends between the Humble, TX (IAH), VORTAC and the Sault Ste Marie, MI (SSM), VOR/DME. The FAA proposes to add the CISAR, AR, Fix to the part 71 description as it would be a turn of more than one degree.

J–131: J–131 currently extends between the San Antonio, TX (SAT), VORTAC and the Pocket City, IN (PXV), VORTAC. The FAA proposes to add the RUSLR, MO, Fix to the part 71 description as it would be a turn of more than one degree.

J–180: J–180 currently extends between the Humble, TX (IAH), VORTAC and the Foristell, MO (FTZ), VORTAC. The FAA proposes to remove the airway segments between the Humble VORTAC and the Little Rock, AR (LIT), VORTAC due to the scheduled decommissioning of the Daisetta, TX (DAS), VORTAC and the Sawmill, LA (SWB), VOR/DME. Instrument Flight Rules (IFR) traffic may continue to utilize parallel jet routes J–101 and J–29. Additionally, aircraft may navigate via point-to-point navigation using the fixes that will remain in place, or request and receive air traffic control (ATC) radar vectors through and around the area. As amended, jet route J–180 would extend between the Little Rock VORTAC and the Foristell VORTAC.

V–54: V–54 consists of two parts: between the Waco, TX (ACT), VORTAC, and the Little Rock, AR (LIT), VORTAC; and between the Sandhills, NC (SDZ), VORTAC, and the Kinston, NC (ISO), VORTAC. The FAA proposes to add the MUFRE, AR, Fix and modify the description to be the Texarkana, AR (TXK), VORTAC, 052°T/045°M and the Little Rock VORTAC, 230°T/230°M radials. Additionally, the FAA proposes to add to the part 71 description that the airway excludes restricted area R–2403B when it is active. The second part of the route would remain unchanged as currently charted.

V–74: V–74 currently extends between Garden City, KS (GCK), VORTAC, and the Magnolia, MS (MHZ), VORTAC. The FAA proposes to add the OLLAS, AR, Fix to the part 71 description as it would be a turn of more than one degree.

V–124: V–124 currently extends between the Bonham, TX (BYP), VORTAC and the Gilmore, AR (GQE), VOR/DME. The FAA proposes to reconnect to the existing airway at the HILLE, AR, Fix, and add to the part 71 description that the airway excludes restricted area R–2403B when it is active. Additionally, the FAA proposes to remove the route segment between the HILLE Fix and the Gilmore VOR/DME as it is not needed for ATC services. In order to navigate through and around the Memphis area, IFR traffic may continue to utilize VOR Federal airways V–16 and V–159. Air traffic may also utilize RNAV route T–398. Visual Flight Rules (VFR) air traffic may also utilize all of the previously listed routes. Aircraft may also navigate via point-to-point navigation using the fixes that will remain in place, or request and receive ATC radar vectors through and around the area. As amended, V–124 would extend between the Bonham VORTAC and the HILLE Fix.

V–305: V–305 consists of two parts: between the El Dorado, AR (ELD), VOR/DME, and the Walnut Ridge, AR (ARG), VORTAC; and between Cunningham, KY (CNG), VOR/DME, and the Brickyard, IN (VHP), VORTAC. The FAA proposes to add the UKORE, AR, Fix to the part 71 description as it would be a turn of more than one degree, and that the airway excludes restricted area R–2403B when it is active.

V–532: V–532 currently extends between Little Rock, AR (LIT), VORTAC and the Lincoln, NE (LNK), VORTAC. The FAA proposes to remove the route segments between the Little Rock VORTAC and the Fort Smith, AR (FSM), VORTAC due to lack of use as V–74 offers a more direct path for aircraft to navigate between the Little Rock VORTAC and the Fort Smith VORTAC. Additionally, V–303 would continue to provide navigation capability between the BLURB, AR, Fix and the Fort Smith VORTAC. As amended, V–532 would extend between the Fort Smith VORTAC and the Lincoln VORTAC.

V–534: V–534 currently extends between Little Rock, AR (LIT), VORTAC and the Fort Smith, AR (FSM), VORTAC. The FAA proposes to remove the entire route due to lack of use as V–74 offers a more direct path for aircraft to navigate between Little Rock VORTAC and Fort Smith VORTAC.

V–573: V–573 currently extends between Will Rogers, OK (IRW), VORTAC and the Little Rock, AR (LIT), VORTAC. The FAA proposes to remove the route segment between Hot Springs, AR (HOT), VOR/DME and Little Rock VORTAC due to V–124 providing redundant navigation capability. As amended, V–573 would extend between Will Rogers VORTAC and the Hot Springs VOR/DME.

The full descriptions of the above routes are listed in the proposed regulatory text of this NPRM.

Regulatory Notices and Analyses

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

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

Paragraph 2004 Jet Routes

* * * * *

J–6 [Amended]

From Salinas, CA; INT Salinas 145° and Avenal, CA, 292° radials; Avenal; INT Avenal 119°and Palmdale, CA, 310° radials; Palmdale; Hector, CA; Needles, CA; Drake, AZ; Zuni, AZ; Albuquerque, NM; Tucumcari, NM; Panhandle, TX; to Will Rogers, OK. From Charleston, WV; INT Charleston 076° and Martinsburg, WV, 243° radials; Martinsburg; Lancaster, PA; Broadway, NJ; Sparta, NJ; to Albany, NY.

* * * * *

J–14 [Amended]

From Panhandle, TX; Will Rogers, OK; INT Will Rogers 097°T/090°M and Little Rock, AR 276°T/276°M radials; Little Rock; INT Little Rock 105°T/105°M and Vulcan, AL 284°T/282°M radials; to Vulcan.

* * * * *

J–66 [Amended]

From Newman, TX; via Big Spring, TX; Abilene, TX; Ranger, TX; Bonham, TX; INT Bonham 070°T/064°M and Little Rock, AR 247°T/247°M radials; Little Rock; Memphis, TN; INT Memphis 100° and Rome, GA 284° radials; to Rome.

* * * * *

J–101 [Amended]

From Humble, TX, Lufkin, TX; INT Lufkin 031°T/026°M and Little Rock, AR 210°T/210°M radials; Little Rock; St. Louis, MO; Spinner, IL; Pontiac, IL; Joliet, IL; Northbrook, IL; Badger, WI; Green Bay, WI; to Sault Ste Marie, MI.

* * * * *

J–131 [Amended]

From San Antonio, TX, via INT San Antonio 007° and Ranger, TX, 214° radials; Ranger; Texarkana, AR; Little Rock, AR; INT Little Rock 049°T/049°M and Walnut Ridge, AR 077°T/073°M radials; to Pocket City, IN.

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J–180 [Amended]

From Little Rock, AR; to Foristell, MO.

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Paragraph 6010(a) Domestic VOR Federal Airways

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V–54 [Amended]

From Waco, TX; to Cedar Creek, TX. From Texarkana, AR; INT Texarkana 052° and Little Rock, AR, 230° radials; to Little Rock. From Sandhills, NC; INT Sandhills 146° and Fayetteville, NC, 267° radials; Fayetteville; to Kinston, NC. Excluding R–2403B when active.

* * * * *

V–74 [Amended]

From Garden City, KS; to Dodge City, KS. From Pioneer, OK; Tulsa, OK; Fort Smith, AR; 6 miles, 7 miles wide (4 miles north and 3 miles south of centerline) INT Fort Smith 112°T/105°M and Little Rock, AR 284°T/284°M radials; Little Rock; Pine Bluff, AR; Greenville, MS; to Magnolia, MS. Excluding R–2403A and R–2403B when active.

* * * * *

V–124 [Amended]

From Bonham, TX, via Paris, TX; Hot Springs, AR; Little Rock, AR; to INT Little Rock 071°T/071°M and Marvel, AR, 326°T/325°M radials. Excluding R–2403B when active.

* * * * *

V–305 [Amended]

From El Dorado, AR; Little Rock, AR; INT Little Rock 039°T/039°M and Marvel, AR 316°T/315°M radials; to Walnut Ridge, AR. From Cunningham, KY; Pocket City, IN; INT Pocket City 046° and Hoosier, IN, 205° radials; Hoosier; INT Hoosier 025° and Brickyard, IN, l85° radials; to Brickyard. Excluding R–2403B when active.

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V–532 [Amended]

From Fort Smith; Okmulgee, OK; Pioneer, OK; Wichita, KS, 014° and Salina, KS, 168° radials; Salina; to Lincoln, NE.

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V–534 [Removed]

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V–573 [Amended]

From Will Rogers, OK; INT Will Rogers 195° and Ardmore, OK, 327° radials; Ardmore; to Bonham, TX. From Texarkana, AR; INT Texarkana 037° and Hot Springs, AR, 225° radials; to Hot Springs.

* * * * *

Issued in Washington, DC, on November 30, 2023.

Karen L. Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023–26672 Filed 12–6–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–2200 Airspace Docket No. 22–AAL–27]

RIN 2120–AA66

Revocation of Colored Federal Airway Blue 28 (B–28) in the Vicinity of Sitka, Alaska

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to revoke Colored Federal airway B–28 in the vicinity of Sitka, AK due to the pending decommissioning of the Sitka and Nichols Nondirectional Radio Beacons (NDB) in Alaska.

DATES: Comments must be received on or before January 22, 2024.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–2200 and Airspace Docket No. 22–AAL–27 using any of the following methods:

* *Federal eRulemaking Portal:* Go to *www.regulations.gov* and follow the online instructions for sending your comments electronically.

* *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

* *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

* *Fax:* Fax comments to Docket Operations at (202) 493–2251.

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

FAA Order JO 7400.11H, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Steven Roff, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify the route structure as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System (NAS).

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one time if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Availability of Rulemaking Documents

An electronic copy of this document may be downloaded through the internet at *www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the office of the Operations Support Group, Western Service Center, Federal Aviation Administration, 2200 South 216th St., Des Moines, WA 98198.

Incorporation by Reference

Colored Federal airways are published in paragraph 6009 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. These updates would be published in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

FAA Order JO 7400.11H lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

In 2003, Congress enacted the Vision 100-Century of Aviation Reauthorization Act (Pub L., 108–176), which established a joint planning and development office in the FAA to manage the work related to the Next Generation Air Transportation System (NextGen). Today, NextGen is an ongoing FAA-led modernization of the nation's air transportation system to make flying safer, more efficient, and more predictable.

In support of NextGen, this proposal is part of an ongoing, large, and comprehensive T-route modernization project in the state of Alaska. The project mission statement states: "To modernize Alaska's Air Traffic Service route structure using satellite-based navigation development of new T-routes and optimization of existing T-routes will enhance safety, increase efficiency and access, and will provide en route continuity that is not subject to the restrictions associated with ground-based airway navigation." As part of this project, the FAA evaluated the existing Colored Airway structure for: (a) direct replacement (*i.e.,* overlay) with a T-route that offers a similar or lower Minimum En route Altitude (MEA) or Global Navigation Satellite System (GNSS) Minimum En route Altitude (MEA); (b) the replacement of the colored airway with a T-route in an optimized but similar geographic area, while retaining similar or lower MEA; or (c) removal with no route structure (T-route) restored in that area because the value was determined to be insignificant.

The aviation industry/users have indicated a desire for the FAA to transition the Alaskan en route navigation structure away from dependency on NDBs and move to develop and improve the United States Area Navigation (RNAV) route structure.

Colored Federal airway B–28 extends between the Prince Rupert, BC, Canada, NDB and the Sitka, AK, NDB, excluding the airspace within Canada. The decommissioning of the Sitka and Nichols NDBs would render B–28 unusable. The FAA proposes to revoke B–28 in its entirety. The loss of B–28 is mitigated by existing Very High Frequency Omnidirectional Range (VOR) federal airways V–309 and V–311, which overlie B–28.

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 to revoke Colored Federal airway B–28 in Alaska due to the pending decommissioning of its supporting Navigational Aids (NAVAID).

Colored Federal airway B–28 extends between the Prince Rupert, BC, Canada, NDB and the Sitka, AK, NDB, excluding the airspace within Canada. The FAA proposes to revoke Colored Federal airway B–28 in its entirety.

Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

Paragraph 6009(d) Colored Federal airways.

* * * * *

B–28 [Remove]

* * * * *

Issued in Washington, DC, on November 30, 2023.

Karen Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023–26709 Filed 12–6–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 120

[Docket No. FAA–2012–1058; Notice No. 24–05]

RIN 2120–AK09

Drug and Alcohol Testing of Certificated Repair Station Employees Located Outside of the United States

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice of proposed rulemaking (NPRM) would require certificated repair stations located outside the territory of the United States whose employees perform safety-sensitive maintenance functions on certain air carrier aircraft to obtain and implement a drug and alcohol testing program in accordance with the requirements of the Drug and Alcohol Testing Program published by the FAA and the Procedures for Transportation Workplace Drug Testing Programs published by the Department of Transportation.

DATES: Send comments on or before February 5, 2024.

ADDRESSES: Send comments identified by docket number FAA–2012–1058 using any of the following methods:

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

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

FOR FURTHER INFORMATION CONTACT: Nancy Rodriguez-Brown, Office of Aerospace Medicine, Drug Abatement Division, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone (202) 267–8442; email: *drugabatement@faa.gov.*

SUPPLEMENTARY INFORMATION:

List of Abbreviations and Acronyms Frequently Used in This Document

BASA—Bilateral Aviation Safety Agreement
ICAO—International Civil Aviation Organization

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I. Overview of Proposed Rule

This proposed rule, which the FAA is required by statute to promulgate, would implement a statutory mandate to require certificated part 145 repair stations located outside the territory of the United States (U.S.) to ensure that employees who perform safety-sensitive maintenance functions on part 121 air carrier aircraft are subject to a drug and alcohol testing program, consistent with the applicable laws of the country in which the repair station is located. This proposed rule would require a part 145 repair station located outside the territory of the U.S. to implement a drug and alcohol testing program meeting the requirements of 49 CFR part 40 and 14 CFR part 120, which must cover its employees who perform maintenance functions on part 121 air carrier aircraft. If a part 145 repair station cannot meet one or all requirements in 49 CFR part 40 (*e.g.,* the laws of the country where the repair station is located are inconsistent with the regulations), the part 145 repair station may apply for an exemption using the process described in 49 CFR 40.7. Similarly, if a part 145 repair station cannot meet one or all requirements in 14 CFR part 120, it may apply for a waiver in accordance with proposed waiver authority. This rulemaking would affect approximately 977 part 145 repair stations in about 65 foreign countries.[1]

It is the responsibility of the employer (*e.g.,* the part 121 operator) to ensure that any person who performs safety-sensitive functions (*e.g.,* maintenance or preventive maintenance), directly or by contract (including by subcontract at any tier), is subject to drug and alcohol testing. The FAA notes that part 145 repair stations located within the territory of the U.S. may elect to, but are not required to, implement a drug and alcohol testing program under 14 CFR part 120. When hiring by contract, if a part 145 domestic repair station does not have a testing program of its own, the part 121 operator must cover the repair station's safety-sensitive employees under its FAA drug and alcohol testing program.[2] In this scenario, for purposes of drug and alcohol testing, the part 121 operator hires the repair station employees as covered employees[3] and must apply all the regulatory requirements of the program to these employees (*e.g.,* conduct a pre-employment drug test, the records check, the training and educational information distribution requirements, and include the individuals in the random testing pool). Therefore, all employees performing a safety-sensitive function within the U.S. are part of a drug and alcohol testing program, whether it is the part 121 operator's program or the repair station's program. As further discussed in this preamble, the FAA does not propose any changes to its current drug and alcohol testing requirements applicable to employees performing a safety-sensitive function within the U.S. as part of this rulemaking. In addition, the FAA invites comments, with supporting data, on whether the drug and alcohol testing requirements in this proposed rule should be extended to safety sensitive maintenance employees of part 121 certificate holders located outside the United States.

II. Authority for This Rulemaking

The FAA's authority to issue rules on aviation safety is in title 49 of the United States Code (49 U.S.C.). 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's authority to issue rules on alcohol and drug testing is in 49 U.S.C. 45102, which directs the Administrator to prescribe regulations that establish a program requiring air carriers and foreign air carriers to conduct certain alcohol and controlled substances testing.

This proposed rule is further promulgated under section 308 of the FAA Modernization and Reform Act of 2012 (the Act), 49 U.S.C. 44733. Specifically, 49 U.S.C. 44733(d)(2), titled "Alcohol and Controlled Substances Testing Program Requirements," requires the FAA to "promulgate a proposed rule requiring that all part 145 repair station employees responsible for safety-sensitive maintenance functions on part 121 air carrier aircraft [be] subject to an alcohol and controlled substances testing program determined acceptable by the [FAA] Administrator and consistent with the applicable laws of the country in which the repair station is located." Additionally, this proposed rule is promulgated under section 2112 of the FAA Extension, Safety, and Security Act of 2016, (the 2016 Act), which directed publication of a notice of proposed rulemaking in accordance with 49 U.S.C. 44733. The 2016 Act also requires that the notice of proposed rulemaking be finalized.

III. Background

A. History

The FAA and the Office of the Secretary of Transportation (OST) have long engaged in a regulatory partnership regarding drug and alcohol testing of persons in the aviation industry. The OST first published its drug testing procedure regulations in 1988 to require antidrug programs for certain transportation industries, including aviation.[4] In that interim final rule, the OST adopted a modification of Department of Health and Human Services (HHS) guidance in new 49 CFR part 40 to require employers to conduct drug testing in accordance with the HHS's Mandatory Guidelines for Federal Workplace Programs.

Simultaneously, the FAA published a final rule setting forth regulations to certain entities to implement an anti-drug program for employees who perform sensitive safety or security related functions.[5] These entities included: domestic and supplemental air carriers, commercial operators of large aircraft, air taxi and commuter

[1] These estimates are current as of April 2021 and sourced from the National Vital Information Subsystem (NVIS). NVIS is a subsystem of the Flight Standards Automation System, a comprehensive information system used primarily by inspectors to record and disseminate data associated with inspector activity and aviation environment. While there are more current estimates (as of March 2023, the rule would affect approximately 962 part 145 repair stations in about 66 foreign countries), the 2021 numbers are used in the regulatory evaluation and Regulatory Impact Assessment to estimate cost.

[2] 14 CFR 120.1(b), 120.105(e), 120.215(a)(5).

[3] A covered employee is defined in § 120.7(e) as an individual who performs, either directly or by contract, a safety-sensitive function listed in §§ 120.105 and 120.215 for an employer (as defined in § 120.7(g)).

[4] Interim Final Rule, Procedures for Transportation Workplace Drug Testing Programs, 53 FR 47002 (Nov. 21, 1988).

[5] Final Rule, Anti-Drug Program for Personnel Engaged in Specified Aviation Activities, 53 FR 47024 (Nov. 21, 1988).

operators, certain commercial operators, certain contractors to these operators, and air traffic control facilities not operated by the FAA or the U.S. military. Before this final rule, the FAA's regulatory action pertaining to drug and alcohol use primarily focused not on testing programs, but on restrictions on commercial aviation personnel (*e.g.,* regulations restricting crewmembers such as pilots, flight attendants, flight engineers, and flight navigators from acting as a crewmember within eight hours after drinking an alcoholic beverage, regulations restricting use of any drug that affects faculties contrary to safety [6]). The final rule required employers to comply with the OST's newly adopted 49 CFR part 40, Procedures for Transportation Workplace Drug Testing Programs (*i.e.,* comply with the modified HHS guidance). However, rather than following the OST structure, which created a new part to promulgate the regulations, the FAA adopted a new appendix within 14 CFR part 121 and required compliance through various cross-references in 14 CFR parts 61, 63, 65, and 135.

The 1988 FAA final rule applied only to domestic U.S. operators but did not expressly exclude employees located outside the territory of the U.S. from testing. In that final rule, the FAA considered the impact that the regulations would have on foreign laws and policy. Specific to foreign repair stations, individuals at foreign repair stations under contract to U.S. certificate holders would not be able to perform maintenance or preventive maintenance work on U.S.-registered aircraft unless they participated in an anti-drug program. However, as set forth by then-part 121, appendix I, section XII, the rule would not be applicable in any situation where compliance would violate the domestic laws or policies of another country. Additionally, the section provided a longer effectivity date to aid the Department of Transportation (DOT) and foreign governments in reaching permanent resolutions to any identified conflict between the final rule and foreign law.

The effectivity date for the final rule with respect to employees located outside the territory of the U.S. was extended several times,[7] during which time Congress passed the Omnibus Transportation Employee Testing Act of 1991 (OTETA).[8] Section 3 of OTETA added sec. 614 to title VI of the Federal Aviation Act of 1958, which directed the Administrator to prescribe regulations to establish a program that requires both air carriers and foreign air carriers to conduct alcohol and controlled substance testing for certain persons. OTETA specified that the FAA should only establish requirements applicable to foreign air carriers consistent with the international obligations of the U.S. and take any laws and regulations of the foreign countries into account.

Again, the OST and the FAA issued congruent final rules [9] to implement the legislation, as applicable. Consistent with the legislation, the FAA final rule mandated that no employee located solely outside the territory of the U.S. shall be tested for illegal use of drugs under appendix I of part 121. An employer was required to remove such employees from the random testing pool while the employee solely performed functions in a foreign country, or while under contract outside the territory of the U.S. Concurrently, the FAA proposed and adopted appendix J within part 121 to supplement the existing regulations concerning alcohol misuse to ensure coordination between OST and FAA. The FAA had originally proposed [10] that the alcohol testing rule would apply to direct employees of U.S. air carriers who performed safety-sensitive functions outside the U.S., subject to the laws and regulations of the country in which the testing would occur; however, in response to comments, the FAA ultimately decided not to require alcohol testing of any employees located outside the territory of the U.S., mirroring the drug testing requirements.[11]

These drug and alcohol testing regulations remained static for almost two decades, despite occasional proposed rulemaking that did not come to fruition.[12] These regulations were scattered throughout 14 CFR.[13] Most recently, in 2009, the FAA concluded that it would be best to streamline and clarify title 14 to pull the regulations existing at that time into one location. Therefore, FAA adopted new part 120 [14] to set forth a better organizational structure for the drug and alcohol testing program regulations, which is where it is situated today. The FAA has engaged in additional rulemaking since that time to harmonize 14 CFR part 120 with OST's amendments to 49 CFR part 40, as warranted (*e.g.,* aligning prohibited drugs in 14 CFR part 120 with those in 49 CFR part 40 [15]).

B. Legislative and Rulemaking Actions

1. FAA Modernization and Reform Act of 2012

In 2012, Congress passed the FAA Modernization and Reform Act of 2012.[16] Section 308(d)(2) of the Act, implemented in 49 U.S.C. 44733, requires that the FAA Administrator publish a proposed rule requiring that all part 145 repair station employees responsible for safety-sensitive maintenance functions on part 121 air carrier aircraft outside the U.S. to be subject to an alcohol and controlled substances testing program determined acceptable by the Administrator and consistent with the applicable laws of the country in which the repair station is located. The FAA considers all maintenance functions performed on part 121 air carrier aircraft to be safety-sensitive under 14 CFR 120.105 and 120.215.

[6] 14 CFR 91.11 (1986).

[7] *See* Final Rule—Request for Comments, Anti-Drug Program for Personnel Engaged in Specified Aviation Activities; 54 FR 15148 (Apr. 14, 1989); Final Rule—Extension of Compliance Date, Anti-Drug Program for Personnel Engaged in Specified Aviation Activities, 54 FR 53282 (Dec. 27, 1989), Final Rule—Extension of Compliance Date, Anti-Drug Program for Personnel Engaged in Specified Aviation Activities, 56 FR 18978 (Apr. 24, 1991), Final Rule—Extension of Compliance Date, Anti-Drug Program for Personnel Engaged in Specified Aviation Activities, 57 FR 31275 (Jul. 14, 1992).

[8] 105 Stat. 917, Public Law 102–143 (Oct. 28, 1991).

[9] DOT Final Rule, Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 59 FR 7340 (Feb. 15, 1994). FAA Final Rule, Antidrug Program for Personnel Engaged in Specific Aviation Activities, 59 FR 42922 (Aug. 19, 1994).

[10] Notice of Proposed Rulemaking, Alcohol Misuse Prevention Program for Personnel Engaged in Specified Aviation Activities, 57 FR 59458 (Dec. 15, 1992).

[11] Final Rule, Alcohol Misuse Prevention Program for Personnel Engaged in Specified Aviation Activities, 59 FR 7380 (Feb. 15, 1994).

[12] For example, in 1994, the FAA proposed to require foreign air carriers operating in the U.S. to implement the same testing required of domestic U.S. air carriers unless multilateral action was taken by ICAO to support international standards (59 FR 7420). However, in 1995, ICAO published the Manual on Prevention of Problematic Use of Psychoactive Substances in the Aviation Workplace, and the FAA subsequently withdrew this proposed rule in 2000 (65 FR 2079).

[13] At that time, requirements for affected certificated airmen were located in parts 61, 63, 65, and 67. Requirements for affected air carriers and operators were located in parts 91, 121, and 135. Requirements for affected air traffic control facilities and air traffic controllers were located in subpart B of part 65. Requirements for repair stations certificated under part 145 and contractors who elected to have drug and alcohol testing programs were located in appendices I and J of part 121.

[14] Final Rule, Drug and Alcohol Testing Program, 74 FR 22649 (May 14, 2009). Certain inadvertent errors were corrected in a subsequent final rule: Correction, Drug and Alcohol Testing Program, 75 FR 3153 (Jan. 20, 2010).

[15] Final Rule, Conforming Amendments and Technical Corrections to Department Rules Implementing the Transportation Drug Testing Program).

[16] Public Law 112–95 (Feb. 14, 2012).

2. Advance Notice of Proposed Rulemaking and Comment Response

In response to the congressional mandate, the FAA published an advanced notice of proposed rulemaking (ANPRM) on March 17, 2014.[17] The comment period for the ANPRM closed July 17, 2014. The FAA received 74 substantive comments of both support and opposition.

The FAA recognized that foreign countries and maintenance providers would have many concerns regarding drug and alcohol testing of certain maintenance personnel outside the territory of the U.S. Therefore, the FAA chose to issue an ANPRM to seek comments from the public and interested governments to help inform the development of a proposed rule. Specifically, the FAA recognized and inquired about the associated legal, practical, and cultural issues related to drug and alcohol testing. Additionally, the FAA asked various questions pertaining to foreign countries' laws and regulations, program elements of acceptable drug and alcohol testing, existing drug and alcohol testing program in other countries, and the scope of a proposed rule to include persons performing safety sensitive maintenance functions on aircraft operated by part 121 air carriers in accordance with part 43. The comment period for the ANPRM, originally set for 60 days, was extended an additional 60 days [18] to allow time for commenters to analyze the ANPRM and prepare comments. Few comments provided specific information on the laws, cultural practices, and existence of drug and alcohol testing programs in foreign countries and instead presented general arguments in support and opposition.

The FAA received 74 comments: 40 generally supported the ANPRM; 29 generally opposed the ANPRM; and five stated no position. The 40 commenters who generally supported the proposal include 33 individuals, including certificated airmen (*e.g.,* mechanics, flight instructors) and members of the flying public; three airline mechanics' unions; two aviation consulting firms; a consumer advocacy group; and an aircraft manufacturer. These commenters generally believed that maintenance personnel both within the U.S. and abroad should be treated the same with respect to drug and alcohol testing.

Supporters additionally proposed that the FAA expand the rule beyond the scope of the statutory mandate to (1) make existing domestic regulations and those that would be extended internationally more stringent, and (2) include part 135 operators, part 91 operators, and fractional ownership operators (under part 91, subpart K) that use part 145 repair station employees outside the territory of the U.S. in the testing requirements. These commenters also recommended expanding the testing requirement to employees of non-certificated repair stations outside the territory of the U.S., such as authorized persons who perform maintenance functions on aircraft operated by part 121 air carriers in accordance with 14 CFR 43.17.[19] These supporters include the Teamsters Aviation Mechanic Coalition, Aircraft Mechanics Fraternal Association, and the Transportation Trades Department labor unions, who stated an expansion in scope would help improve the safety of maintenance functions that are outsourced to repair stations outside the territory of the U.S. Some commenters asserted that U.S.-based maintenance facilities are operating at an economic disadvantage as maintenance facilities abroad are not required to subject employees to drug and alcohol testing and, therefore, are essentially circumventing the associated costs to maintain a testing program.

Outside of the five commenters that did not state an overt position on the proposal, the remaining comments were from nine foreign repair stations, four foreign governmental aviation organizations, four trade associations, four foreign trade associations, three airline manufacturers, three foreign airlines, one foreign aviation industry coalition, and one foreign government representative. These twenty-nine commenters generally opposed the ANPRM stating that the FAA threatens to overreach its authority and the proposal fails to recognize national sovereignty, existing Bilateral Aviation Safety Agreements (BASAs), the impact of ICAO initiatives,[20] and the economic impact to the aviation industry. The FAA responds to the comments in the subsequent sections.

National Sovereignty

More than half of the opposing commenters cited failure to recognize each nation's sovereignty, stating that the FAA cannot impose regulations on persons outside the territory of the U.S. where those regulations conflict with the laws of sovereign nations. The Coalition of Industry Groups, which includes members from Aeronautical Repair Station Association (ARSA), Airlines for America (A4A), Regional Airline Association (RAA), International Air Transport Association (IATA), and other associations, supported requiring drug and alcohol testing programs outside the territory of the U.S. However, these aviation associations also emphasized that many countries have laws protecting the right to privacy in employment, as well as labor and data security laws, that could conflict with the proposed rule. These associations and commenters strongly suggested the FAA respect national sovereignty and ensure the proposal is consistent with applicable laws of the country in which the repair station is located. Commenters asserted that the FAA must not move forward with a proposal that would be applied without respect to national sovereignty.

FAA Response

In evaluating the international implications of requiring part 145 repair stations outside of the United States to implement drug and alcohol testing programs that comply with U.S. domestic testing standards throughout the global community, the FAA has become aware of the difficulties associated with the establishment of such programs. Specifically, any regulation that requires 14 CFR part 145 repair stations located outside the territory of the U.S. to implement drug or alcohol testing programs without respect to national sovereignty may be contrary to international law and might exceed generally recognized limits to extraterritorial jurisdiction. Further, section 308 of the FAA Modernization and Reform Act of 2012 directs that the proposed rule be ''consistent with the applicable laws of the country in which the repair station is located.'' Given these considerations, should the application of 49 CFR part 40 and 14 CFR part 120 wholly or in part be inconsistent with a country's laws or

[17] Advanced Notice of Proposed Rulemaking, Drug and Alcohol Testing of Certain Maintenance Provider Employees Located Outside of the United States, 79 FR 14621 (Mar. 17, 2014).

[18] ANPRM—Extension of Comment Period, Drug and Alcohol Testing of Certain Maintenance Provider Employees Located Outside of the United States; Extension of Comment Period, 79 FR 24631 (May 1, 2014).

[19] Section 43.17 sets forth requirements for maintenance and preventative maintenance performed on U.S. aeronautical products by persons who hold valid Transport Canada Civil Aviation Maintenance Engineer licenses and Transport Canada Civil Aviation Approved Maintenance Organizations.

[20] The FAA notes that as of the publication of the ANPRM, there were (and continue to be) a number of ICAO standards and recommended practices that address misuse of drugs and alcohol by aviation personnel; however, ICAO did not, and does not, require ICAO Member States to establish testing program to deter or detect inappropriate drug and alcohol use by aviation personnel with safety-sensitive responsibilities.

regulations, the 14 CFR part 145 repair station could apply for an exemption from 49 CFR part 40 using the process described in 49 CFR 40.7. Additionally, the repair station could request a waiver from 14 CFR part 120 following the instructions proposed in new § 120.9. As further discussed in section IV.C. of this preamble, the FAA has proposed language in 14 CFR 120.5 to clarify that the FAA will recognize any 49 CFR part 40 exemptions issued to an employer as meeting the procedures set forth in accordance with that part.

Bilateral Aviation Safety Agreements

Most of the same commenters opposing unilateral application of drug and alcohol testing regulations pointed to the BASAs the U.S. is party to, (*e.g.,* Switzerland, Canada, and the European Union). Commenters detailed that these BASAs include separate detailed agreements on mutual cooperation and technical assistance in the evaluation and acceptance of each country's approved maintenance organization systems (*i.e.,* Maintenance Implementation Procedures agreements). The International Air Transport Association (IATA) commented that BASAs contribute to growth in aviation services by dramatically reducing regulatory compliance costs, making government oversight more efficient, and helping aerospace interests grow and compete globally. IATA recommended that the FAA focus on working with governments that impose equivalent, not duplicate, measures in its efforts to apply requirements for drug and alcohol testing programs outside the territory of the U.S.

Additional commenters asserted that BASAs contain provisions requiring consultation before unilateral rulemaking, which has not yet happened in relation to this proposal. The commenters expressed that the FAA is obligated to ensure that current international agreements are honored, which would include such consultation. Comments from the UK Department for Transport, International Aviation Safety and Environment Division specifically stated that it is important for the FAA to consider consultations under Article 17 of the EU/U.S. BASA.[21]

FAA Response

The FAA has been directed by Congress to promulgate regulations requiring part 145 repair stations outside the U.S. to have a drug and alcohol testing program for their employees who perform work on part 121 aircraft. To the extent that BASA provisions concerning notice and consultation are applicable to the proposed regulations, the FAA intends to follow those provisions. Commenters have not identified any specific BASAs that are in conflict with the statutory requirements this proposed rule would implement, nor is FAA aware of any at this time. The FAA invites comments as to whether there are any BASAs that would conflict with the requirements of this proposed rule. Additional discussion regarding the FAA's international obligations may be found in section IV.D. of this preamble.

Safety Case

Commenters also raised concerns regarding the lack of supporting evidence indicating that a safety case exists to justify the proposed rule. Commenters noted that there have been no documented aviation accidents in the U.S., the European Union, or Hong Kong in which drug use and/or alcohol misuse has been a direct cause or contributing factor. The Federal Office of Civil Aviation (FOCA)—Swiss Confederation stated that it has found no data that would support the existence of a safety case, and Switzerland and other European Aviation Safety Agency (EASA) Member States have safety management provisions in place for maintenance stations and a verifiable track record demonstrating that drug use and/or alcohol misuse does not currently represent a safety concern requiring further regulatory action. Commenters noted that according to the ICAO Accident Data Reporting system, between 1970 and 2012, there were no occurrence reports of drug or alcohol intake at maintenance facilities. Additionally, commenters pointed out that the FAA's own data demonstrates a low risk of drug use and/or alcohol misuse by maintenance personnel in the U.S.

FAA Response

The FAA does not have sufficient data to estimate a baseline level of safety risk associated with drug use and/or alcohol misuse at foreign repair stations. As previously discussed, the FAA received a minimum amount of information pertaining to foreign countries' laws and regulations, program elements of acceptable drug and alcohol testing, and existing drug and alcohol testing programs in other countries. The FAA also recognizes that the number of proven accidents and incidents involving drug use and/or alcohol misuse by maintenance personnel at foreign repair stations is unknown. Because the FAA does not have testing data or knowledge of existing testing programs in other countries, the FAA is unable to estimate the impact of the proposed rule in detecting and deterring drug use and/or alcohol misuse at this time. Therefore, the FAA cannot determine whether the rule would have any additional impact on safety or persons performing non-safety sensitive functions and has, accordingly, scoped this proposal to address the specific statutory mandates in 49 U.S.C. 44733(d)(2) and 49 U.S.C. 44733. The FAA invites comments on this issue.

In addition, the FAA is considering how best to deter drug and alcohol misuse for any aircraft mechanic working on a part 121 aircraft regardless of how that mechanic is employed. Therefore, the FAA seeks comments as to whether the testing requirements in this proposed rule should be extended to foreign aircraft mechanics working directly for part 121 carriers. Commenters are asked to submit data that would allow the FAA to quantify the benefits and costs of expanding drug and alcohol testing requirements to these mechanics.

Financial and Operational Concerns

While many of the commenters noted that it was difficult to estimate the cost of implementing drug and alcohol testing programs since any testing regime closely resembling U.S. requirements does not exist in most areas abroad, they also noted that it was likely that imposition of drug and alcohol testing requirements would have a disproportionate financial impact on small-to-medium sized aerospace companies. Some commenters, including A4A, Honeywell, and Taikoo (Xiamen) Landing Gear Services Co. Ltd. (TALSCO), among others, provided some level of estimated costs. Pratt & Whitney, for example, provided estimated costs for implementing and maintaining a drug and alcohol testing program, specifics of which may be found in the public docket, and stated those extensive costs are without justification if the FAA cannot quantify the added benefit to safety. The Coalition of Industry Groups noted its concern regarding the FAA's responsibility to ensure that the costs do not outweigh the benefits of any agency action. Additionally, Hong Kong Aero Engine Services Limited (HAESL) stated that extra costs will be incurred with no significant benefit.

[21] In light of the withdrawal of the UK from the EU on January 31, 2020, the UK is no longer part of the EU/U.S. BASA. Consultations between the U.S. and UK are now governed by Article IV of the 1995 UK/U.S. BASA.

FAA Response

The FAA acknowledges the commenters' concerns. The FAA used a combination of the estimates submitted by commenters and U.S. data to estimate costs to all part 145 foreign repair stations developing a drug and alcohol testing program that meets U.S. requirements. However, not all estimates provided by commenters were used as some estimates were considered high compared to current practice and estimates obtained through industry outreach. The FAA also acknowledges that small-to-medium sized aerospace companies would be impacted by this rulemaking but does not have sufficient data to isolate the impact to small and medium size foreign repair stations. Additionally, although the FAA is unable to quantify benefits, this proposed rule would apply the FAA's primary tool for detecting and deterring substance abuse by safety-sensitive aviation employees throughout the international aviation community to enhance safety.

International Civil Aviation Organization (ICAO)

A significant number of commenters noted that the appropriate vehicle to set standards to require drug and alcohol testing programs worldwide would be an ICAO initiative. Commenters pointed out that the Act mandates dealing with this issue under the auspices of an ICAO initiative.[22] Many of these commenters, including the European Commission, Boeing Commercial Airplanes, the Embassy of the Netherlands to the U.S., Deutsche Lufthansa, and the Cargo Airline Association, among others, supported proceeding through the ICAO process. Additionally, commenters stated it is inappropriate for the FAA to take further action on this issue without first seeking common ground through ICAO. IATA stated that an ICAO initiative would set a common baseline for safety with adequate flexibility for varying customs and laws, which governments could follow when issuing their own regulations. Most commenters observed that the FAA's historical position regarding global drug and alcohol testing has been to address testing issues through ICAO.

FAA Response

The FAA supports the development of international standards and believes that they would help deter and detect drug and alcohol use that could compromise aviation safety. However, ICAO standards do not presently require ICAO Member States to establish (or direct industry to establish) testing programs to deter or detect drug use and alcohol misuse by aviation personnel in the performance of safety-sensitive functions. ICAO's Annex 1 sets forth international standards and recommended practices for license holders concerning their mental fitness and use of psychoactive substances, including drugs and alcohol. Annex 1 applies to flight crew members[23] and other personnel and recommends the identification and removal of license holders from their safety-sensitive functions while under the influence of any psychoactive substance. Specifically, annex 1 section 1.2.7, Use of Psychoactive Substances, states that holders of licenses provided for in this Annex shall not exercise the privileges of their licenses and related ratings while under the influence of any psychoactive substance which might render them unable to safely and properly exercise these privileges and shall not engage in any problematic use of substances.[24] ICAO provides further guidance about drug and alcohol testing in its *Manual on Prevention of Problematic Use of Substances in the Aviation Workplace;* the manual outlines suitable methods of identifying license holders who are under the influence, including through biochemical testing under certain circumstances. Although the ICAO standards set forth in Annex 1 and many countries' aviation regulations prohibit the use of drugs and alcohol by certain aviation personnel when use may threaten aviation safety, many countries either do not require testing of aviation personnel to verify compliance or do not extend testing to maintenance personnel. In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to ICAO Standards and Recommended Practices (SARP) to the maximum extent practicable. However, the FAA proposes this rule in accordance with the Act's statutory mandate in an area within which there are no ICAO SARPs. Should ICAO adopt drug and alcohol program standards in the future the FAA will work to ensure its drug and alcohol programs are aligned with such SARPs.

3. FAA Extension, Safety, and Security Act of 2016

After the FAA published the ANPRM, as previously discussed, Congress enacted the FAA Extension, Safety, and Security Act of 2016 (2016 Act),[25] which reemphasized Congress' prioritization of drug and alcohol programs for foreign repair station employees in section 2112. Specifically, section 2112 directed the FAA to (1) ensure that an NPRM is published within 90 days of the date of the enactment of the 2016 Act and (2) ensure that the rulemaking is finalized within a year of the NPRM publication.[26] This NPRM is promulgated in accordance with such direction. The FAA notes that, while section 2112 (using the cross-referenced 49 U.S.C. 44733(d)(2)) specifies minimum content for the NPRM, it does not specify minimum content for the final rule, which may be changed from the NPRM in response to comments.

IV. Discussion of the Proposal

A. Application of 14 CFR Part 120 and 49 CFR Parts 40 Through 145 Certificated Repair Stations Located Outside the Territory of the United States (§§ 120.1, 120.123 and 120.227)

Currently, the drug and alcohol testing regulations in 14 CFR part 120 require certain persons to establish a drug and alcohol program. These persons include all air carriers and operators certificated under 14 CFR part 119 authorized to conduct operations under 14 CFR part 121 or part 135; all air traffic control facilities not operated by the FAA or under contract to the U.S. military; all operators as defined in 14 CFR 91.147; all individuals who perform a safety sensitive function provided in subpart E or F of 14 CFR

[22] The FAA surmises that the commenters were indicating § 308(d)(1) of the FAA Modernization and Reform Act of 2012, which states, ''The Secretary of State and the Secretary of Transportation, acting jointly, shall request the governments of foreign countries that are members of the International Civil Aviation Organization to establish international standards for alcohol and controlled substances testing of persons that perform safety-sensitive maintenance functions on commercial air carrier aircraft.'' In response to the Congressional mandate, the FAA notes that prior to the publication of the ANPRM, the Department of State, in conjunction with the FAA, sent a demarche request to countries with active part 145 repair stations requesting support in ICAO action. Of the 66 countries surveyed, 29 replied indicating support to establish international standards for effective drug and alcohol testing of all persons performing safety-sensitive functions on commercial air carrier aircraft within their country through ICAO initiatives.

[23] ICAO defines a ''flight crew member'' as a licensed crew member charged with duties essential to the operation of an aircraft during a flight duty period. ICAO Annex 1, 1.1. Section 1.2(a) identifies flight crew as private pilots; commercial pilots; multi-crew pilot; airline transport pilot; glider pilot; free balloon pilot; flight navigator; and flight engineer. Section 1.2(b) identifies other personnel as aircraft maintenance (technician/engineer/mechanic), air traffic controllers, flight operations officers/flight dispatchers, and aeronautical station operators.

[24] Annex 1, 1.2.7.1, 1.2.7.2.

[25] Public Law 114–190 (Jul. 15, 2016).

[26] Section 2112(b).

part 120; all 14 CFR part 145 certificate holders who perform safety-sensitive functions and elect to implement a drug and alcohol testing program; and all contractors who elect to implement a drug and alcohol testing program.[27] The FAA-mandated testing program consists of compliance with both the FAA's drug and alcohol testing program requirements, 14 CFR part 120 (as applicable), as well as the OST's procedural regulation, 49 CFR part 40.[28]

Notably, 14 CFR part 120 restricts these activities from occurring outside of the U.S. Specifically, certain regulations bar (1) any part of the drug testing process from occurring outside the territory of the U.S., including specimen collection, laboratory processing, and Medical Review Officer (MRO) actions [29] and (2) any testing for alcohol misuse while located outside the territory of the U.S.[30] These regulations have restricted any drug and alcohol testing under 14 CFR part 120 from applicability outside the territory of the U.S. As it pertains to this rulemaking, these regulations are applicable only to domestic part 145 certificate holders who perform safety-sensitive functions within the territories of the U.S. and elect to implement a drug and alcohol testing program under this part.

The U.S. Government has found that drug and alcohol testing programs for domestic aviation personnel who perform safety-sensitive functions on part 121 aircraft are necessary given the potential of drugs and alcohol to impair human performance. Safety-sensitive personnel are responsible for their own safety as well as the safety of countless others due to the inherent nature of their positions; therefore, the FAA has defined certain persons as those with safety-sensitive functions, which includes individuals employed by a part 145 repair station to perform aircraft maintenance duties [31] for a part 121 operator. In the absence of data to support another approach to drug and alcohol testing, the FAA would apply its primary tool for detecting and deterring substance abuse by aviation employees performing safety-sensitive maintenance functions throughout the international aviation community.

Title 49 U.S.C. 44733 requires the Administrator to propose a rule requiring that all employees responsible for safety sensitive maintenance functions on part 121 air carrier aircraft at part 145 repair stations located outside the U.S.[32] be subjected to an alcohol and controlled substances testing program determined *acceptable by the Administrator.* The FAA notes that the legislation specifically used the term ''controlled substances.'' This term is also used in 49 U.S.C. 45102, which originally charged the FAA with prescribing regulations for air carriers and foreign air carriers to conduct certain drug and alcohol testing (*i.e.,* eventual 14 CFR part 120). Title 49 U.S.C. chapter 447 does not include a definition for ''controlled substance.'' However, the FAA finds that given (1) the deference to the FAA Administrator to determine program acceptability in 49 U.S.C. 44733 and (2) the FAA's firmly established drug and alcohol testing regulations based off the original authority in 49 U.S.C. 45201, ''controlled substances'' should be intended to mean the FAA current definition of ''drug'' as based off the definition of ''controlled substances'' provided by 49 U.S.C. 45201.[33] Specifically, 49 U.S.C. 45101 states that the definition of ''controlled substance'' means any substance under section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 *specified by the Administrator of the FAA.*[34]

In 14 CFR 120.7, the FAA defines a ''prohibited drug'' as any of the drugs specified in 49 CFR part 40. OST defines ''drugs'' as marijuana, cocaine, amphetamines, phencyclidine (PCP), and opioids in 49 CFR 40.3. These drugs are aligned with the HHS Mandatory Guidelines established by the HHS for Federal drug-testing programs for scientific testing issues, pursuant to OTETA, as previously discussed [35] and updated as HHS updates their drug categories. Specifically, the HHS Mandatory Guidelines allow Federal agencies with drug-testing responsibilities to test for certain controlled substances set forth by the Controlled Substances Act (*i.e.,* the drugs as defined in 49 CFR 40.3), which is title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.[36] Additionally, the FAA does not believe that Congress intended to expand the scope of testing beyond that required by current airmen and safety-sensitive positions. Should the FAA adopt a differing definition of ''controlled substances,'' part 145 repair stations outside the U.S. would be held to more stringent standards than those required for domestically situated current airmen and safety-sensitive positions. Neither the FAA, nor the OST, has a mechanism to regulate such standards at this time. Therefore, the FAA finds that the established term ''drug'' meets the intention of Congress in using the term ''controlled substances.''

The FAA, as discussed in section III.A. of this preamble, has long held that the standards set forth in 14 CFR part 120 and 49 CFR part 40 are acceptable drug and alcohol testing programs for the aforementioned safety-sensitive functions. The FAA finds that requirements of part 145 repair stations located outside the territory of the U.S. should mirror those inside the U.S. who elect to have a drug and alcohol program. Specifically, the FAA lacks the data or studies that would support a deviation from the current program requirements as applicable to those persons who perform safety-sensitive functions (*i.e.,* 14 CFR part 120 and 49 CFR part 40). Therefore, this proposal would require all employees of part 145 repair stations located outside the territory of the U.S. who perform safety-sensitive maintenance functions on part 121 air carrier aircraft [37] to be subject to

[27] 14 CFR 120.1.

[28] 14 CFR 120.5.

[29] 14 CFR 120.123(a).

[30] 14 CFR 120.227(a).

[31] 49 U.S.C. 44733 specifies ''aircraft maintenance,'' but does not include ''preventive maintenance.'' Safety-sensitive functions are defined in 14 CFR 120.7(n) as functions listed in 14 CFR 120.105 and 120.215. The FAA notes that the list of safety-sensitive functions found in 14 CFR 120.105 and 120.215 includes aircraft maintenance and preventive maintenance as separate duties. The FAA draws a clear distinction between maintenance and preventive maintenance (see: 14 CFR 1.1, expressly excluding preventive maintenance from the definition of maintenance and defining preventive maintenance as mutually exclusive from maintenance). Therefore, preventive maintenance is outside the scope of the mandate and is not covered in these proposed regulations.

[32] Section 308 was promulgated in the U.S. Code as 49 U.S.C. 44733, *Inspection of repair stations located outside the United States.* Under 49 U.S.C. chapter 447, ''United States'' is defined as the States of the United States, the District of Columbia, and the territories and possessions of the United States, including the territorial sea and the overlying airspace. 14 CFR 1.1 similarly defines United States, in a geographical sense, as the States, the District of Columbia, Puerto Rico, and the possessions including the territorial waters, and the airspace of those areas.

[33] This definition was set forth by Public Law 103–272, section 1(e) (Jul. 5, 1994).

[34] The FAA, and the legislation itself, recognize that countries may have different laws and regulations that set forth a different set of acceptable or prohibited drugs. Section IV.C. of this preamble discusses this issue in further detail.

[35] Public Law 102–143, title V, 105 Stat. 952 (Oct. 28, 1991). Specifically, OTETA required the DOT and agencies to look to the HHS Mandatory Guidelines for the scientific and technical guidelines regarding the drugs to be tested.

[36] Because this proposal would apply 49 CFR part 40, any type of testing allowed under part 40 would be permitted, including oral fluid testing once at least two labs are approved to test those specimens.

[37] There are currently 977 part 145 repair stations located throughout 65 foreign countries that maintain an FAA-issued certificate. Many of these

Continued

the current FAA-mandated testing programs. Accordingly, for purposes of 49 U.S.C. 44733(d)(2), the Administrator finds that the current drug and alcohol testing scheme is acceptable in applicability to the affected part 145 repair stations outside the territory of the U.S.

Therefore, the FAA proposes three revisions to 14 CFR 120.1, which outlines to whom part 120 applies. First, the FAA proposes to revise current 14 CFR 120.1(c) to specify that paragraph (c) applies to those part 145 certificate holders located in the territory of the U.S. who elect to implement a drug and alcohol testing program under 14 CFR part 120. The FAA notes that there is no substantive change to the current applicability of domestic part 145 certificate holders. Next, the FAA proposes to expand applicability of 14 CFR part 120 to all part 145 certificate holders outside the territory of the U.S. who perform safety-sensitive maintenance functions on part 121 air carrier aircraft by adding new paragraph (d).[38] This, in turn, would redesignate current 14 CFR 120.1(d) as paragraph (e).

Additionally, the FAA finds it necessary to provide specific instructions to affected part 145 repair stations outside the territory of the U.S., consistent with the requirements for other affected persons (*i.e.,* the persons listed in 14 CFR 120.1), on how to obtain the necessary authority to implement a drug and alcohol testing program. Specifically, 14 CFR 120.117 and 120.225 set forth certain requirements specific to the person implementing a drug and alcohol testing program and do not currently include part 145 repair stations affected by this proposed rulemaking.

The FAA, therefore, proposes three revisions to the charts set forth in 14 CFR 120.117(a) and (c), which would treat applicable part 145 repair stations outside the territory of the U.S. similar to those domestic part 145 repair stations who choose to enact their own drug testing programs. First, 14 CFR 120.117(a) provides the documentation that a company must obtain from the FAA to implement a drug testing program: an Antidrug and Alcohol Misuse Prevention Program Operations Specification (A449), Letter of Authorization (A049), or Drug and Alcohol Testing Program Registration. Second, a revision to paragraph (a)(5) is necessary to specify the requirements in that paragraph, which permit a repair station to elect to implement a testing program, are applicable only to part 145 certificate holders located inside the territory of the U.S. Finally, the FAA proposes to add new paragraph (a)(6) within the chart in 14 CFR 120.117. This paragraph would require a part 145 repair station located outside the territory of the U.S. whose employees perform safety-sensitive maintenance functions on part 121 air carrier aircraft to obtain an A449 in their Operations Specification by contacting the repair station's Principal Maintenance Inspector. The A449 serves as the certification to comply with the drug and alcohol testing regulations, 49 CFR part 40 and 14 CFR part 120. In turn, current 14 CFR 120.117(a)(6) would be redesignated as paragraph (a)(7).

Similarly, 14 CFR 120.117(c) prescribes certain requirements pertaining to the implementation of an Antidrug and Alcohol Misuse Prevention Program. The FAA proposes several revisions to 14 CFR 120.117(c). First, a revision to paragraph (c)(1) is necessary to specify the requirements in that paragraph are applicable only to part 145 certificate holders located inside the territory of the U.S. Next, the FAA proposes new paragraph (c)(2) to require the applicable repair station located outside the territory of the U.S. to (1) obtain an A449 in their Operations Specification by contacting the repair station's Principal Maintenance Inspector, (2) implement the drug testing program no later than one year from the effective date of the regulation[39] (or, if a foreign repair station begins operations more than one year after the effective date of the regulation, implement a drug testing program no later than the date the repair station begins operations), and (3) meet the requirements of 14 CFR part 120, subpart E. In turn, current 14 CFR 120.117(c)(2) would be redesignated as paragraph (c)(3). Finally, the FAA proposes minor grammatical changes to the headings of the chart set forth by 14 CFR 120.117(c) and introductory text of paragraphs (c)(1) and (3) to conform with the heading revisions.

Subpart F of 14 CFR part 120 sets forth the alcohol testing program requirements. The requirements pertaining to implementation largely mirror those set forth in subpart E, Drug Testing Program Requirements. The FAA, therefore, proposes similar amendments to the implementation charts set forth in 14 CFR 120.225(a) and (c) for the same reasons as previously discussed. Specifically, in 14 CFR 120.225(a), the FAA proposes to: first, revise the introductory language of paragraph (a)(5) to specify that paragraph is applicable to part 145 certificate holders located inside the territory of the U.S.; second, add new paragraph (a)(6) to include the requirements for a part 145 repair station located outside the territory of the U.S. who performs safety-sensitive maintenance functions on part 121 air carrier aircraft; and, third, redesignate current paragraph (a)(6) as new (a)(7). Likewise, in 14 CFR 120.225(c), the FAA proposes to: first, revise paragraph (c)(1) as necessary to specify the requirements in that paragraph are applicable only to part 145 certificate holders located inside the territory of the U.S.; second, add new paragraph (c)(2) to require the applicable repair station located outside the territory of the U.S. to (1) obtain an A449 in their Operations Specification by contacting the repair station's Principal Maintenance Inspector, (2) implement the drug testing program no later than one year from the effective date of the regulation (or, if a foreign repair station begins operations more than one year after the effective date of the regulation, implement a drug testing program no later than the date the repair station begins operations), and (3) meet the requirements of 14 CFR part 120, subpart E; and, third, redesignate current paragraph (c)(2) as (c)(3). Finally, the FAA proposes, first, minor grammatical changes to the headings of the chart set forth by 14 CFR 120.225(c) and introductory text of paragraphs (c)(1) and (3) to conform with the heading revisions and, second, to add the correct introductory text in paragraph (d), which is currently and inadvertently blank in the regulations.

B. Conforming Amendments To Facilitate Drug and Alcohol Procedures Outside the United States (§§ 120.123 and 120.227)

There are certain regulations in 14 CFR part 120 that effectively restrict any drug and alcohol programs from implementation outside of the U.S. Specifically, 14 CFR 120.123(a) bars any

repair stations provide maintenance functions to part 121 air carrier aircraft.

[38] The FAA notes that domestic repair stations may elect to implement a drug and alcohol testing program; however, foreign repair stations must implement a drug and alcohol testing program covering employees who perform maintenance on part 121 aircraft. If a domestic repair station does not elect to implement a drug and alcohol testing program, then the part 121 air carrier must cover the repair station's safety-sensitive employees under its FAA drug and alcohol testing program.

[39] The FAA finds that a one-year implementation date from the effective date of the legislation would give part 145 repair stations outside the territory of the U.S. sufficient time to identify laws that may contradict the regulations set forth in 14 CFR part 120 and 49 CFR part 40 and provide the FAA and DOT sufficient time to process waivers and exemptions, respectively, addressing such barriers.

part of the drug testing process from being conducted outside the territory of the U.S. and requires that employees assigned safety-sensitive functions solely outside the territory of the U.S. to be removed from random testing pools, only to be returned once the covered employee has resumed functions wholly or partially in the U.S. Additionally, 14 CFR 120.123(b) states that the provisions of subpart E (Drug Testing Program Requirements) do not apply to any individual who performs a function pursuant to 14 CFR 120.105 by contract for an employer outside the territory of the U.S. Likewise, 14 CFR 120.227(a) bars covered employees from being tested for alcohol misuse while located outside the territory of the U.S. and mirrors the requirement of removal of a covered employee outside the territory of the U.S. from the random testing pool as with drug testing programs previously discussed. Additionally, 14 CFR 120.227(b) states that the provisions of subpart E (Alcohol Testing Program Requirements) do not apply to any individual who performs a safety sensitive function by contract for an employer outside the territory of the U.S.

The FAA recognizes that these regulations serve as barriers to the implementation of a drug and alcohol testing program for a part 145 repair station outside the territory of the U.S. Without conforming amendments to except these repair stations from 14 CFR 120.123 and 120.227, it would be impossible to comply with the proposed regulations and the current regulations. Therefore, the FAA proposes to amend §§ 120.123 and 120.227 to allow drug and alcohol testing processes to be conducted on employees of part 145 repair stations located outside the territory of the U.S. who perform safety-sensitive maintenance functions on part 121 air carrier aircraft. Specifically, this proposal would add language at the beginning of 14 CFR 120.123(a), 120.123(a)(1), 120.123(b), 120.227(a), 120.227(a)(1), and 120.227(b) that would except persons under proposed 14 CFR 120.1(d) from applicability of those regulations restricting drug and alcohol testing outside the territory of the U.S.

Currently, part 121 air carriers are responsible for ensuring that individuals who perform safety-sensitive maintenance functions within the territory of the U.S. are subject to testing. If a part 121 air carrier does not include a maintenance worker under their own testing program, it must ensure the worker is included in the FAA-mandated testing program of whomever the air carrier uses to perform safety-sensitive maintenance functions (*e.g.,* a part 145 repair station). In keeping with the congressional mandate, this proposal does not change the language of the regulation that removes part 121 employees located outside of the territory of the U.S. from the testing pool. Thus, part 121 air carriers that directly perform their own maintenance outside the territory of the U.S. would not be required to test their employees for drugs and alcohol. If the part 121 air carrier decides to hire (either as an employee or an independent contractor) the foreign part 145 repair station employees who work on its aircraft, then those employees would not be subject to testing because the part 121 air carrier is restricted from including into its testing pool employees who work solely outside the territory of the U.S.

This approach is consistent with the statutory mandate, which did not address drug and alcohol testing of part 121 employees performing safety-sensitive maintenance functions outside the territory of the U.S. As previously discussed, the FAA lacks safety data and supporting research to support a proposal of drug and alcohol testing beyond that required by the legislation. However, the FAA is considering how best to deter drug use and alcohol misuse for any aircraft mechanic working on a part 121 aircraft regardless of how that mechanic is employed. Therefore, the FAA seeks comments, with supporting data, as to whether the testing requirements in this proposed rule should be extended to foreign aircraft mechanics working directly for part 121 carriers.

C. Exemptions and Waivers to Drug and Alcohol Program Requirements (§§ 120.5 and 120.9)

The FAA recognizes that the different laws and regulations of some countries (including, but not limited to, privacy laws) may place limitations on drug and alcohol testing, prohibit it entirely, or place conditions on how testing would be done. In fact, Congress contemplated this potential barrier in 49 U.S.C. 44733(d)(2), as evidenced by the language requiring the drug and alcohol program to be both acceptable to the Administrator and consistent with the applicable laws of the country in which the repair station is located. As previously discussed in the responses to comments to the ANPRM, the FAA seeks to avoid situations whereby the regulations of the FAA are inconsistent with laws in other sovereign countries. As this proposal extends the drug and alcohol testing requirements beyond the territory of the U.S., the FAA realizes that the different laws of some countries, including, but not limited to, privacy laws, may place limitations on drug and alcohol testing or prohibit it entirely. For example, some countries may bar pre-employment drug testing, which is required by 14 CFR 120.109(a).

Section 120.5 requires each employer having a drug and alcohol testing program under part 120 to ensure that all drug and alcohol testing conducted under that part complies with the procedures set forth in 49 CFR part 40. In evaluating the effects of the congressional mandate, the FAA has scrutinized the many challenges associated with the establishment and implementation of drug and alcohol testing programs outside the U.S. that comply with both the FAA regulations and the DOT's testing standards and procedures.[40] In cases in which compliance with certain provisions of 49 CFR part 40 would not be attainable due to legal restrictions in the country where testing must occur, the part 145 repair station could apply for an exemption from part 40 using the process described in 49 CFR 40.7. Under § 40.7, an exemption will only be granted if the requestor documents special or exceptional circumstances (*e.g.,* a country's law) that make compliance with a specific provision of 49 CFR part 40 impracticable. To acknowledge the potential need for foreign repair stations to obtain exemptions issued by the DOT from 49 CFR part 40, the FAA proposes to add language to 14 CFR 120.5 to clarify that an employer's drug and alcohol testing conducted pursuant to 14 CFR part 120 must comply with the procedures set forth in 49 CFR part 40, to include any exemptions issued to that employer in accordance with 49 CFR 40.7.

Traditionally, when a person cannot comply with an FAA regulation, the person may seek an exemption through

[40] 49 CFR 40.3 sets forth the terms used in part 40 and includes the definition for laboratory, which is any U.S. laboratory certified by HHS under the National Laboratory Certification Program as meeting the minimum standards of Subpart C of the HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs; or, in the case of foreign laboratories, a laboratory approved for participation by DOT under part 40. Laboratories participating in the DOT drug testing program must comply with the requirements of 49 CFR part 40 and with all applicable requirements of HHS in testing DOT specimens. Currently, a laboratory located in the U.S. is permitted to participate in DOT drug testing only if it is certified by HHS under the National Laboratory Certification Program (NLCP), or, in the case of a foreign laboratory, if it is approved for participation by the DOT with respect to part 40. The FAA recognizes that there are, first, no HHS certified laboratories in any of the foreign countries impacted by this rulemaking and, second, that there is a multitude of differently situated laboratories internationally. Therefore, a foreign laboratory would be required to seek approval in accordance with DOT procedures under 49 CFR part 40.

the procedures set forth by 14 CFR part 11. However, to streamline and efficiently address potential international legal conflicts, the FAA proposes to add waiver authority in new 14 CFR 120.9 that will allow repair stations located outside of the U.S. to request waivers from specific provisions of 14 CFR part 120. Specifically, proposed 14 CFR 120.9(a) sets forth the waiver authority for those applicable repair stations that would be unable to comply with the requirements of 14 CFR part 120 due to the laws of the country within which the repair station is located. New paragraph (b) would set forth the information required by the Administrator to evaluate and process the waiver request.

For example, the Administrator requires basic informational details; the specific section(s) of 14 CFR part 120 from which a waiver is sought; the reasons why granting the waiver would not contravene the purpose of 14 CFR part 120, as defined in § 120.5; a copy of the law that is inconsistent with 14 CFR part 120; an explanation of how the law applies to affected employees and how it is inconsistent with 14 CFR part 120; and a description of alternate means used to achieve the objectives of the part 120 provision from which the waiver is sought (or, if it is impossible to achieve the objective by alternative means, a justification of why it would be so). Finally, new 14 CFR 120.9(c) would provide the manner in which the repair station should submit their waiver request.

The FAA finds that the existing exemption process in 49 CFR part 40 in tandem with the proposed waiver process in new 14 CFR 120.9 would provide sufficient pathways to work with part 145 certificated repair stations outside the territory of the U.S. to ensure these repair stations are not in violation of the laws of the country within which they are situated. The FAA notes that each process is intended to provide relief for its respective regulations. While the FAA requires compliance with 49 CFR part 40 through its regulations, the FAA does not have the authority to exempt a person from the regulations situated there, and person should not request a waiver from the FAA for relief from the DOT's regulations. If a person determines they cannot meet certain 49 CFR part 40 requirements (*e.g.,* if their country's laws do not allow drug testing for one or more of the drugs required under 49 CFR 40.85), the person should follow the process set forth by 49 CFR 40.7; should the DOT grant the exemption, the FAA would recognize the exemption through proposed 14 CFR 120.5. Likewise, the waiver process set forth in new 14 CFR 120.9 provides an avenue by which a person may seek relief from FAA regulations that a person determines they cannot meet (*e.g.,* if their country's laws do not allow pre-employment drug testing, which is required under 14 CFR 120.109(a)). As such, a person may have to appeal to both the DOT and FAA for an exemption and a waiver, respectively, if there are regulations in each part that a person seeks relief from.

D. Impact on International Agreements

As noted in the discussion of comments to the ANPRM, commenters raised concerns regarding the impact of the legislation and enabling regulations on existing Bilateral Aviation Safety Agreements (BASA). However, commenters have not identified any specific BASAs that are in conflict with the statutory requirements this proposed rule would implement, nor is FAA aware of any at this time. The FAA invites comments as to whether there are any BASAs that would conflict with the requirements of this proposed rule.

V. Regulatory Notices and Analyses

Federal agencies consider impacts of regulatory actions under a variety of Executive orders and other requirements. First, Executive Order 12866 and Executive Order 13563, as amended by Executive Order 14094 (''Modernizing Regulatory Review''), direct that each Federal agency may propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39 as amended) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the U.S. In developing U.S. standards, the Trade Agreements Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. The current threshold after adjustment for inflation is $177,000,000, using the most current (2022) Implicit Price Deflator for the Gross Domestic Product. This portion of the preamble summarizes the FAA's analysis of the economic impacts of this proposed rule. The FAA has provided a more detailed Regulatory Impact Analysis of this proposed rule in the docket of this rulemaking.

In conducting these analyses, the FAA has determined that this proposed rule: is a ''significant regulatory action,'' as defined in section 3(f) of Executive Order 12866 because it raises legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in Executive Order 12866 as amended by Executive Order 14094; could have a significant economic impact on a substantial number of small entities; could create unnecessary obstacles to the foreign commerce of the U.S.; and would not impose an unfunded mandate on state, local, or tribal governments, or on the private sector by exceeding the threshold identified above. These analyses are summarized below.

A. Regulatory Evaluation

Total Benefits and Costs of This Rule

In response to Congressional direction, the FAA proposes to require certificated part 145 repair stations located outside the U.S. and its territories whose employees perform safety-sensitive maintenance functions on part 121 air carrier aircraft to ensure those employees are subject to a controlled substance and alcohol testing program consistent with the applicable laws of the country in which the repair station is located. This proposed rule would require part 145 repair station located outside the territory of the U.S. to cover its employees performing maintenance functions on part 121 air carrier aircraft under its own testing program that meets the requirements of 49 CFR part 40 and 14 CFR part 120. However, if a part 145 repair station cannot meet one or all requirements in 49 CFR part 40 (*e.g.,* the laws of the country where the repair station is located are inconsistent with the regulations), they may apply for an exemption using the process described in 49 CFR 40.7. Similarly, if a part 145 repair station cannot meet one or all requirements in 14 CFR part 120, they may apply for a waiver in accordance with proposed waiver authority. Although there are no quantifiable benefits, this rulemaking would apply the FAA's existing primary tool for detecting and deterring substance abuse by safety-sensitive aviation employees, especially illegal drug use, throughout

the international aviation community to enhance aviation safety. The total cost, at seven percent present value, of this proposed rule equals the foreign repair station cost of $102.3 million, plus FAA cost of $6.3 million for a total of $108.7 million ($122.4 million at three percent present value) over five years.

Who is potentially affected by this rule?

- Part 145 Certificated Foreign Repair Station outside the U.S. that performs safety-sensitive maintenance functions on part 121 aircraft.
- The FAA Office of Aerospace Medicine.

I. Costs of This Rule

Part 145 certificated foreign repair stations outside the U.S. and the FAA would incur the cost of this proposed rule. The estimated cost of the proposed rule to part 145 certificated foreign repair stations are the costs to implement a drug and alcohol testing program that adheres to U.S. domestic testing standards. Cost to foreign repair stations would consist of developing a drug and alcohol testing program, training, testing safety sensitive maintenance employees for drugs and alcohol, and documentations. Total cost to foreign repair stations over five years, at seven percent present value, sums to $102.3 million with and annualized cost of $24.9 million. At three percent present value, estimated total cost to foreign repair stations is $115.2 million with an annualized cost of $25.1 million.

TABLE 1—COST TO PART 145 FOREIGN REPAIR STATIONS OVER 5 YEARS

[$Millions] *

Year	Program and training development & maintenance	Training	Testing (drug and alcohol)	Annual reports	Total cost (7% PV)	Total cost (3% PV)
1	$0.5	$12.9	$0.0	$3.8	$16.1	$16.7
2	0.4	2.2	9.0	14.1	22.5	24.3
3	0.4	2.3	9.4	14.7	21.9	24.5
4	0.4	2.4	9.7	15.3	21.2	24.7
5	0.4	2.5	10.1	15.9	20.6	24.9
Total	2.2	22.2	38.3	63.9	102.3	115.2

* These numbers are subject to rounding error.

Cost to the FAA would include inspections and the necessary documentation associated with monitoring these repair stations. Total cost to FAA over five years, at seven percent present value, sums to $6.3 million with an annualized cost of $1.5 million. At three percent present value, total cost is $7.2 million with an annualized cost of $1.6 million.

The FAA also invites commenters to submit data that would allow it to quantify the costs of extending this proposed rule to foreign aircraft mechanics employed directly by part 121 certificate holders.

II. Benefits of This Rule

Congress mandated that the FAA propose a rule that establishes drug and alcohol testing programs for foreign repair stations. Any benefits of the regulations would result from potential reductions in safety risks, any improvements in safety in detecting and deterring drug use and/or alcohol misuse, and worker productivity. The FAA concludes that two specific sets of benefits may accrue from this rulemaking:

- The prevention of potential injuries and fatalities and property losses resulting from accidents attributed to drug use/alcohol misuse or neglect or error on the part of individuals whose judgement or motor skills may be impaired by the presence of alcohol or drugs; and
- The potential reduction in absenteeism, lost worker productivity, and other cost to employers, as well as improved general safety in the workplace, by the deterrence of drug use and/or alcohol misuse.

However, the FAA lacks sufficient data to estimate a baseline level of safety risk associated with a drug and alcohol testing program at part 145 certificated foreign repair stations that perform safety sensitive maintenance on part 121 aircraft. Additionally, it is difficult to estimate (and the FAA does not have data on) the impact of the proposed rule in detecting and deterring drug use and/or alcohol misuse. To estimate safety and productivity benefits that would result from this proposed rule, the FAA would need estimates of the following:

- Baseline risks attributable to drug use and/or alcohol misuse;
- Effectiveness of the rule; and
- Value of the reduction in risk of affected outcomes.

The FAA invites comments on this issue. The FAA also invites commenters to submit data that would allow it to quantify the safety and productivity benefits of extending this proposed rule to foreign aircraft mechanics employed directly by part 121 certificate holders.

Baseline Risks Attributable to Drug Use and/or Alcohol Misuse

The FAA does not have data to estimate a baseline level of safety risk associated with safety-sensitive maintenance personnel drug use and/or alcohol misuse. The FAA acknowledges there have been no accidents or incidents related to safety-sensitive maintenance personnel using drugs or alcohol. The FAA may use accidents or incidents related to part 121 aircraft that list maintenance as either a cause or factor in the accident report as a proxy to assess the decreased risk of injuries, fatalities, and property losses. However, it is difficult to attribute an accident or incident that occurs months after the maintenance was completed to poor maintenance work related to drug use and/or alcohol misuse.

Effectiveness of the Rule

The FAA would also need data on the effect of the rule on maintenance workers' drug use and/or alcohol misuse and the resulting effect on job performance. For example, drug and alcohol programs may serve as a deterrent, resulting in less drug use and/or alcohol misuse by employees and higher productivity. However, it would be difficult to analyze the direct causal effect of less drug use and/or alcohol misuse to improved productivity. The FAA would need to retrieve extensive data, such as employees' health levels,

employees' sleep patterns, changes to operating procedures, levels of education and training, and staffing levels, amongst other factors, to isolate the direct effect of a decrease in drug or alcohol usage on productivity levels. Additionally, even if this data were available, the analysis would be extensive and there would be academic questions regarding whether the causal effect was properly measured.

Additionally, as mentioned above, there are no accidents or incidents directly related to drug use and/or alcohol misuse to estimate the effect of the rule on injuries, fatalities, or property loss. Therefore, there is a lack of information to establish a baseline.

Value of Risk Reduction

The safety risks from drug use and/or alcohol misuse are increased risk of injuries and fatalities in the event of an accident or incident. The FAA values the reductions in such risks using the value of statistical life (VSL) for fatalities and fractions of the VSL based on the Maximum Abbreviated Injury Scale (MAIS) for injuries. The Department of Transportation guidance on valuing reductions in fatalities and injuries [41] could be used to monetize and quantify estimates of the potential safety benefits associated with this rulemaking.

Alternatives Considered

Alternative 1—the Status Quo—The status quo represents a situation in which the FAA would not propose to require part 145 foreign repair stations to test their safety-sensitive maintenance personnel for drugs and alcohol. This alternative is counter to Congressional direction and, therefore, rejected.

Alternative 2—The FAA would work through the International Civil Aviation Organization (ICAO) to create an international standard for drug and alcohol testing of maintenance personnel at repair stations. While the FAA is willing to work with ICAO, that alternative may not meet Congressional direction due to the multitude of Member State equities considered in the implementation of an ICAO standard. In other words, Congress directed the FAA to establish a program acceptable to the Administrator; working through ICAO to create an international standard may not expeditiously meet this intention given the time, resources, and scope of the adoption of an international standard.

[41] DOT Departmental Guidance on Valuation of a Statistical Life. Economic Analyses. Office of the Secretary of Transportation. *https://www.transportation.gov/office-policy/transportation-policy/revised-departmental-guidance-on-valuation-of-a-statistical-life-in-economic-analysis.*

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act (RFA) of 1980, Public Law 96–354, (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) and the Small Business Jobs Act of 2010 (Pub. L. 111–240), requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term ''small entities'' comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The FAA is publishing this Initial Regulatory Flexibility Analysis (IRFA) to aid the public in commenting on the potential impacts to small entities from this proposal. The FAA invites interested parties to submit data and information regarding the potential economic impact that would result from the proposal. The FAA will consider comments when making a determination or when completing a Final Regulatory Flexibility Analysis.

Under section 603(b) and (c) of the RFA, an IRFA must contain the following:

(1) A description of the reasons why the action by the agency is being considered;

(2) A succinct statement of the objective of, and legal basis for, the proposed rule;

(3) A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule; and

(6) A description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities.

1.1 Reasons the Action Is Being Considered

The proposed rule is in response to Congressional mandate that the FAA propose a rule to establish drug and alcohol testing program requirements for part 145 repair stations outside the territory of the United States that provide safety-sensitive maintenance functions for part 121 air carriers acceptable to the FAA Administrator.

1.2 Objectives and Legal Basis of the Proposed Rule

This proposed rule would require certificated part 145 repair stations located outside the territory of the United States (U.S.) to ensure that employees who perform aircraft maintenance on part 121 air carrier aircraft are subject to a drug and alcohol testing program. A part 145 repair station located outside the territory of the U.S. would cover its employees performing maintenance functions on part 121 air carrier aircraft under its own testing program meeting the requirements of 49 CFR part 40 and 14 CFR part 120. If a part 145 repair station cannot meet one or all requirements in 49 CFR part 40 (*e.g.,* the laws of the country where the repair station is located are inconsistent with the regulations), the part 145 repair station may apply for an exemption using the process described in 49 CFR 40.7. Similarly, if a part 145 repair station cannot meet one or all requirements in 14 CFR part 120, they may apply for a waiver in accordance with proposed waiver authority.

The FAA's authority to issue rules on aviation safety is in title 49 of the United States Code (49 U.S.C.), specifically 49 U.S.C. 106 and 49 U.S.C. 45102. This proposed rule is further promulgated under section 308 of the FAA Modernization and Reform Act of 2012 (the Act) (49 U.S.C. 44733) and section 2112 of the FAA Extension, Safety, and Security Act of 2016, which directed publication of a notice of proposed rulemaking in accordance with 49 U.S.C. 44733.

1.3 All Federal Rules That May Duplicate, Overlap, or Conflict

There are no relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule.

1.4 Description and Estimate of the Number of Small Entities

This proposed rule would impact part 145 repair stations located outside the territory of the U.S. that perform safety sensitive maintenance functions on part 121 air carrier aircraft. The act defines a small business as ''a business entity

organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.'' [42] While the regulatory flexibility determination does not require small foreign entities to be considered, foreign repair stations may be using U.S. components or labor, especially if they are working on U.S. manufactured aircraft; therefore, the FAA assumes the RFA would apply.

The SBA (2022) established size standards for various types of economic activities, or industries, under the North American Industry Classification System (NAICS).[43] These size standards generally define small businesses based on the number of employees or annual receipts. Table 2 shows the SBA size standard, based on the NAICS code, applicable to repair stations, as it encompasses air transport support activities to include aircraft maintenance and repair services.

TABLE 2—SMALL BUSINESS SIZE STANDARDS: AIRCRAFT MAINTENANCE AND REPAIR SERVICES

NAICS code	Description	Size standard
488190	Other Support Activities for Air Transportation	$40.0 million.

Source: SBA (2022).
NAICS = North American Industrial Classification System.
SBA = Small Business Administration.

Although the FAA was able to identify a size standard for repair stations to be considered small, the FAA lacks financial data to determine if foreign repair stations meet the applicable size standard. Instead, the FAA provides an analysis estimating the total cost to small entities based on available data for domestic repair stations. A 2011 antidrug and alcohol misuse prevention rule for domestic repair stations analyzed the effect on domestic repair stations that were small entities and subcontractors those entities used. That rule based the regulatory flexibility determination analysis on a Transportation Security Administration (TSA) study that used Dun & Bradstreet data to estimate the share of domestic repair stations that would be considered small entities.[44] The findings show that 93.28% of domestic repair stations would be classified as small entities. Extrapolating this estimate to the 977 foreign repair stations used in the analysis of this rulemaking results in 912 foreign repair stations that could be considered small entities.[45] The FAA seeks comment and requests data on how this rulemaking will affect part 145 foreign repair stations.

1.5 Projected Reporting, Recordkeeping, and Other Compliance Requirements

Based on the total nominal cost of the rule to repair stations, $126.5 million, the cost per repair station is $129,473.[46] Multiplying the cost per repair station by the estimated 912 repair stations that are small entities results in a total cost to small entities of $118.1 million over five years. Table 3 shows the estimated annualized compliance costs by category.

TABLE 3—AVERAGE COST OF COMPLIANCE AND SMALL ENTITIES

Category	Number of small entities	Average annualized cost per repair station
Program and Training Development & Maintenance Cost	912	$444.69
Training	912	3,689.98
Testing Cost	912	6,366.88
Paperwork	912	10,624.49

[1] Based on a baseline of existing practices and using a 7% discount rate.

1.6 Significant Alternatives Considered

Alternative 1—the Status Quo—The status quo represents a situation in which the FAA would not propose to require part 145 foreign repair stations to test their safety-sensitive maintenance personnel for drugs and alcohol. This alternative is counter to Congressional direction and, therefore, rejected.

Alternative 2—The FAA would work through the International Civil Aviation Organization (ICAO) to create an international standard for drug and alcohol testing of maintenance personnel at repair stations. While the FAA is willing to work with ICAO, 49 U.S.C. 44733(d)(2) requires the FAA to expeditiously proceed with this rulemaking. In other words, Congress directed the FAA to establish a program acceptable to the Administrator; working through ICAO to create an international standard may not expeditiously meet this intention given

[42] 13 CFR 121.105(a)(1). The Regulatory Flexibility Act defines a ''small business'' as having the same meaning as ''small business concern'' under section 3 of the Small Business Act. 5 U.S.C. 601(3). Section 121.105 of 13 CFR contains the Small Business Administration's implementing regulations clarifying the definition of ''small business concern.''

[43] Small Business Administration (SBA). 2019. Table of Size Standards. Effective August 12, 2019. *https://www.sba.gov/document/support--table-size-standards.*

[44] Final Rule, Supplemental Regulatory Flexibility Determination, Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities: Supplemental Regulatory Flexibility Determination, 76 FR 12559 (Mar. 8, 2011).

[45] The calculation is as follows: 977*.9328 = 911.31. This estimate is rounded up to get 912.

[46] $126,495,150/977 = $129,473.03.

the time, resources, and scope of the adoption of an international standard.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the U.S. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the U.S., so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. This rulemaking is congressionally mandated. The FAA assessed the potential effect of this proposed rule and determined that it ensures the safety of the American public while noting some countries and foreign trade associations, in their comments, voiced their opposition to an FAA drug and alcohol testing standard for foreign repair stations. In comments to the ANPRM, as discussed in section III.B.2. of this preamble, these countries cited failure of the legislation to recognize each nation's sovereignty and cited that the International Civil Aviation Organization (ICAO) would be the appropriate vehicle to set worldwide standards. As a result, this rulemaking could create an obstacle or retaliation to foreign commerce. The FAA invites comments on this issue.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $177.0 million in lieu of $100 million. This proposed rule does not contain such a mandate; therefore, the requirements of title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number.

This action contains the following amendments to the existing information collection requirements previously approved under OMB Control Number 2120–0535. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA has submitted these proposed information collection amendments to OMB for its review.

Summary: Under §§ 120.1, 120.123 and 120.227, the proposed rule would extend the drug and alcohol testing regulations beyond the territory of the U.S. The proposal would require all employees of part 145 repair stations located outside of the U.S. who perform maintenance on part 121 air carrier aircraft to be subject to a drug and alcohol testing program. Of the approximately 977 part 145 repair stations located throughout 66 foreign countries, it is likely that all of these repair stations would continue to perform maintenance on part 121 air carrier aircraft. If the repair stations continue to perform maintenance for part 121 air carrier aircraft, each repair station would be required to obtain an *Antidrug and Alcohol Misuse Prevention Program Operations Specification.* In addition, each repair station located outside the territory of the U.S. would be required to provide drug and alcohol testing program management information system (MIS) data.

Use: The information would be used by the part 145 repair station located outside of the territory of the U.S. to certify implementation and maintenance of a drug and alcohol testing program. The FAA's Drug Abatement Compliance and Enforcement Inspectors would use this information to identify those foreign repair stations with an active program for inspection scheduling. Inspections are used to verify compliance with the drug and alcohol testing regulations and requirements. In addition, the Drug Abatement Division would use the annual MIS data reported to calculate the annual random drug and alcohol testing rates in the aviation industry.

Respondents (including number of): There are currently 977 part 145 certificated repair stations located outside the territory of the U.S.

Frequency: Part 145 repair stations located outside the territory of the U.S. would provide information for program certification only once; however, these repair stations would also incur annual program maintenance: *e.g.,* updates to the programs per new guidance; the random pool list; and the overall testing process. The aggregate annual testing data would be provided electronically through the Department of Transportation's Drug and Alcohol Management Information System.

Annual Burden Estimate

1. Burden for Program Certification and Annual Program Maintenance

Documentation	Number of repair stations	Hours per repair station	Hourly wage	Total cost
Antidrug and Alcohol Misuse Prevention Program Operations Specification	977	[47] 16.2	[48] $26.90	$425,757

[47] Based on the previous PRA, the FAA assumes 16 hours in the first year to establish the testing program and one hour to register with the FAA's Drug Abatement Division. Therefore, 17 hours are required for the first year. For each year after, the recurring time to update and maintain the testing list will be 16 hours. The average over five years results in the 16.2 hours per year.

[48] Office and Administrative Support Workers, All Other (SOC 43–9119) NAICS 481000—Air Transportation, May 2020; Mean Hourly wage *https://www.bls.gov/oes/2020/may/oes439199.htm:* Includes Fringe Benefits.

2. Burden for Annual Test Data

Documentation	[49] Total records	Time per record (hours)	Hourly wage	Total cost	Average yearly cost [50]
Training records	656,720	0.25	[51] $34.47	$5,659,285	$1,131,857
Records related to the alcohol and drug collection process, test results, refusal to test, employee dispute records, SAP reports, follow-up tests	335,354	5.0	34.47	57,798,262	11,559,652
Total	992,074	N/A	N/A	63,457,547	12,691,509

To calculate the number of drug and alcohol training records, the FAA took the 2021 data showing 147,194 mechanics and 29,439 supervisors and accounted for a four percent growth rate over five years. Accounting for these rates results in an initial first year total of 159,205 mechanics and 31,842 supervisors. This is a total of 191,047 employees. In the first year all mechanics and supervisors will take anti-drug and alcohol training. These are two separate trainings. This results in 191,047 records for anti-drug training and 191,047 for alcohol training. In addition, supervisors will have to take an additional supervisor reasonable cause/reasonable suspicion determinations training for drugs and alcohol. This adds another 63,684 records since they are two separate trainings as well.[52] Therefore, in the first year, there will be a total of 445,778 records.[53]

For year two and beyond, for drug records, the total records reflect the increase in new mechanics and supervisors which will be required to take the drug training. Using the growth rate this results in 6,368 mechanics and 1,274 supervisors for a total of 7,642 records. The 1,274 new supervisors will also have to take the reasonable cause/reasonable suspicion determinations for drugs training. In addition, there is recurrent reasonable cause/reasonable suspicion determinations for drugs training that all supervisors will have to take every 12 to 18 months. In year two, this results in 31,842 supervisors taking the recurring trainings. Thus, the records for drug training in year two is 40,758.[54] In addition, new mechanics and supervisors will be required to take alcohol training and supervisors will have to take the reasonable cause/reasonable suspicion determinations for alcohol training. This adds another 8,916 records. There is no recurrent alcohol training for supervisors. Therefore, in year two the total records are 49,674.[55]

The same calculation for year two is repeated for years three through five. There are 51,662 records in year three, 53,729 in year four, and 55,877 in year five. This results in a total of 656,720 total training records over the five years.[56]

To calculate the number of records related to alcohol and drug collection, the FAA sums the number of pre-employment drug tests, random drug and alcohol tests, and post-accident, reasonable cause, return to duty, and follow-up drug and alcohol tests per year beginning in year two. First, for drug testing, every new employee performing maintenance will be required to take a pre-employment drug test but not an alcohol test. Second, the FAA estimates 25 percent of current employees performing maintenance will be randomly drug tested per year. Third, there will be post-accident, reasonable cause, return to duty, or follow-up testing. The FAA estimates 1.70 percent of employees tested in a given year will be tested again under this category. The total drug tests over the five years is 247,521.[57]

For alcohol testing, no pre-employment alcohol testing is required. The other two categories of alcohol testing will be the same as for drug testing. However, the FAA estimates random drug testing will occur at a rate of 10 percent of current employees and 4.10 percent for post-accident, reasonable cause, return to duty, and follow-up tests. The total alcohol tests over the five years is 87,833.[58] Taking the sum of drug and alcohol tests results in 335,354 records related to alcohol and drug collection.

The agency is soliciting comments to—

(1) Evaluate whether the proposed information requirement 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;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of collecting information on those who are to respond, including by using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Individuals and organizations may send comments on the information collection requirement to the address listed in the **ADDRESSES** section at the beginning of this preamble by February 5, 2024. Comments also should be submitted to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Desk Officer for FAA, New Executive Office Building, Room 10202, 725 17th Street NW, Washington, DC 20053.

F. International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these proposed regulations.

G. Environmental Analysis

FAA Order 1050.1F identifies FAA actions that are categorically excluded

[49] Estimated number of records from 2018 to 2022.

[50] Average yearly cost is calculated by dividing total cost by five years.

[51] Information and Records Clerks (SOC 43–4000) NAICS 481000—Air Transportation, May 2020: Mean Hourly Wage *https://www.bls.gov/oes/2020/may/naics3_481000.htm#43-0000:* Includes Fringe Benefits.

[52] 31,842*2 = 63,684.

[53] 191,047 + 191,047 + 63,684 = 445,778.

[54] 7,642 + 1,274 + 31,842 = 40,758.

[55] 40,758 + 8,916 = 49,674.

[56] 445,778 + 49,674 + 51,662 + 53,729 + 55,877 = 656,720.

[57] This is broken down by category as 32,452 pre-employment drug tests, 210,932 random drug tests, 4,137 post-accident, reasonable cause, return to duty, and follow-up tests.

[58] This is broken down by category as 84,373 random drug tests and 3,460 post-accident, reasonable cause, return to duty, and follow-up tests.

from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 5–6.6f for regulations and involves no extraordinary circumstances.

VI. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this proposed rule under the principles and criteria of Executive Order 13132, Federalism. The agency has determined that this action would not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, would not have federalism implications.

B. Executive Order 13211, Regulations that Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. The agency has determined that it would not be a ''significant energy action'' under the Executive order and would not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

C. Executive Order 13609, Promoting International Regulatory Cooperation

Executive Order 13609, Promoting International Regulatory Cooperation, promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609 and has determined that this action could create differences in international regulatory requirements. The FAA acknowledges that the FAA may need to revisit certain international agreements, as discussed in section IV.D and invites comments on this issue.

VII. Additional Information

A. Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The FAA also invites comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one time if comments are filed electronically or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *https://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.dot.gov/privacy.*

B. Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this 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 the person in the **FOR FURTHER INFORMATION CONTACT** section of this document. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

C. Electronic Access and Filing

A copy of this NPRM, all comments received, any final rule, and all background material may be viewed online at *https://www.regulations.gov* using the docket number listed above. A copy of this proposed rule will be placed in the docket. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at *https://www.federalregister.gov* and the Government Publishing Office's website at *https://www.govinfo.gov.* A copy may also be found at the FAA's Regulations and Policies website at *https://www.faa.gov/regulations_policies.*

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267–9677. Commenters must identify the docket or notice number of this rulemaking.

All documents the FAA considered in developing this proposed rule, including economic analyses and technical reports, may be accessed in the electronic docket for this rulemaking.

List of Subjects in 14 CFR Part 120

Alcoholism, Air carriers, Alcohol abuse, Alcohol testing, Aviation safety, Drug abuse, Drug testing, Operators, reporting and recordkeeping requirements, Safety, Safety-sensitive, Transportation.

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend chapter I of title 14, Code of Federal Regulations as follows:

PART 120—DRUG AND ALCOHOL TESTING PROGRAM

■ 1. The authority citation for part 120 is revised to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40101–40103, 40113, 40120, 41706, 41721, 44106, 44701, 44702, 44703, 44709, 44710, 44711, 44733, 45101–45105, 46105, 46306.

■ 2. Amend § 120.1 by:

■ a. Revising paragraph (c);

■ b. Redesignating paragraph (d) as paragraph (e);

■ c. Adding new paragraph (d).

The revision and addition read as follows:

§ 120.1 Applicability.

* * * * *

(c) All part 145 certificate holders located in the territory of the United States who perform safety-sensitive functions and elect to implement a drug and alcohol testing program under this part.

(d) All part 145 certificate holders outside the territory of the United States who perform safety-sensitive maintenance functions on part 121 air carrier aircraft.

■ 3. Revise § 120.5 to read as follows:

§ 120.5 Procedures.

Each employer having a drug and alcohol testing program under this part must ensure that all drug and alcohol testing conducted pursuant to this part complies with the procedures set forth in 49 CFR part 40 and any exemptions issued to that employer by the Department of Transportation in accordance with 49 CFR 40.7.

■ 4. Add § 120.9 to read as follows:

§ 120.9 Waivers for Part 145 Repair Stations Outside the Territory of the United States.

(a) A part 145 repair station whose employees perform safety-sensitive maintenance functions on part 121 air carrier aircraft outside the territory of the United States may request a waiver from the Administrator from any requirements under 14 CFR part 120, subpart E or F, if specific requirements of the subpart are inconsistent with the laws of the country where the repair station is located.

(b) Each waiver request must include, at a minimum, the following elements:

(1) Information about your organization, including your name and mailing address and, if you wish, other contact information such as a fax number, telephone number, or email address;

(2) The specific section or sections of this part from which you seek a waiver;

(3) The reasons why granting the waiver would not adversely affect the prevention of accidents and injuries resulting from the use of prohibited drugs or the misuse of alcohol by employees;

(4) A copy of the law that is inconsistent with the provision(s) of this part from which a waiver is sought;

(5) An explanation of how the law is inconsistent with the provision(s) of this part from which a waiver is sought, and;

(6) A description of the alternative means that will be used to achieve the objectives of the provision that is the subject of the waiver or, if applicable, a justification of why it would be impossible to achieve the objectives of the provision in any way.

(c) Each petition for a waiver must be submitted to the Federal Aviation Administration, Office of Aerospace Medicine, Drug Abatement Division (AAM–800), 800 Independence Avenue SW, Washington, DC 20591.

■ 5. Amend § 120.117 by:

■ a. Revising paragraph (a)(5);

■ b. Redesignating paragraph (a)(6) as paragraph (a)(7);

■ c. Adding new paragraph (a)(6);

■ d. Revising paragraph (c);

The revisions and additions read as follows:

§ 120.117 Implementing a drug testing program.

(a) * * *

If you are . . .	You must . . .
* * * *	* * *
(5) A part 145 certificate holder located inside the territory of the United States who has your own drug testing program.	Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector or register with the FAA, Office of Aerospace Medicine, Drug Abatement Division (AAM–800), 800 Independence Avenue SW, Washington, DC 20591, if you opt to conduct your own drug testing program.
(6) A part 145 repair station located outside the territory of the United States whose employees perform safety-sensitive maintenance functions on part 121 air carrier aircraft.	Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector.
* * * *	* * *

* * * * *

(c) If you are an individual or company that intends to provide safety-sensitive services by contract to a part 119 certificate holder with authority to operate under part 121 and/or part 135 of this chapter, an operation as defined in § 91.147 of this chapter, or an air traffic control facility not operated by the FAA or by or under contract to the U.S. military, use the following chart to determine what you must do if you opt to have your own drug testing program.

If you are . . .	You must . . .
(1) A part 145 certificate holder located inside the territory of the United States and opt to conduct your own program under this part.	(i) Have an Antidrug and Alcohol Misuse Prevention Program Operations Specification or register with the FAA, Office of Aerospace Medicine, Drug Abatement Division (AAM–800), 800 Independence Avenue SW, Washington, DC 20591, (ii) Implement an FAA drug testing program no later than the date you start performing safety-sensitive functions for a part 119 certificate holder with authority to operate under parts 121 or 135, or operator as defined in § 91.147 of this chapter, and (iii) Meet the requirements of this subpart as if you were an employer.

If you are . . .	You must . . .
(2) A part 145 repair station located outside the territory of the United States whose employees perform maintenance functions on part 121 air carrier aircraft.	(i) Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector. (ii) Implement a drug testing program acceptable to the Administrator no later than one year from [EFFECTIVE DATE OF REGULATION], or if company operations begin more than one year after [EFFECTIVE DATE OF REGULATION], implement a drug testing program acceptable to the Administrator no later than the date you start operations, and (iii) Meet the requirements of this subpart in a manner acceptable to the Administrator.
(3) A contractor who opts to implement a testing program under this part.	(i) Register with the FAA, Office of Aerospace Medicine, Drug Abatement Division (AAM–800), 800 Independence Avenue SW, Washington, DC 20591, (ii) Implement an FAA drug testing program no later than the date you start performing safety-sensitive functions for a part 119 certificate holder with authority to operate under parts 121 or 135, or operator as defined in § 91.147 of this chapter, or an air traffic control facility not operated by the FAA or by or under contract to the U.S. Military, and (iii) Meet the requirements of this subpart as if you were an employer.

* * * * *

■ 6. Amend § 120.123 by revising paragraphs (a) introductory text, (a)(1), and (b) to read as follows:

§ 120.123 Drug testing outside the territory of the United States.

(a) Except for those testing processes applicable to persons testing pursuant to § 120.1(d), no part of the testing process (including specimen collection, laboratory processing, and MRO actions) shall be conducted outside the territory of the United States.

(1) Except for those persons testing pursuant to § 120.1(d), each employee who is assigned to perform safety-sensitive functions solely outside the territory of the United States shall be removed from the random testing pool upon the inception of such assignment.

* * * * *

(b) Except for those persons testing pursuant to § 120.1(d), the provisions of this subpart shall not apply to any individual who performs a function listed in § 120.105 by contract for an employer outside the territory of the United States.

■ 7. Amend § 120.225 by:

■ a. Revising paragraph (a)(5);

■ b. Redesignating paragraph (a)(6) as paragraph (a)(7);

■ c. Adding new paragraph (a)(6);

■ d. Revising paragraph (c); and

■ e. Revising paragraphs (d) introductory text and (d)(1).

The revisions and addition read as follows:

§ 120.225 How to implement an alcohol testing program.

(a) * * *

If you are . . .	You must . . .
* * *	* * * *
(5) A part 145 certificate holder located inside the territory of the United States who has your own alcohol testing program.	Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector or register with the FAA Office of Aerospace Medicine, Drug Abatement Division (AAM–800), 800 Independence Avenue SW., Washington, DC 20591, if you opt to conduct your own alcohol testing program.
(6) A part 145 repair station located outside the territory of the United States who performs safety-sensitive maintenance functions on part 121 air carrier aircraft.	Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector.
* * *	* * * *

* * * * *

(c) If you are an individual or company that intends to provide safety-sensitive services by contract to a part 119 certificate holder with authority to operate under part 121 and/or part 135 of this chapter, or an operator as defined in § 91.147 of this chapter, use the following chart to determine what you must do if you opt to have your own drug testing program.

If you are . . .	You must . . .
(1) A part 145 certificate holder located inside the territory of the United States and opt to conduct your own program under this part.	(i) Have an Antidrug and Alcohol Misuse Prevention Program Operations Specifications or register with the FAA, Office of Aerospace Medicine, Drug Abatement Division (AAM–800), 800 Independence Avenue SW, Washington, DC 20591,

If you are . . .	You must . . .
	(ii) Implement an FAA alcohol testing program no later than the date you start performing safety-sensitive functions for a part 119 certificate holder with the authority to operate under parts 121 and/or 135, or operator as defined in § 91.147 of this chapter, and (iii) Meet the requirements of this subpart as if you were an employer.
(2) Are a part 145 repair station located outside of the territory of the United States who performs maintenance functions on part 121 air carrier aircraft.	(i) Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector. (ii) Implement an alcohol testing program acceptable the Administrator no later than one year from [EFFECTIVE DATE OF REGULATION], or if company operations begin more than one year after [EFFECTIVE DATE OF REGULATION], implement an alcohol testing program acceptable to the Administrator no later than the date you start operations, and (iii) Meet the requirements of this subpart in a manner acceptable to the Administrator.
(3) A contractor	(i) Register with the FAA, Office of Aerospace Medicine, Drug Abatement Division (AAM–800), 800 Independence Avenue SW, Washington, DC 20591, (ii) Implement an FAA drug testing program no later than the date you start performing safety-sensitive functions for a part 119 certificate holder with authority to operate under parts 121 or 135, or operator as defined in § 91.147 of this chapter, or an air traffic control facility not operated by the FAA or by or under contract to the U.S. Military, and (iii) Meet the requirements of this subpart as if you were an employer.

(d) To obtain an antidrug and alcohol misuse prevention program operations specification:

(1) You must contact your FAA Principal Operations Inspector or Principal Maintenance Inspector. Provide him/her with the following information:

* * * * *

■ 8. Amend § 120.227 by revising paragraphs (a) introductory text, (a)(1), and (b) to read as follows:

§ 120.227 Employees located outside the U.S.

(a) Except for those persons testing pursuant to § 120.1(d), no covered employee shall be tested for alcohol misuse while located outside the territory of the United States.

(1) Except for those persons testing pursuant to § 120.1(d), each covered employee who is assigned to perform safety-sensitive functions solely outside the territory of the United States shall be removed from the random testing pool upon the inception of such assignment.

* * * * *

(b) Except for those persons testing pursuant to § 120.1(d), the provisions of this subpart shall not apply to any person who performs a safety-sensitive function by contract for an employer outside the territory of the United States.

Issued in Washington, DC.

Susan E. Northrup,

Federal Air Surgeon.

[FR Doc. 2023–26394 Filed 12–6–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 334

[COE–2023–0010]

Danger Zone; Marine Corps Base Hawaii, Kaneohe Bay, Island of Oahu, Hawaii

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The U.S. Army Corps of Engineers is proposing to amend the regulations for the existing danger zone at the U.S. Marine Corps Ulupau Crater Weapons Training Range in the vicinity of Kaneohe Bay, Hawaii. The U.S. Marine Corps requested a change to the hours that weapons firing may occur. These regulations are necessary to protect the public from potentially hazardous conditions which may exist as a result from use of the areas by the U.S. Marine Corps.

DATES: Written comments must be submitted on or before January 8, 2024.

ADDRESSES: You may submit comments, identified by docket number COE–2023–0010, by any of the following methods:

Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions for submitting comments.

Email: david.b.olson@usace.army.mil. Include the docket number, COE–2023–0010, in the subject line of the message.

Mail: U.S. Army Corps of Engineers, Attn: CECW–CO–R (David B. Olson), 441 G Street NW, Washington, DC 20314–1000.

Hand Delivery/Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

Instructions: Direct your comments to docket number COE–2023–0010. All comments received will be included in the public docket without change and may be made available on-line at *https://www.regulations.gov,* including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through *regulations.gov* or email. The *regulations.gov* website is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to the Corps without going through *regulations.gov*, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, we recommend that you include your name and other contact information with your comment. If we

cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

Docket: For access to the docket to read background documents or comments received, go to *www.regulations.gov.* All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as 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.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson, Headquarters, Operations and Regulatory Community of Practice, Washington, DC at 202–761–4922.

SUPPLEMENTARY INFORMATION: Pursuant to its authorities in section 7 of the Rivers and Harbors Act of 1917 (40 Stat. 266; 33 U.S.C. 1) and chapter XIX of the Army Appropriations Act of 1919 (40 Stat. 892; 33 U.S.C. 3), the Corps is proposing to amend the danger zone regulations at 33 CFR 334.1380 to change the hours that weapons firing may occur at the Ulupau Crater Weapons Training Range, Marine Corps Base Hawaii (MCBH), Kaneohe Bay, Island of Oahu, Hawaii.

The danger zone represents a public safety buffer beyond the physical boundaries of the training range to further reduce the safety threat to the boating public. The geographical nature of the crater combined with the use of man-made measures makes the crater secure from unintended projectiles exiting its confines, although a very slight possibility exists that a projectile could ricochet or otherwise be inadvertently fired beyond the confines of the crater. Under current conditions, sensitive wildlife areas, including designated protected areas, are encompassed within the existing boundaries of the danger zone. Since munitions are not intentionally fired into waters surrounding Ulupau Crater and the probability of an unintended projectile exiting the crater is negligible, an extension in the time that weapons may be fired will not incrementally change, modify or otherwise adversely impact sensitive marine species and organisms that inhabit or are supported by the waters and protected areas occurring within the danger zone. Marine resources, including endangered species, migratory shorebirds, and other seabirds that occupy designated protected areas will remain adequately protected by the MCBH under obligations of pre-existing agreements. For similar reasons, submerged lands will not be directly or indirectly adversely affected by the expanded danger zone.

The current regulations state that weapons firing at the Ulupau Crater Weapons Training Range may occur at any time between 6 a.m. and 11 p.m., Monday through Sunday. In the proposed rule, the time period for weapons firing is extended three hours so that weapons may be fired at any time between 6 a.m. and 2 a.m., Monday through Sunday.

Procedural Requirements

a. Regulatory Planning and Review. This proposed rule is not a ''significant regulatory action'' under Executive Order 12866 (58 FR 51735, October 4, 1993) and Executive Order 13563 (76 FR 3821, January 21, 2011) and it was not submitted to the Office of Management and Budget for review.

b. Review under the Regulatory Flexibility Act. This proposed rule has been reviewed under the Regulatory Flexibility Act (Pub. L. 96–354). The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (*i.e.,* small businesses and small governments). The danger zone is necessary to protect public safety during use of the weapons firing range. The danger zone regulation allows any vessel that needs to transit the danger zone to expeditiously transit through the danger zone whenever weapons firing is scheduled. The proposed amendment to this regulation would only change the hours when the danger zone is activated; it would not change the geographic extent of the existing danger zone. When the range is not in use, the danger zone will be open to normal maritime traffic and to all activities, include anchoring and loitering. When the danger zone is activated, small entities can utilize navigable waters outside of the danger zone. Unless information is obtained to the contrary during the comment period, the Corps certifies that the proposed rule would have no significant economic impact on the public.

c. Review under the National Environmental Policy Act. Due to the administrative nature of this action and because there is no intended change in the use of the area, the Corps expects that this regulation, if adopted, will not have a significant impact on the quality of the human environment and, therefore, preparation of an environmental impact statement will not be required. An environmental assessment will be prepared after the public notice period is closed and all comments received have been considered.

d. Unfunded Mandates Act. This proposed rule does not contain a Federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. Therefore, this proposed rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act (UMRA). The proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the proposed rule is not subject to the requirements of section 203 of UMRA.

e. *Congressional Review Act.* The Congressional Review Act, 5 U.S.C. 801 *et seq.,* generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The Corps will submit a report containing the final rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This proposed rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 33 CFR Part 334

Danger zones, Navigation (water), Restricted areas, Waterways.

For the reasons stated in the preamble, the Corps proposes to amend 33 CFR part 334 as follows:

PART 334—DANGER ZONE AND RESTRICTED AREA REGULATIONS

■ 1. The authority citation for 33 CFR part 334 continues to read as follows:

Authority: 40 Stat. 266 (33 U.S.C. 1) and 40 Stat. 892 (33 U.S.C. 3).

■ 2. Amend § 334.1380, by revising the first sentence of paragraph (b)(1) to read as follows:

§ 334.1380 Marine Corps Base Hawaii (MCBH), Kaneohe Bay, Island of Oahu, Hawaii—Ulupau Crater Weapons Training Range; danger zone.

* * * * *

(b) * * *

(1) Weapons firing at the Ulupau Crater Weapons Training Range may occur at any time between 6 a.m. and 2 a.m., Monday through Sunday. * * *

* * * * *

Thomas P. Smith,

Chief, Operations and Regulatory Division.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket No. 21–31; FCC 23–91; FRS ID 185870]

Addressing the Homework Gap Through the E-Rate Program

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) initiates a proceeding to address the ongoing remote learning needs of today's students, school staff, and library patrons through the E-Rate program and to ensure the millions who have benefitted from the Emergency Connectivity Fund program support do not fall back onto the wrong side of the digital divide once the program ends.

DATES: Comments are due on or before January 8, 2024 and reply comments are due on or before January 22, 2024. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this document, you should advise the contact listed below as soon as possible.

ADDRESSES: Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments. You may submit comments, identified by WC Docket No. 21–31, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the 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 at its headquarters. 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, DA 20–304 (March 19, 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), (202) 418–0432 (TTY).
- *Availability of Documents:* Comments, reply comments, and *ex parte* submissions will be publicly available online via ECFS.

FOR FURTHER INFORMATION CONTACT: Molly O'Conor *molly.oconor@fcc.gov* in the Telecommunications Access Policy Division, Wireline Competition Bureau, 202–418–7400 or TTY: 202–418–0578. Requests for accommodations should be made as soon as possible in order to allow the agency to satisfy such requests whenever possible. Send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Addressing the Homework Gap through the E-Rate Program, Notice of Proposed Rulemaking (*NPRM*) in WC Docket No. 21–31; FCC 23–91, adopted November 1, 2023 and released November 8, 2023. The full text of this document is available for public inspection during regular business hours at Commission's headquarters 45 L Street NE, Washington, DC 20554 or at the following internet address: *https://www.fcc.gov/document/fcc-proposes-e-rate-support-wi-fi-hotspots.*

I. Introduction

1. High-speed internet is critical to educational equity, economic opportunity, job creation, and civic engagement. Since its inception, the Federal Communications Commission's (Commission) E-Rate program has supported high-speed, affordable internet services to and within school and library buildings, and has been instrumental in providing students and library patrons with access to the essential broadband services that are required for next-generation learning. But advances in technology have changed the modern learning environment to increasingly employ interactive online education tools that can be used anywhere, at any time, allowing students to develop the digital skills needed to prosper in the 21st Century. The ongoing proliferation of innovative digital learning technologies and the need to connect students, teachers, and library patrons to jobs, life-long learning, and information have led to a steady rise in the demand for broadband connectivity both inside and outside of school and library buildings. In response to those needs, the Commission proposes and seeks comment on updates to the E-Rate program to ensure the program is equipped to support the ongoing remote learning needs of today's students, school staff, and library patrons.

2. In recent years, the demand for connectivity beyond school and library buildings became a crisis when the COVID–19 pandemic disrupted operations and caused schools and libraries across the country to temporarily close their doors. Millions of students caught in the ''Homework Gap''—*i.e.,* students unable to *fully* participate in educational opportunities because they lack broadband connectivity in their homes—suddenly found themselves unable to participate in education *at all.* Library patrons who relied on their local libraries for remote learning opportunities and internet access suddenly experienced a loss of these critical services when most, if not all, library buildings closed their doors by the summer of 2020. However, even before the COVID–19 pandemic, the Homework Gap affected somewhere between 8.5 to 16 million K–12 students, leaving 15% of U.S. households with children ages six to seventeen lacking a high-speed internet connection at home and approximately one in four households without high-speed internet access. Although the E-Rate program helped approximately 98% of the K–12 schools and districts in the country meet the Commission's

connectivity goals by 2018 by providing support for broadband connections to and within schools, and approximately 12,000 distinct libraries from across the nation receive E-Rate support each year for broadband connections to and within libraries, the increasing shift to online and remote instruction highlighted the need to connect the millions of students, school staff, and library patrons who had no at-home broadband connectivity. To address this longstanding critical need, Congress created the Emergency Connectivity Fund (ECF), which allowed the Commission to create the nation's first ever federal program designed to address the Homework Gap by providing funding for connected devices, Wi-Fi hotspot devices, broadband connections, and other eligible equipment and services for students, school staff, and library patrons in need for use at locations outside of their school or library.

3. Over the past two years, the ECF program's funding of internet access services through Wi-Fi hotspots has enabled significant progress in expanding digital learning, addressing digital and educational equity, and closing the Homework Gap by providing students, school staff, and library patrons with access to broadband connections. Schools in Oakland, California reported that they nearly closed the Homework Gap for their students through the use of ECF-funded Wi-Fi hotspots and internet access services. Libraries, like the Boston Public Library, established ECF-funded Wi-Fi hotspot lending programs to provide the hotspot equipment and monthly mobile broadband services needed to connect thousands of their most vulnerable residents to library resources. These are just two examples of the many ways that schools and libraries across the nation have relied on ECF support to fulfill the remote learning needs of their students, school staff, and library patrons who otherwise lacked access to these resources.

4. Following three successful application filing windows and more than two years of funding broadband services for students, school staff, and library patrons with unmet needs, ECF funding is nearly fully obligated, and the program will sunset on June 30, 2024. As the Commission approaches the sunsetting of the ECF program, the Commission has committed more than $123 million for the purchase of Wi-Fi hotspot devices and nearly $1.3 billion for the associated services to provide off-premises broadband connectivity to students, school staff, and library patrons who otherwise would lack sufficient broadband access needed to fully engage in remote learning. Building on its experience with the ECF program, the Commission now reexamines the E-Rate program and seeks comment on proposals and potential actions the Commission could take to support the needs of students, school staff, and library patrons who risk losing access to essential broadband connections necessary to engage in educational opportunities once the ECF program sunsets.

5. In the *NPRM,* the Commission initiates a proceeding to address the ongoing remote learning needs of today's students, school staff, and library patrons through the E-Rate program and to ensure the millions who have benefitted from ECF program support do not fall back onto the wrong side of the digital divide once the program ends. Specifically, the Commission proposes to permit eligible schools and libraries to receive E-Rate support for Wi-Fi hotspots and wireless internet services that can be used off-premises. The Commission proposes to find that the off-premises use of Wi-Fi hotspots and internet services by students, school staff, and library patrons for remote learning and the provision of virtual library services constitutes an educational purpose as defined by the Commission and enhances access to advanced telecommunications and information services for schools and libraries. The Commission also seeks comment on how to adapt the E-Rate program to reflect the virtual nature of today's modern educational environment. Additionally, the Commission seeks comment on the applicability of the Children's internet Protection Act (CIPA) requirements and the off-premises use of E-Rate-supported hotspots and services. In considering whether to support the off-premises use of Wi-Fi hotspots and internet access services, the *NPRM* seeks to balance the need to modernize the E-Rate program to support today's technology-based learning environment with the need to ensure the limited E-Rate funding remains available for its primary purpose of providing connectivity to schools and libraries, and is protected from potential waste, fraud, and abuse.

II. Discussion

6. The Commission proposes to modernize the E-Rate program in recognition of the technologically advanced educational needs of students, school staff, and library patrons that persist even when they are not physically at their school or library, by making the off-premises use of Wi-Fi hotspots and services eligible for E-Rate support. Broadband access is proven to improve individuals' educational outcomes, while lack of access has been shown to severely hamper educational opportunities. Yet, for years, the adoption of broadband connectivity in today's educational settings has outpaced the adoption of broadband connectivity in the homes of students, school staff, and library patrons throughout the country. As a result, students, school staff, and library patrons who lack adequate access to broadband connectivity are left further and further behind. Over the course of the last two years, the ECF program has bridged some of the gap between individuals with home broadband access and individuals caught on the wrong side of the digital and educational divide. Schools and libraries have maximized their limited ECF funding by establishing Wi-Fi hotspot lending programs, and ensuring that as many students, school staff, and library patrons in need as possible had access to broadband connectivity outside of the school or library building. With ECF support, approximately 6,800 schools, libraries, and consortia of schools and libraries purchased Wi-Fi hotspot devices and associated services, and were able to provide much-needed mobile broadband connectivity through ECF-funded Wi-Fi hotspots to more than 1.1 million students, school staff, and library patrons who otherwise lacked internet access services sufficient to engage in remote learning. In the *NPRM,* the Commission seeks to continue supporting ECF-funded broadband connectivity and proposes to allow E-Rate support to fund the off-premises use of Wi-Fi hotspots and services to ensure that the students, school staff, and library patrons who lack broadband connectivity remain supported after the ECF program sunsets. The Commission also seeks comment on how the it can implement funding for the off-premises use of Wi-Fi hotspots and services within existing E-Rate program processes, what actions are necessary to safeguard these critical funds from any potential waste, fraud, or abuse, and its authority to adopt the measures described in the *NPRM.*

A. Making Off-Premises Use of Wi-Fi Hotspots and Services Eligible for E-Rate Support

7. The Commission proposes to permit schools and libraries to receive E-Rate support for Wi-Fi hotspots and services that can be used off-premises by students, school staff, and library patrons, finding that these services serve a critical educational purpose and

enhance the ability of students, school staff, and library patrons to access advanced telecommunications and information services. The Commission seeks comment on this proposal and, if adopted, how best to implement the proposed measures in a manner that ensures that schools and libraries target their students, school staff, and library patrons who lack internet access, while simultaneously protecting limited E-Rate funds. In particular, the Commission seeks information and data from schools and libraries that have used Wi-Fi hotspots and services for remote learning and/or implemented Wi-Fi hotspot lending programs to provide service to students, school staff, and library patrons who would otherwise lack broadband access outside of their school or library.

1. Equipment and Service Eligibility

8. In proposing to make Wi-Fi hotspot devices eligible for E-Rate support, the Commission seeks comment on what devices should be covered. In the ECF program, a Wi-Fi hotspot is defined as a device that is capable of (a) receiving advanced telecommunications and information services; and (b) sharing such services with a connected device through the use of Wi-Fi. For the E-Rate program, the Commission proposes to limit eligibility to Wi-Fi hotspots receiving mobile services and seek comment on whether this is the right approach. Are there any devices that perform the same functions as a Wi-Fi hotspot that are not covered by this definition and that should be included? Conversely, is the ECF program's definition of Wi-Fi hotspot overinclusive and could it encompass devices that go beyond the intended purpose of meeting the remote learning needs of students, school staff, and library patrons with unmet need? The Commission encourages commenters to provide specific examples of any equivalent or similar equipment and/or services, or equipment and/or services that should be considered ineligible. Should Wi-Fi hotspots be treated as internal connections, as the State of Colorado has argued? The Commission notes that in defining the scope of E-Rate program eligibility for internal connections, the Commission has previously declined to support ''computers and other peripheral equipment'' because it found that only equipment that is an essential element in the transmission of information is eligible (*e.g.,* internal connections). The Commission seeks comment on whether Wi-Fi hotspot devices are ''peripheral equipment'' or if they serve the necessary transmission function contemplated by the Commission to be considered internal connections, like wireless access points.

9. Consistent with the ECF program, the Commission also proposes to limit Wi-Fi hotspot device eligibility to Wi-Fi hotspots for individual users. The Commission proposes to treat as ineligible multi-user hotspot devices or smartphones. The Commission seeks comment on this proposal. Additionally, the ECF rules limited support to the purchase of one Wi-Fi hotspot device per student, school staff member, or library patron. Should the Commission similarly adopt a per-user limitation in the E-Rate program or consider a per-household limit? What should that limit be? Is an individual Wi-Fi hotspot capable of connecting more than one user at a time without degrading the quality of the connectivity or compromising connectivity altogether? In considering whether to impose some limit, the Commission seeks to balance the goals of administrative ease, such as implementing a simple one-per-household limit, with the needs of all households, including multi-student households. Some sources state that Wi-Fi hotspot devices have a useful life of three to five years. In commenters' experience, is this the typical length of the useful life of Wi-Fi hotspots? If the Commission funds Wi-Fi hotspots, should the Commission limit their eligibility to purchases made once every three years or adopt some other eligibility timeframe? The Commission seeks comment on these questions and request that commenters provide any available supporting data.

10. With respect to wireless internet access services, the Commission proposes to limit the use of services to those that can be supported by and delivered with Wi-Fi hotspots provided to an individual user (as opposed to multi-user hotspots). Pursuant to this proposal, schools and libraries would be able to seek E-Rate support for commercially available internet access services (*e.g.,* a data plan) that will be used on any individual user Wi-Fi hotspot, including E-Rate- or ECF-funded hotspots, previously purchased hotspots, and/or student-, staff member-, or patron-owned hotspots. The Commission seeks comment on this proposal. The Commission also seeks comment on the quality of internet access services that should be eligible for support through the E-Rate program. For example, should the Commission adopt minimum service standards? The Commission invites input on the level of service that is needed to support remote learning, based on the direct experiences of providing Wi-Fi hotspots to students, school staff, and library patrons during the pandemic. Should the Commission limit support to just the off-premises use of the recurring internet access services needed for remote learning (and not the Wi-Fi hotspot equipment)? The Commission expects this limitation could allow schools and libraries with existing Wi-Fi hotspot lending programs to continue to lend or check-out a portable Wi-Fi hotspot device with a mobile broadband connection to students, school staff, or library patrons for off-premises access to the internet. If the Commission decides not to make Wi-Fi hotspot devices eligible, how should the Commission address Wi-Fi hotspot devices that are bundled with services? Are there benefits or disadvantages if the Commission limits E-Rate support to only services, and does not include Wi-Fi hotspot devices as eligible for support? Should the Commission limit eligibility to the services associated with the Wi-Fi hotspots purchased using ECF program funds? Would this limitation help to ensure E-Rate support is directed to students, school staff, and library patrons who are expected to lose their connectivity when the ECF program sunsets? Are there other issues or concerns the Commission should consider when determining how to fund Wi-Fi hotspot devices and/or services? For example, how should leased or bundled equipment and service packages offered by providers be treated and should they be eligible for E-Rate support? The Commission seeks comment on these questions.

2. Cost-Effective Purchases

11. Next, the Commission seeks comment on how to ensure schools and libraries purchase the most cost-effective service offering(s) when selecting Wi-Fi hotspots and services for students, school staff, and library patrons who lack access to broadband. Are the requirements to pay the non-discounted share of costs and conduct competitive bidding sufficient incentives to prevent wasteful spending? The Commission also seeks comment on the anticipated costs of the Wi-Fi hotspots and services if provided on a program-wide basis. The Commission encourages schools, libraries, and other stakeholders to provide in their comments specific information about the devices and services purchased through the ECF program or with other funding, the costs, the device and service parameters, any steps they have taken to ensure the sufficiency of the service, and any steps they have taken to lower costs

associated with Wi-Fi hotspots and service. The anticipated costs should consider and describe any secondary components, such as additional hotspot features, different bandwidth capabilities, and any reasonable fees incurred with the purchase of Wi-Fi hotspots and services.

12. The Commission next ask about cost-control mechanisms. Should the Commission adopt a cap on the amount of costs that will be considered cost-effective for Wi-Fi hotspots and/or monthly services, and if so, should the Commission rely on ECF program data to establish a cap for a Wi-Fi hotspot provided to an individual user? For services, the Affordable Connectivity Program (ACP) provides discounts of up to $30 per month towards internet service (or up to $75 per month for eligible households on qualifying Tribal lands). Are these reasonable caps on what the Commission might consider cost-effective for monthly service? Should the Commission use different amounts for the monthly reimbursement of these services in the E-Rate program, and if so, what amounts should be used? If the Commission adopts caps on the amounts considered cost-effective for monthly services, should those caps be regularly updated, and if so, what mechanism should the Commission use to make those updates? What requirements should the Commission implement to ensure service providers in these underserved areas provide the most cost-effective services to eligible schools and libraries if a higher amount is allowed for support? The Commission seeks comment on these questions.

13. Relatedly, under the Commission's E-Rate rules, applicants are required to conduct fair and open competitive bidding when requesting funding for eligible services. The competitive bidding requirements are a cornerstone of the E-Rate program and are critical to ensuring that applicants obtain the most cost-effective offering available. However, the Commission recognizes that there may be challenges associated with conducting competitive bidding for off-premises wireless services that can be used from multiple locations. How can the Commission ensure applicants conduct fair and open competitive bidding for off-premises wireless services while also ensuring students, school staff, and library patrons can access those services from locations other than their school or library? For instance, in geographically large districts, a single service provider may not be able to provide service throughout the school's or library's service area. Should the Commission allow applicants to select multiple service providers for Wi-Fi hotspots and services based on the geographic area(s) of their students, school staff, and library patrons? How can the Commission ensure that applicants select the most cost-effective service offerings? Are there competitively-bid state or other master contracts available for schools and libraries to purchase Wi-Fi hotspot devices and services for off-premises use? Are there any other issues that schools and libraries may encounter during their competitive bidding processes for Wi-Fi hotspots and services to be used off-premises that the Commission should also consider?

B. Funding and Prioritization

14. Based on its experience funding Wi-Fi hotspots and services through the ECF program, the Commission tentatively finds that taking this step toward addressing the educational needs of millions of students, school staff, and library patrons caught in the digital and educational divide is also technically feasible and economically reasonable, consistent with section 254(h)(2)(A) of the Communications Act. The Commission estimates that approximately 4.5 million students, school staff, and library patrons received mobile broadband service and/or hotspots through the ECF program for the 2021–2022 school year, with an average cost of approximately $294 per user per year. The Commission seeks comment on this estimate, and any data and numerical evidence that can be used to support or update its estimate. Given that the demand for E-Rate program funding has consistently fallen below the program's funding cap in recent years, the Commission believes the cost of funding Wi-Fi hotspots and services for off-premises use could be accomplished within the E-Rate program's existing budget, and the potential increase in program disbursements would result in a substantial benefit to students, school staff, and library patrons stuck on the wrong side of the digital and educational divide, and in the Homework Gap across the country. The Commission seeks comment on its tentative conclusion.

15. Commenters are also invited to address whether the number of students, school staff, and library patrons that received mobile broadband service through Wi-Fi hotspots in the ECF program provides an accurate basis for estimating demand if the Commission permits mobile broadband service and Wi-Fi hotspots for off-premises use to be funded with E-Rate support, particularly given that not all E-Rate participants applied for the ECF program, and other federal or state funding may have also been used for this purpose during the pandemic. The Commission requests additional information on whether there are schools and libraries that did not apply for ECF support that would apply for E-Rate support for the off-premises use of Wi-Fi hotspots and services. In addition, the Commission seeks comment on whether the ECF program's $294 estimated average cost per user provides an accurate basis for estimating the potential cost to the E-Rate program of supporting Wi-Fi hotspots and mobile broadband service for off-premises use, provided the Commission reduces that amount by the average discounted share that will be paid by schools and libraries. Is this estimated cost too high, given the ECF program was an emergency program and there were not program-specific competitive bidding rules, unlike for the E-Rate program, which requires competitive bidding and for applicants to select the most cost-effective service offering using prices of the eligible services as the primary factor? How should the Commission account for the average three-year lifespan of Wi-Fi hotspot devices and the fact that many users will be able to continue to use devices funded through ECF after the sunset of the program, as well as funded through the other state and federal programs? For example, how can the Commission prevent parties from replacing ECF-funded Wi-Fi hotpots with new Wi-Fi hotpots funded through the E-Rate program before the ECF-funded equipment reaches its end-of-life (EOL)? Could the FCC manage the potential costs to the E-Rate program by establishing limits on the amount of support dedicated to the off-premises use of Wi-Fi hotspots and services? The Commission seeks comment on these questions.

16. The Commission acknowledges that there are some circumstances where Wi-Fi hotspots and services may not meet the connectivity needs of all students, school staff, and library patrons caught in the Homework Gap. The Commission also acknowledges that some schools and libraries used ECF funding for other remote learning solutions, such as building their own fixed wireless networks, and may also seek to use E-Rate funding to continue providing connectivity to their students, school staff, or patrons after the ECF program sunsets. While the Commission recognizes that there may be other off-premises uses that may meet the definition of an educational purpose, these solutions also have the potential to be extremely costly to fund with the

very limited E-Rate support and could be duplicative of funding made available through other state and federal programs. The Commission seeks comment on these conclusions. The Commission believes that taking this initial, incremental step to fund Wi-Fi hotspots and services for off-premises use strikes the right balance and is consistent with its universal service goals. The Commission also believes its proposal can be accomplished without excessive cost to the E-Rate program or significant administrative delay. The Commission therefore proposes to limit the scope of the *NPRM* to the off-premises use of Wi-Fi hotspots and services because the Commission is mindful of its obligation to be a prudent, responsible steward of the limited E-Rate funding and its statutory directive to establish rules only to the extent it is ''economically reasonable'' to do so. The Commission invite comment on this proposal. Recognizing that there may be circumstances where there is either no commercially available mobile service or the existing service is insufficient to allow students, school staff, or library patrons to fully engage in remote learning, the Commission seeks comment on whether the Commission should consider alternatives for off-premises services funded through the E-Rate program in such limited circumstances and what alternatives should be considered. For example, should the Commission permit schools and libraries to use existing E-Rate-funded networks to connect students, school staff, or library patrons off-premises in the narrow instances where commercially available mobile broadband is not a viable option (*e.g.,* due to geographic challenges or cost)? The Commission also seeks comment on how the Commission should determine there is no commercially available service, or existing service is insufficient to support remote learning and how to ensure the alternative solutions are the most cost-effective way of providing service to students, school staff, and library patrons who otherwise are not able to fully engage in remote learning.

1. Prioritization

17. If the Commission makes students', school staff members', and library patrons' off-premises use of Wi-Fi hotspots devices and services eligible, what category of service should these devices and services be? Under the current Eligible Services List, wireless internet services are category one services and are eligible under limited circumstances. Should the Commission therefore considers Wi-Fi hotspots to be network equipment necessary to make category one wireless internet services functional? If the Commission determines that Wi-Fi hotspots are comparable to internal connections as the State of Colorado suggests, should these devices be considered category two services?

18. Based on the Commission's experience in the ECF program and other publicly available information, the Commission anticipates that its proposal to fund the off-premises use of Wi-Fi hotspots and services will result in an increase in E-Rate funding requests. In the event that E-Rate program demand exceeds its annual funding cap, the Commission seeks comment on how requests for the off-premises use of Wi-Fi hotspots and services should be prioritized. Are there measures the Commission should consider to ensure that E-Rate funding remains available for the currently-eligible category one and category two services that are needed by schools and libraries? Should these requests be prioritized after services and equipment needed to bring connectivity *to* and *within* schools and libraries (*i.e.,* category one and category two services) are funded? Should the Commission prioritize requests for services associated with the Wi-Fi hotspots purchased using ECF program funds? Will funding the off-premises use of Wi-Fi hotspot devices and services have any impact on other pending E-Rate-related eligibility requests, such as expanding basic firewall services to include advanced or next-generation firewall services? Are there other ways to limit the financial impact of supporting the off-premises use of Wi-Fi hotspots and services? For example, should the Commission consider an overall budget for these new off-premises services? Should there be an annual funding cap for the amount of support that is available for the off-premises use of Wi-Fi hotspots and services? If so, what should the funding cap be? Should it be indexed to inflation? Alternatively, would a per-student limit, like the one used for category two funding budgets, help to ensure the limited E-Rate program support is distributed equitably to schools and libraries across the various discount rates? Should the Commission implement these changes on an interim basis and subsequently assess whether to implement a permanent rule change based on its interim experience? The Commission seeks comment on these proposals and questions.

2. Unmet Need

19. The Commission also recognizes that there are insufficient E-Rate funds to support Wi-Fi hotspots and services for every student, school staff member, and library patron across the nation. Therefore, how can the Commission prioritize support for students, school staff, and library patrons who do not have internet access at home? In the ECF program, the Commission limited support to students, school staff, and library patrons without internet access services sufficient to engage in remote learning. Through its experience in the ECF program, the Commission understands that schools and libraries have faced challenges in determining which parts of their population needed access to Wi-Fi hotspots and services for the upcoming funding year. The Commission therefore seeks comment on administratively feasible ways to ensure the E-Rate program prioritizes support for Wi-Fi hotspots and services for use by students, school staff, or patrons who would otherwise lack access to internet access services.

20. The ECF program limited support for eligible equipment and services to students, school staff, or library patrons with unmet need, and, because it was an emergency COVID–19 relief program, schools and libraries were required to provide only their best estimate of unmet need during the application stage. However, because the E-Rate program is not an emergency program, there is time for schools and libraries to determine the actual number of students, school staff, and library patrons with unmet needs. The Commission seeks comment on whether the Commission should adopt more stringent unmet needs requirements for the E-Rate program than it adopted for the ECF program. For example, should the Commission require schools and libraries to conduct and submit as part of their funding requests a survey or other documentation that substantiates their student and school staff, or patron population who has current unmet needs? Would such a requirement raise any privacy concerns (*e.g.,* insofar as such surveys would be intended to elicit information from potentially lower-income children, families, and individuals)? If this requirement would create privacy risks for students, families, and patrons, how could the Commission mitigate those risks (*e.g.,* via data minimization, anonymization, or deidentification)? For example, would it be possible for schools and libraries to conduct such surveys without collecting any personally identifiable information (PII) from

students, staff, or patrons, and what burdens would such a collection place on school and library resources? If schools and libraries would need to collect PII, should the Commission requires that all such information be removed from the survey results when submitted with funding requests?

21. Are there other ways that the Commission can ensure it focuses and targets the limited E-Rate program support to only students, school staff, and library patrons who currently lack broadband access—and who cannot afford it—so that the E-Rate program does not support services for students, school staff, or library patrons who already have broadband connectivity at their homes? For example, should the Commission restricts the support of off-premises use of Wi-Fi hotspots and services to students whose parent or guardian certifies that they lack broadband at home and who are eligible for the free or reduced-price lunch program (also known as the National School Lunch Program or NSLP)? Are there any other school nutrition programs that a student's parent or guardian should be able to use to demonstrate eligibility under this approach, such as the School Breakfast Program? What burdens could conditioning support on NSLP participation impose on school administrators and/or students? If the Commission declines to use NSLP for determining eligibility, what other measures could be taken to ensure the limited E-Rate support is directed to the students with the greatest need? For school staff and library patrons, are there similar or alternative requirements that the Commission should consider to ensure that E-Rate support is used towards existing unmet needs and to prevent waste, fraud, and abuse of the program? The Commission seeks comment on these questions and how to best target E-Rate funding to only students, school staff, and library patrons with the greatest need.

22. The Commission further seeks comment on whether there are certain school populations, such as Head Start and pre-kindergarten students, for whom the risks may outweigh the benefits of providing E-Rate support for the off-premises use of Wi-Fi hotspots and services. For example, studies show that children under the age of 5 should limit internet access to one hour or less per day and are harmed if exposed to longer periods of use. The Commission proposes that the Head Start program, which provides early learning and development for pre-school children from the ages of 3 to 5, and pre-kindergarten students should be determined to be ineligible to receive E-Rate support for off-premises use of Wi-Fi hotspots and services. The Commission notes that Head Start and/or pre-kindergarten education facilities serving this particular age group may be eligible for E-Rate funding for broadband connectivity to and within their facilities, if determined to be elementary schools under their applicable state laws. Further, parents and guardians of Head Start students may be eligible for home internet access services through ACP because Head Start is an income-based program and, to qualify, a family must be at or below the federal poverty level, or participate in a federal government assistance program. The Commission seeks comment on this proposal and other measures the Commission should take to ensure that the E-Rate program's limited support is targeted to students, school staff, and library patrons with the greatest need, as there is insufficient funding to support the off-premises use of Wi-Fi hotspots and services for every student, school staff member, and library patron.

C. Program Safeguards

23. The Commission is mindful of its obligation to protect the Universal Service Fund (USF) and the USF programs from waste, fraud, and abuse, and take seriously its duty to be a careful steward of E-Rate program funds. The Commission is similarly committed to ensuring the integrity of the E-Rate program and identify below potential tools at its disposal to ensure that the E-Rate program's funds are used for its intended purposes, *i.e.,* to enhance and enable access to broadband services for educational opportunities for schools and libraries nationwide. The Commission seeks comment on what safeguards the Commission should consider imposing to protect the constrained E-Rate funds from waste, fraud, and abuse, and to prevent the imposition of unnecessary costs on the program.

1. Educational Purpose

24. The Commission first seeks comment on how to ensure that the off-premises use of Wi-Fi hotspots and services is primarily for educational purposes, consistent with the Commission's rules and section 254(h)(1)(B) of the Communications Act. The COVID–19 pandemic demonstrated the educational benefits of providing critical broadband connections to students, school staff, and library patrons and highlighted their reliance on interactive and collaborative remote learning outside the physical school or library building. The Commission recognizes that the use of eligible services on school or library property typically occurs under the supervision of school or library staff; whereas, the off-premises use of these services presents new concerns about ensuring the proper use of the E-Rate-funded equipment and services that are not directly supervised by the recipient of the funding. In balancing these benefits and concerns, the Commission therefore seeks comment on what safeguards should be imposed to mitigate the risk of off-premises non-educational use of E-Rate-supported Wi-Fi hotspots and services.

25. Currently, E-Rate participants are required to certify on program forms that supported services will be used primarily for educational purposes. The Commission seeks comment on whether requiring schools and libraries to certify on their forms that E-Rate support is being used primarily for educational purposes is sufficient to protect against improper use or if additional guardrails should be imposed to ensure that services are used ''primarily for educational purposes.'' For example, libraries that used ECF funding to connect their patrons through Wi-Fi hotspot lending programs are required to provide patrons with a copy of their eligible use policy and collect signed statements from patrons confirming that they would otherwise lack access to the equipment or services necessary to meet their educational needs. Should the Commission adopt a similar requirement in the E-Rate program and require schools and libraries to provide copies of their eligible use policies and collect signed documentation of user compliance from patrons, school staff members, or parents/guardians of students to ensure the E-Rate-funded Wi-Fi hotspots and services are used solely by the intended recipient and serve an educational purpose? How can the Commission ensure that the off-premises Wi-Fi hotspots and services are being used as intended by the individual student, school staff member, or library patron for educational purposes, and E-Rate funding is not being used to provide broadband connectivity for the whole family, for which there are more appropriate funding sources available, like the ACP? Should the Commission require schools and libraries, as a condition of receiving E-Rate support for off-premises use, to include certain minimum requirements in their eligible use policies, or limit the duration of time a student, school staff member, or library patron can use the hotspot at home? Should, for example,

schools and libraries be required to restrict access to the off-premises use of Wi-Fi hotspots and services to students, school staff, and patrons with appropriate credentials? What would constitute appropriate credentials? Should there be an annual verification process to establish continuing need and eligible use for students and school staff before the start of each school year? Should the documentation signed by users include a notice of potential consequences if a Wi-Fi hotspot is used improperly, including the return of the device and revocation of the associated service? Are there other actions that the Commission could take to help ensure the appropriate use of the E-Rate-funded Wi-Fi hotspots and services? The Commission seeks comment on these questions.

26. If the Commission extends support to the off-premises use of Wi-Fi hotspots and services, the Commission expects the support would be subject to the audits and reviews currently utilized in the E-Rate program (*e.g.,* Beneficiary and Contributor Audit Program (BCAP) audits, Payment Quality Assurance (PQA) audits, and Payment Integrity Assurance (PIA) reviews and Selective Reviews (SR) of the FCC Form 471). Are the current E-Rate audit and application/invoice review mechanisms sufficient to ensure that off-premises Wi-Fi hotspots and services are actively being used by eligible users primarily for educational purposes? Should the Commission increase the number and frequency of random or targeted audits in the first few years of support as a means of detecting and preventing improper payments for Wi-Fi hotspots and services that are not needed, are not being used, are being used to provide home broadband connectivity to an entire family, or are not being used primarily for an educational purpose? Are there other issues, such as privacy concerns, or changes the Commission should consider for audits and reviews related to funding requests and disbursements for off-premises use of Wi-Fi hotspots and services? For example, because it is presumed to serve an educational purpose when the services are used on school or library property, how should the Commission verify that the off-premises use of E-Rate-funded Wi-Fi hotspots and services are being used for educational purposes? Are there mechanisms or tools available that would allow for verifying compliance with E-Rate rules regarding the off-premises use of supported Wi-Fi hotspots and services that would *not* require review of users' online activities, browsing history, etc.? If not, should users receive advance notice that their use of an E-Rate-supported Wi-Fi hotspot and service is subject to audit, which may include review of their online activities and browsing history to verify compliance with the Commission's rules? The Commission seeks comment on these questions.

27. The Commission also seeks comment on what other requirements should be imposed to ensure schools and libraries are not requesting funding for more Wi-Fi hotspots and services than are necessary to meet the needs of only students, school staff, and library patrons who lack access to broadband and are used for educational purposes. For instance, schools and libraries may allow the community to use E-Rate-funded services from on-premises locations during non-operating hours, subject to certain conditions to ensure students always have the first priority to use the supported services and to protect against the waste, fraud, and abuse of the funds. Are there similar conditions that the Commission should impose on the off-premises use of Wi-Fi hotspots and services to ensure applicants are not requesting excess services for non-educational purposes like video games or non-educational streaming services, and that students, school staff, and library patrons are receiving first priority in the use of school or library resources? Are there incidental uses that should be permissible, like telehealth appointments or filling out government forms, that would not result in a greater demand on E-Rate funding? The Commission seeks comment on these questions and invite input on what steps schools and libraries have taken to ensure the off-premises use of ECF-funded Wi-Fi hotspots and services were used only by the intended individual(s) and for educational purposes.

2. Usage

28. If the Commission makes off-premises use of Wi-Fi hotspots and services eligible, how can the Commission prevent the warehousing of Wi-Fi hotspots and reimbursement for unused equipment and/or services? Are there ways to prevent the purchase of ''back-up'' Wi-Fi hotspots, *e.g.,* hotspots purchased in anticipation of loss, breakage, or additional unmet need? Should the Commission adopt numerical criteria to assess usage: *e.g.,* should usage below a weekly, monthly, or quarterly threshold of X hours be treated as ''non-usage''? Should the Commission require participants to provide evidence of usage and/or strengthen the certification requirements surrounding non-usage? For example, should the Commission require the submission of data usage reports (*i.e.,* reports on the *amount* of data used, not the *substance* of the usage) with requests for reimbursement to demonstrate the Wi-Fi hotspots and services were used by students, school staff, and library patrons as intended for the time period being invoiced to the E-Rate program? Should there be different usage requirements applicable to schools and libraries? How does the Commission avoid having the E-Rate program pay for service to Wi-Fi hotspots during the summer, when students may not be using the devices? For example, should E-Rate support for schools be limited to only nine months per school year to prevent the E-Rate program from covering the costs of unused devices and/or services during the summer? Should the certifications regarding non-usage in the ECF program be strengthened for the E-Rate program? How should the certifications be strengthened, and how could a school, library, or service provider demonstrate compliance with the certification requirements? The Commission seeks comment on these questions.

29. The Commission also seeks comment on how schools, libraries, and service providers should address non-usage issues. If the monthly usage report indicates that certain hotspot devices are not being used by the student, school staff member, or library patron, should the school or library be required to terminate the service to that device? Should the service provider be responsible for notifying the school or library which devices had no usage on a monthly basis and be required to terminate the service? Should there be a cure or notification period to allow the student, school staff member, or library patron to restart use of the services or should the services be terminated after there is a month of no usage? The Commission seeks comment on what requirements should be implemented to ensure usage of the devices and services and what actions the school, library, or service provider should be required to take to address any non-usage issues related to their students, school staff, or library patrons.

30. The Commission also seeks comment on how the Administrator should handle non-usage issues related to off-premises Wi-Fi hotspots and services. If a school or library cannot demonstrate the Wi-Fi hotspots and services were used by the intended individual, should their request for reimbursement be denied, and the

Administrator be directed to reduce the committed funding amount by the same amount to prevent this funding from being disbursed in the future? Should schools and libraries be required to notify the Administrator if their service provider submits invoices for Wi-Fi hotspots or services that the school or library knows are not being used by its students, school staff, or library patrons, because, for example, the device has not been distributed yet? Should the Administrator be directed to seek recovery from a service provider that invoices the program for Wi-Fi hotspots and services that were not in use during the reimbursement period? Should the Commission also prohibit service providers from invoicing applicants for periods of non-usage? If there is evidence of non-usage of the off-premises Wi-Fi hotspots and/or services, should schools and libraries be required to file an FCC Form 500, or other post-commitment request, to reflect the actual periods of time that the Wi-Fi hotspots and services were in use by their students, school staff, or library patrons? Should E-Rate participants that improperly received E-Rate support for unused Wi-Fi hotspots and/or services not be eligible to request E-Rate support for off-premises Wi-Fi hotspots and services in future funding years? Or should the school or library be required to reduce their funding requests by the amount of funding related to the unused Wi-Fi hotspots and services in future funding years? The Commission seeks comment on these questions and ways to ensure the off-premises Wi-Fi hotspots and services are actually being used for their intended purpose of providing broadband connectivity to students, school staff, and library patrons who lack access and are used for educational purposes.

3. Duplicative Funding

31. The Commission seeks comment on what safeguards are necessary to prevent duplicative funding for the same off-premises Wi-Fi hotspots and/or services across the federal universal service programs and other funding programs, including federal, state, Tribal, or local programs. For example, the ACP provides discounts to help low-income households pay for the home broadband service and connected devices needed for critical activities like work and school. However, a household may justifiably receive support from multiple universal service programs at the same time: for instance, a household may receive a Lifeline-supported discount on mobile broadband and voice service for a cellular phone that a parent takes with them to work, while separately receiving support for a Wi-Fi hotspot to help a child in that same household complete their homework on a school-issued laptop. How can the Commission ensure that funding sought for internet access services through the E-Rate program will not be duplicative of funding received through other programs, like the ACP, for home internet access, while recognizing that a household may permissibly benefit from multiple federal universal service programs simultaneously? If schools and libraries already provide off-premises access for their students, school staff, and patrons through ECF or other sources of funding, should those schools and libraries be prohibited from using E-Rate support for that same purpose? For example, how does the Commission ensure that schools and libraries that have purchased Wi-Fi hotspots with ECF support do not purchase new hotspots with E-Rate support prior to the end of the useful life of the ECF-funded hotspots? To help us assess this issue, the Commission asks commenters to identify any ECF support or other sources of funding currently being used by schools or libraries to subsidize off-premises access for students, school staff, and library patrons that would eliminate or reduce the need for E-Rate-supported Wi-Fi hotspots. Would a certification by the school or library be sufficient to indicate that E-Rate support is only being sought for eligible students, school staff, or library patrons and the school or library does not already have access to Wi-Fi hotspots purchased with ECF support or other sources of funding? The Commission seeks comment on how to prevent duplicative funding between E-Rate, ECF, and other funding programs, including federal, state, Tribal, or local programs.

4. Recordkeeping

32. The Commission's rules currently requires schools and libraries to retain all documentation related to the application, receipt, and delivery of eligible services received through the E-Rate program for at least ten years after the last date of the delivery of services. The Commission proposes to apply existing E-Rate recordkeeping requirements to funding provided for the off-premises use of Wi-Fi hotspots and services. The Commission seeks comment on this proposal and whether additional recordkeeping requirements should be imposed for these purposes. For example, while both the E-Rate and ECF rules require applicants to maintain inventories of equipment purchased with the programs' support, ECF rules require applicants to maintain specific information in their equipment and service inventories for each device or service purchased with ECF support and provided to an individual student, school staff member, or library patron. For each hotspot purchased with ECF support, a school or library must maintain the device make/model, the device serial number, the name of the person to whom the device was provided, and the dates the device was loaned out and returned to the school or library. Each ECF-funded service inventory must include the type of service provided, the broadband plan details (*i.e.,* upload and download speeds and the monthly data cap), and the name of the person to whom the service was provided. Should the Commission adopts these inventory requirements in the E-Rate program for the off-premises use of Wi-Fi hotspots and services? For Wi-Fi hotspot lending programs, should the Commission consider library-specific inventory rules?

33. The Commission seeks comment on any other issues related to maintaining documentation to demonstrate compliance with E-Rate rules and certifications. Related to the Commission's unmet need inquiries, should applicants be required to maintain records of students', school staff members', or library patrons' unmet needs, and if so, what types of records should be required (*e.g.,* surveys)? If the Commission requires schools and libraries to retain new records regarding unmet needs containing PII, how can the Commission address any privacy risks to students, families, school staff, and patrons? Related to its non-usage requirements inquiries, the Commission notes that service providers would be required to retain and produce monthly usage reports for off-premises Wi-Fi hotspots and services funded through the E-Rate program under its current rules. Should applicants be required to request and retain monthly usage reports from their service providers as well? Are there other recordkeeping requirements for the off-premises use of Wi-Fi hotspots and services that should be considered by the Commission?

D. Legal Authority and Other Outstanding Issues

34. Several stakeholders have argued that the Commission should, and has the authority to, clarify that the E-Rate program may support off-premises solutions like Wi-Fi hotspots for extending connectivity to students', school staff members', and patrons' homes. For example, the Schools, Health & Libraries Broadband (SHLB)

Coalition argued that section 254(h)(1)(B) of the Communications Act does not prohibit the provision of E-Rate support for off-premises services; rather, it simply requires a demonstration by E-Rate participants that the off-premises use of eligible equipment and services primarily serves an educational purpose. Additionally, Apple posited that the Commission should determine that equipment and services that support remote learning, like Wi-Fi hotspots, are eligible for E-Rate support because they ''enhance . . . access to advanced telecommunications and information services'' for schools and libraries under section 254(h)(2)(A) of the Communications Act. The Commission tentatively concludes, consistent with the recent *Wi-Fi on School Buses Declaratory Ruling* and the Commission's past determinations regarding the off-campus use of certain E-Rate services, that the Commission has authority under section 254 of the Communications Act to permit eligible schools and libraries to receive E-Rate support for Wi-Fi hotspots and wireless internet services that may be used off-premises. The Commission seeks comment on its tentative conclusion and the scope of the Commission's relevant legal authority, including the applicability of CIPA requirements.

35. First, the Commission tentatively concludes that such Wi-Fi hotspot and wireless internet services that may be used off-premises and are targeted for use by students and educators constitute services that are ''provide[d] . . . to elementary schools, secondary schools, and libraries,'' and thus may be supported pursuant to section 254(h)(1)(B) of the Communications Act when used ''for educational purposes.'' The Commission seeks comment on this tentative conclusion, including that the reference to ''elementary schools, secondary schools, and libraries'' does not constrain us from supporting off-premises use of such services for educational purposes. The Commission also seeks comment on whether and under what circumstances the off-premises use of wireless services, and the Wi-Fi hotspots needed to deliver such services, by students, school staff, and library patrons at locations other than at a school or library constitutes an educational purpose under section 254(h)(1)(B) of the Communications Act. Taking into consideration the lack of a reliable broadband connection at some students', school staff members', and library patrons' homes, and the increasing need for connectivity in today's technology-based educational environment that extends learning beyond a school or library building (*e.g.,* for virtual classes, electronic research projects, homework assignments, virtual library resources, and job or government assistance applications), as well as its experience connecting students, school staff, and library patrons using ECF-funded Wi-Fi hotspots and services, the Commission specifically proposes that the off-premises use of mobile wireless services and the Wi-Fi hotspots needed to deliver such connectivity is integral, immediate, and proximate to the education of students, or in the case of libraries, integral, immediate, and proximate to the provision of library services. The Commission seeks comment on this proposal and invite commenters to provide specific examples of how Wi-Fi hotspots and services used off-premises serve an educational purpose. As discussed in greater detail above, the Commission also seeks comment on the necessary safeguards to ensure that this off-premises use is primarily for educational purposes, consistent with its rules and section 254(h)(1)(B) of the Communications Act.

36. Next, the Commission seeks comment on whether supporting Wi-Fi hotspots and services is consistent with the Commission's precedent permitting certain off-premises uses of other E-Rate-funded services. Although prior off-premises uses permitted by the Commission were limited to telecommunications services, the Commission has expressly rejected the assertion that the support provided under section 254(h) of the Communications Act is limited to telecommunications services. Specifically, in the *First Universal Service Order,* 62 FR 32862, June 17, 1997, the Commission concluded that section 254(h)(1)(B) through section 254(c)(3) of the Communications Act authorizes universal service support for telecommunications services *and* additional services such as information services. Furthermore, in the *Wi-Fi on School Buses Declaratory Ruling,* the Commission concluded that the provision of support for Wi-Fi on school buses fit squarely within its authority under section 254(h)(1)(B) to designate '' 'services that are within the definition of universal service under subsection (c)(3),' which itself authorizes the Commission to designate non-telecommunications services for support under E-Rate.'' To the extent section 254(h)(1)(B) of the Communications Act encompasses additional services, such as information services, does the Commission have a basis to authorize support under that subsection for wireless Internet access services needed for the off-premises use of Wi-Fi hotspots?

37. The Commission also seeks comment on how the Commission should reconcile the authority provided under section 254(h)(1)(B) of the Communications Act to support certain ''services'' with the fact that Wi-Fi hotspots are physical devices needed to provide those services. In the *First Universal Service Order,* for example, the Commission specifically concluded that ''it can include 'the information services' *e.g.,* protocol conversion and information storage, that are needed to access the Internet, as well as *internal connections,* as 'additional services' that section 254(h)(1)(B), through section 254(c)(3), authorizes us to support.'' Consistent with that precedent, the Commission tentatively concludes that the Commission has authority under section 254(h)(1)(B) through section 254(c)(3) of the Communications Act to support the Wi-Fi hotspot devices that are needed for the off-premises use of the broadband services. The Commission invites comment on its tentative conclusion.

38. Further, the Commission tentatively concludes that providing E-Rate support for the off-premises use of Wi-Fi hotspots and services ''enhance[s], to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms . . . and libraries'' consistent with section 254(h)(2)(A) of the Communications Act. Funding the off-premises use of Wi-Fi hotspots and services will help provide the broadband connectivity necessary to support the ability of schools and libraries to facilitate remote learning for students, school staff, and library patrons who lack access when they are away from school or library premises and will allow schools and libraries to provide digital educational resources at anytime from anywhere. Therefore, the Commission believes the action proposed today will enhance schools' and libraries' access to advanced telecommunications and information services under section 254(h)(2)(A) of the Communications Act. The Commission seeks comment on this interpretation.

39. The Commission also tentatively concludes that this proposal is consistent with the Commission's exercise of its authority under section 254(h)(2)(A) of the Communications Act to establish the Connected Care Pilot Program and in its recent Declaratory Ruling clarifying that use of Wi-Fi

services on school buses is an educational purpose and, therefore, can be eligible for E-Rate support. In establishing the Connected Care Pilot Program, the Commission found that providing support for patients' home broadband connections expanded health care providers' digital footprints for purposes of providing connected care services and allowed health care providers to serve more patients through the pilot program, thus enhancing eligible health care providers' access to advanced telecommunications and information services. Similarly, in the recent *Wi-Fi on School Buses Declaratory Ruling,* the Commission found that ''the use of Wi-Fi on school buses to aid the many students who lack robust internet access at home similarly enhances eligible schools' and libraries' access to advanced telecommunications and information services.'' Would funding Wi-Fi hotspots and services to provide off-premises connectivity to students, school staff, and library patrons who lack access similarly enhance eligible schools' and libraries' access to advanced telecommunications and information services? The Commission seeks comment on its tentative conclusion.

40. *Off-Premises Limitations.* In tentatively concluding that providing E-Rate support for off-premises use of Wi-Fi hotspots and services is consistent with section 254(h)(2)(A) of the Communications Act, the Commission also seeks comment on how today's modern educational environment has evolved for the purposes of enhancing affordable access to 21st Century broadband services capable of supporting today's digital learning. The Commission has long recognized the evolving nature of educational technology, noting in the 2010 National Broadband Plan that ''[o]nline educational systems are rapidly taking learning outside the classroom, creating a potential situation where students with access to broadband at home will have an even greater advantage over those students who can only access these resources at their public schools and libraries.'' Over a decade later, and in the wake of nationwide school and library shutdowns, the need for connectivity for remote learning has become only more pronounced. There is little doubt that advances in technology have enabled students to continue to learn well after the school bell rings, including from their homes or other locations like, for example, youth centers. Today's learning settings have evolved, and learning now occurs outside of the school or library building, increasing the need to have broadband connections for educational success. As such, the Commission seeks comment on its tentative conclusion that the reference in section 254(h)(2)(A) of the Communications Act to ''elementary and secondary school classrooms . . . and libraries'' extends to student, school staff, and library patron homes, given that today's educational environment clearly extends outside of the physical school or library building. Does the modern student, school staff member, or library patron require internet access outside of school or library premises to achieve their educational goals? Is there data showing the extent to which certain educational activities take place in both the physical on-premises classroom and other off-premises locations? What about the extent to which students are required to do homework or engage in remote learning beyond school or library premises? The Commission invites commenters to share their experiences with the increasingly virtual nature of the modern educational environment and how evolving technologies have changed education.

41. As noted, Congress did not define ''classrooms'' for the purposes of section 254(h)(2)(A) of the Communications Act. In the *First Universal Service Order,* the Commission concluded that the statutory reference to ''classrooms'' demonstrated that Congress intended to fund service to each individual classroom but did not define the term. More recently, the Commission determined that ''in today's world, teaching and learning often occur outside of brick and mortar school buildings and thus 'classroom' may be interpreted more broadly,'' which may include, for example, school buses. The Commission seeks comment on whether the Commission should adopt a definition of ''classrooms'' for the purposes of the E-Rate program and what would be an appropriate definition to adequately cover the modern learning environment. Do homes and other off-premises locations (*i.e.,* community centers, after-school centers, etc.) function as ''virtual classrooms'' within the meaning of ''classrooms'' as used in section 254(h)(2)(A) of the Communications Act, particularly after the COVID–19 pandemic? Furthermore, in establishing universal service support for schools and libraries, Congress explained that the intent of the support authorized under subsection (h)(2) is to ''enhance the availability of advanced telecommunications and information services to public institutional telecommunications users'' and to ensure ''Americans everywhere'' have access ''via schools and libraries.'' The Commission seeks comment on whether interpreting ''classroom'' to mean an in-person, on-premises setting would bar any intended Americans from benefiting from supported advanced telecommunications and information services. Alternatively, would a broader interpretation of ''classrooms'' to include locations other than the school or library and that focuses on the intended beneficiaries' (*i.e.,* ''Americans everywhere'') ability to access educational services, rather than the exact location of the services, be consistent with Congress's intent? Relatedly, if the Commission adopts a broader interpretation of ''classrooms'', is there a definition that strikes a balance between ensuring access to educational services in this evolving learning environment while also establishing boundaries to ensure that the off-premises use of E-Rate-supported services remains the exception to the general presumption that activities that occur on library or school property serve an educational purpose? The Commission emphasizes that any determination of support for off-premises use of E-Rate-supported services will still be subject to the relevant statutory requirements discussed herein, including that the Commission first finds that the off-premises provision of such services serves an educational purpose pursuant to section 254(h)(1)(B), and enhances, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services under section 254(h)(2)(A) of the Communications Act. The Commission seeks comment on whether these limitations are sufficient to ensure that E-Rate funding is being used for its intended purposes.

42. *The Children's Internet Protection Act (CIPA).* The Commission seeks comment on the applicability of the Children's Internet Protection Act (CIPA) when connecting to internet made available by E-Rate-funded Wi-Fi hotspots and services. Congress enacted CIPA to protect children from exposure to harmful material while accessing the internet from a school or library. In enacting CIPA, Congress was particularly concerned with protecting children from exposure to material that was obscene, child pornography, or otherwise inappropriate for minors (*i.e.,* harmful content). CIPA prohibits certain schools and libraries from receiving funding under section 254(h)(1)(B) of the Communications Act for internet access, internet service, or internal

connections, unless they comply with specific internet safety requirements. Specifically, CIPA applies to schools and libraries ''having computers with internet access,'' and requires each such school or library to certify that it is enforcing a policy of internet safety that includes the operation of a technology protection measure ''with respect to any of its computers with internet access.'' Schools, but not libraries, must also monitor the online activities of minors and provide education about appropriate online behavior, including warnings against cyberbullying. The Commission tentatively concludes that the requirements of CIPA would apply to school- or library-owned computers being used off-premises if the school or library receives internet service, internet access, or network connection services or related equipment (including Wi-Fi hotspots) funded through the E-Rate program, and seek comment on this conclusion.

43. In the ECF program, the Commission found that the purchase of hotspots would qualify as the purchase of network equipment for internet access, internet service, or internal connections, and would trigger CIPA compliance for the purchasing school or library only if used with any school- or library-owned computers. Similarly, other ECF-funded recurring internet access or internet services (if any) used off-premises triggers CIPA compliance if used with any school- or library-owned computer. On the other hand, the Commission determined for the ECF program that CIPA does not apply to the use of any third-party-owned device, even if that device is connecting to a school's or library's ECF-funded hotspot or other ECF-funded internet access or internet service. The Commission seeks comment on whether this is the appropriate interpretation of CIPA with regard to E-Rate-funded Wi-Fi hotspots and services used off-premises as discussed further below.

44. At the time of CIPA's enactment, schools and libraries primarily owned one or two stationary computer terminals that were used solely on-premises. Today, it is commonplace for students, school staff, and library patrons to carry internet-enabled devices onto school or library premises and for schools and libraries to allow third-party-owned devices access to their internet and broadband networks. In view of the changes in technology and the wider range of internet-enabled devices in circulation today, the Commission seeks comment on whether its current interpretation of CIPA's applicability to computers owned by schools or libraries that receive E-Rate-funded internet service, internet access, or internal connections achieves CIPA's intended purpose of protecting minors from exposure to harmful content while accessing internet services provided by a school or library. Are students or library patrons able to access content that is obscene, child pornography, or harmful to minors through E-Rate-funded internet or internal connections when they use their own (*i.e.,* third-party) computers or devices? What steps can the Commission take to ensure that E-Rate funding is not being used to facilitate minors' access to harmful content, including when using third-party-owned devices to connect to E-Rate-funded internet access, internet service, or internal connections? The Commission also understands that many mobile broadband service providers include network-level filtering in their service offerings and that many schools and libraries already deploy network-level technology protection measures. The Commission seeks comment on whether it can and should require or encourage filtering and other technology protection measures to be implemented at the network-level to ensure that minors are not accessing harmful content through E-Rate-funded internet access, internet service, or internal connections. The Commission invites input from commenters on their experiences implementing and using network-level protections to protect minors from accessing harmful content.

45. The Commission also invites comment on the scope of the Commission's authority to impose requirements on third-party-owned devices pursuant to CIPA. For example, the Commission seeks comment on whether the requirement in section 254(h)(5)(B)(i) of the Communications Act that requires schools to certify that their internet safety policy ''includes monitoring the online activities of minors'' could be construed to extend to third-party-owned devices, notwithstanding other language in CIPA that suggests that its applicability is limited to school- or library-owned computers. Should monitoring the online activities of minors requirement apply to third-party-owned devices that use or access E-Rate-funded internet access, internet service, or internal connections? Is that interpretation consistent with Congress's intent ''to protect America's children from exposure to obscene material, child pornography, or other material deemed inappropriate for minors while accessing the internet from a school or library receiving Federal Universal Service assistance for provisions of internet access, internet service, or internal connection''? The Commission seeks information about current practices that would assist the Commission in formulating policies that reflect the importance of CIPA protections in the context of more modern uses of the internet services supported by E-Rate.

46. The Commission also seeks comment on how CIPA's requirements are being met remotely and whether the Commission's existing CIPA-related rules adequately cover off-premises use. What measures are ECF recipients taking to comply with CIPA when providing ECF-funded hotspots for use on school- or library-owned computers? How are libraries balancing CIPA requirements and the needs of library patrons who rely on E-Rate-funded internet access or internal connections for remote learning and other E-Rate approved uses (*e.g.,* job searching)? The Commission seeks comment on these questions and whether there may be other circumstances it has not considered related to the application of CIPA to the proposals in the *NPRM.*

47. Finally, the Commission acknowledges there are privacy concerns related to certain CIPA requirements, particularly as it relates to library patrons' data that is often subject to various federal and/or state privacy laws. The Commission seeks comment on these privacy-related issues and encourage commenters to be specific about how CIPA can be applied to ensure minors who are using E-Rate-funded Wi-Fi hotspots and services are protected from harmful online content, as intended by Congress. The Commission also seeks comment on any privacy-related implications if network-level filtering or other technology protection measures are required for third-party-owned devices that access E-Rate funded internet or internal connections.

E. Promoting Digital Equity and Inclusion

48. The Commission, as part of its continuing effort to advance digital equity for all, including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, the Commission seeks comment on how its proposals may promote or inhibit advances in diversity, equity, inclusion, and

accessibility, as well the scope of the Commission's relevant legal authority.

III. Procedural Matters

49. *Regulatory Flexibility Act.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the Addressing the Homework Gap through the E-Rate Program, Notice of Proposed Rulemaking (*NPRM*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments in the *NPRM.* The Commission will send a copy of the *NPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).

50. The Commission's E-Rate program provides support to schools and libraries, allowing them to obtain affordable, high-speed broadband services and internal connections, which enables them to connect students and library patrons to critical next-generation learning opportunities and services. The primary objectives of the *NPRM* are to address the remote learning needs of today's students, school staff, and library patrons and to help close the country's digital and educational divide (sometimes referred to as the Homework Gap), particularly once ECF program funding for off-premises broadband connectivity ends on June 30, 2024. To achieve these objectives, the *NPRM* proposes to make the off-premises use of Wi-Fi hotspots and services by students, school staff, and library patrons who would otherwise be unable to engage in remote learning eligible for E-Rate support.

51. The Commission seeks comments on its proposal to address the Homework Gap through the E-Rate program. Based on the Commission's experience gained through the ECF program, its prior record, and other data sources, the Commission believes that there are significant benefits and need for the proposed rules in continuing to fund the off-premises use of Wi-Fi hotspots and services for students, school staff, and library patrons who would otherwise be unable to fully engage in remote learning. The *NPRM* requests comments on multiple ways to implement funding for the off-premises use of Wi-Fi hotspots and services within the existing E-Rate program processes, including eligibility limits and how to prioritize requests for off-premises Wi-Fi hotspots and services to help balance service needs with limited E-Rate funding. It also seeks comments on how to ensure cost-effective purchases and the potential challenges associated with conducting competitive bidding for off-premises Wi-Fi hotspots and services. Additionally, the *NPRM* seeks comments on what actions are necessary to safeguard these critical funds from potential waste, fraud, or abuse, for example, how to ensure the off-premises Wi-Fi hotspots and services are being used by the intended recipient and serve an educational purpose. The Commission also seeks comment on modifying the recordkeeping requirements to require applicants to maintain equipment and service inventories for off-premises Wi-Fi hotspots and services purchased with E-Rate support. Furthermore, the *NPRM* seeks comments on how to protect minor online users from harmful content.

52. The proposed action is authorized pursuant to sections 1 through 4, 201–202, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151 through 154, 201–202, 254, 303(r), and 403.

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

54. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* The Commission's actions, over time, may affect small entities that are not easily categorized at present. The Commission therefore describes, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the Small Business Administration's (SBA) Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States, which translates to 33.2 million businesses.

55. Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' The Internal Revenue Service (IRS) uses a revenue benchmark of $50,000 or less to delineate its annual electronic filing requirements for small exempt organizations. Nationwide, for tax year 2020, there were approximately 447,689 small exempt organizations in the U.S. reporting revenues of $50,000 or less according to the registration and tax data for exempt organizations available from the IRS.

56. Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau data from the 2017 Census of Governments indicate there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number, there were 36,931 general purpose governments (county, municipal, and town or township) with populations of less than 50,000 and 12,040 special purpose governments—independent school districts with enrollment populations of less than 50,000. Accordingly, based on the 2017 U.S. Census of Governments data, the Commission estimates that at least 48,971 entities fall into the category of ''small governmental jurisdictions.''

57. Small entities potentially affected by the rules herein include Schools, Libraries, Wired Telecommunications Carriers, All Other Telecommunications, Wireless Telecommunications Carriers (except Satellite), Wireless Telephony, Wired Broadband internet Access Service Providers (Wired ISPs), Wireless Broadband internet Access Service Providers (Wireless ISPs or WISPs), internet Service Providers (Non-Broadband), Vendors of Infrastructure Development or Network Buildout, Telephone Apparatus Manufacturing, and Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.

58. The potential rule changes discussed in the *NPRM* if adopted, could impose some new or modified reporting, recordkeeping, or other compliance requirements on small entities. The *NPRM* proposes to apply existing E-Rate recordkeeping requirements to funding provided for the off-premises use of Wi-Fi hotspots and services and seeks comment on

whether additional recordkeeping requirements should be imposed, such as the requirement in the ECF program to maintain detailed equipment and service inventories for each device or service purchased with ECF support and provided to an individual student, school staff member, or library patron. The proposed actions would require schools and libraries to maintain inventory records of the Wi-Fi hotspot device make/model, the device serial number, the name of the person to whom the device was provided, and the dates the device was loaned out and returned to the school or library; and for services, the type of service provided, the broadband plan details (*i.e.,* upload and download speeds and the monthly data cap), and the name of the person to whom the service was provided. To ensure the equipment and services are being used, the *NPRM* also seeks comment on whether applicants and/or service providers should be required to retain and produce monthly usage reports for Wi-Fi hotspots and services funded through the E-Rate program.

59. Additionally, regarding the Commission's proposal to prioritize for students, school staff, and library patrons that lack internet access outside of school or library premises, the *NPRM* asks whether applicants should be required to determine and maintain records of students', school staff members', or library patrons' unmet need by, for example, conducting surveys. Although, new recordkeeping requirements may be implemented if the proposals in the *NPRM* are adopted, most of the recordkeeping would be similar to what most applicants, including small entities, are already familiar with and currently undertaking for the E-Rate and ECF programs.

60. In assessing the cost of compliance for small entities, at this time the Commission cannot quantify the cost of compliance with any of the potential rule changes that may be adopted. Further, the Commission is not in a position to determine whether, if adopted, the proposals and matters upon which the *NPRM* seeks comment will require small entities to hire professionals to comply. The information the Commission receives in comments, including, where requested, cost information, will help the Commission identify and evaluate relevant compliance matters for small entities, including compliance costs and other burdens that may result from potential changes discussed in the *NPRM.*

61. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

62. In the *NPRM,* the Commission takes steps to minimize the economic impact on small entities of the proposed changes to the E-Rate program on which it seeks comment. Absent the proposed action, schools and libraries receiving ECF program support may no longer be able to provide the broadband connectivity needed to engage in remote learning to their students, school staff, and library patrons once the program ends. The *NPRM* therefore proposes to make the off-premises use of Wi-Fi hotspots and services eligible for E-Rate funding to support remote learning for students, school staff, and library patrons with unmet needs, which, if adopted, will reduce the burden on applicants, including small entities, who seek to provide students, school staff, and library patrons the off-premise broadband connectivity needed for educational success. This proposal will also lessen the administrative requirements of cost-allocating certain portions of services used off-premises from applicants' funding requests. The *NPRM* also seeks comment relevant to small entities, including entities in remote areas, by asking how to conduct competitive bidding for off-premises wireless services delivered to multiple locations.

63. Additionally, the *NPRM* invites commenters to suggest other measures or alternatives the Commission should consider to best implement E-Rate funding for Wi-Fi hotspots and internet services for off-premises use. This may result in proposals from small entities that lessen the economic impact of the proposed changes to the E-Rate program, and increase their participation. The Commission expects the information received in the comments to allow it to more fully consider ways to minimize the economic impact on small entities and explore additional alternatives to improve and simplify opportunities for small entities to participate in the E-Rate program.

64. *Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules.* None.

65. *Paperwork Reduction Act.* This document seeks comment on possible modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

66. *Providing Accountability Through Transparency Act.* Consistent with the Providing Accountability Through Transparency Act, Public Law 118–9, a summary of this document will be available on *https://www.fcc.gov/proposed-rulemakings.*

67. *Ex Parte Rules—Permit but Disclose.* Pursuant to section 1.1200(a) of the Commission's rules, the *NPRM* 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 presenter's 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 section

1.1206(b). In proceedings governed by rule 1.49(f) 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.

IV. Ordering Clauses

68. Accordingly, *it is ordered* that, pursuant to the authority found in sections 1 through 4, 201–202, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151 through 154, 201 through 202, 254, 303(r), and 403, this Notice of Proposed Rulemaking *is adopted.*

69. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 54

Communications common carriers, Hotspots, Internet, Libraries, Reporting and recordkeeping requirements, Schools, Telecommunications, Telephone.

Federal Communications Commission.

Marlene Dortch,

Secretary.

For the reasons set forth above, the Federal Communications Commission proposes to amend part 54 of title 47 of the Code of Federal Regulations as follows:

PART 54—UNIVERSAL SERVICE

■ 1. The authority citation for part 54 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 155, 201, 205, 214, 219, 220, 229, 254, 303(r), 403, 1004, 1302, 1601–1609, and 1752, unless otherwise noted.

■ 2. Amend section 54.504 by adding paragraphs (a)(1)(x) through (xiii), and adding paragraph (f)(6) to read as follows:

§ 54.504 Requests for services.

(a) * * *

(1) * * *

(x) If requesting support for Wi-Fi hotspots and service for use off-premises, the school or school consortium listed on the FCC Form 471 application is only seeking support for eligible equipment and/or services provided to students and school staff who would otherwise lack internet access service sufficient to engage in remote learning.

(xi) If requesting support for Wi-Fi hotspots and service for use off-premises, the library or library consortium listed on the FCC Form 471 application is only seeking support for eligible equipment and/or services provided to library patrons who have signed and returned a statement (physically or electronically) that the library patron would otherwise lack access but for the use of equipment and/or service provided by the library.

(xii) If requesting support for Wi-Fi hotspots and service for use off-premises, the school, library, or consortium is not seeking support and reimbursement for eligible equipment and/or services that have been purchased and reimbursed in full with other federal, state, Tribal, or local funding, or providing duplicative equipment and/or services to a student, school staff member, or library patron.

(xiii) The school, library, or consortium will create and maintain an equipment and service inventory as required by § 54.516(a)(3).

* * * * *

(f) * * *

(6) If requesting reimbursement for Wi-Fi hotspots and service for use off-premises, the service provider will provide the school, library, or consortium with notice if a student, school staff member, or library patron has not used the equipment and/or service within the past [30] days and will not willfully or knowingly request reimbursement or invoice the school, library, or consortium for eligible equipment and/or services that were not used. The service provider shall provide the school, library, or consortium with monthly usage data upon request.

■ 3. Amend Section 54.516 by revising paragraph (a)(1), adding paragraph (a)(3), and revising paragraph (b) to read as follows:

§ 54.516 Auditing and inspections.

(a) * * *

(1) *Schools, libraries, and consortia.* Schools, libraries, and any consortium that includes schools or libraries shall retain all documents related to the application for, receipt, and delivery of supported services for at least 10 years after the latter of the last day of the applicable funding year or the service delivery deadline for the funding request. Any other document that demonstrates compliance with the statutory or regulatory requirements for the schools and libraries mechanism shall be retained as well. Subject to paragraph (a)(3) of this section, schools, libraries, and consortia shall maintain asset and service inventory records for a period of 10 years from the last date of service or delivery of equipment.

* * * * *

(3) *Asset and service inventory requirements.* Schools, libraries, and consortia shall keep asset and service inventories as follows:

(i) For equipment purchased as components of supported category two services, the asset inventory must be sufficient to verify the actual location of such equipment.

(ii) For each Wi-Fi hotspot provided to an individual student, school staff member, or library patron, the asset inventory must identify:

(A) The device or equipment make/model;

(B) The device or equipment serial number;

(C) The full name of the person to whom the device or other piece of equipment was provided; and

(D) The dates the device or other piece of equipment was loaned out and returned to the school or library, or the date the school or library was notified that the device or other piece of equipment was missing, lost, or damaged.

(iii) For mobile wireless services provided through Wi-Fi hotspots to individual students, school staff, or library patrons, the service inventory must contain:

(A) The type of service provided (*i.e.,* mobile wireless);

(B) The service plan details, including upload and download speeds and any monthly data cap; and

(C) The full name of the person(s) to whom the service was provided.

(b) *Production of Records.* Schools, libraries, consortia, and service providers shall produce such records at the request of any representative (including any auditor) appointed by a state education department, the Administrator, the FCC, or any local, state, or federal agency with jurisdiction over the entity. Where necessary for compliance with Federal or state privacy laws, E-Rate participants may produce records regarding students, school staff, and library patrons in an anonymized or deidentified format. When requested by the Administrator or the Commission, as part of an audit or investigation, schools, libraries, and consortia must seek consent to provide personally identifiable information from

a student who has reach age of majority, the relevant parent/guardian of a minor student, or the school staff member or library patron prior to disclosure.

* * * * *

[FR Doc. 2023–26033 Filed 12–6–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 97

[WT Docket No. 16–239; FCC 23–93; FR ID 188661]

Amateur Radio Service Rules To Permit Greater Flexibility in Data Communications

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) adopted a Further Notice of Proposed Rulemaking (FNPRM) that proposes to remove the baud rate limitation in the 135.7–137.8 kHz (2200 meter band), 472–479 kHz (630 meter band), the very high frequency (VHF) bands, and the ultra-high frequency (UHF) band in the amateur radio service. The VHF bands with baud rates are the 6 meter band (50.1–51.0 MHz), (51.0–54.0 MHz); 2 meter band (144.1–148.0 MHz); and the 1.25 meter band (222–225 MHz). The UHF band with a baud rate is the 70 centimeter band (420–450 MHz). Additionally, the FNPRM proposes to maintain the existing bandwidth limitations in the Commission's rules for these VHF/UHF bands and seeks comment on the appropriate bandwidth limitation for the 2200 meter and 630 meter bands.

DATES: Comments due on or before January 8, 2024; reply comments due on or before January 22, 2024.

ADDRESSES: You may submit comments, identified by WT Docket No. 16–239, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *https://apps.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, DA 20–304 (March 19, 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), 202–418–0432 (TTY).

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Nellie Foosaner of the Wireless Telecommunications Bureau, Mobility Division, at (202) 418–2925 or *nellie.foosaner@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Further Notice of Proposed Rulemaking, in WT Docket No. 16–239; FCC 23–93, adopted on November 13, 2023, and released on November 13, 2023. The full text of this document is available for public inspection online at *https://docs.fcc.gov/public/attachments/FCC-23-93A1.pdf.*

Synopsis

1. On November 13, 2023 the Commission adopted a Report and Order eliminating the baud rate applicable to certain amateur radio bands and implementing a 2.8 kHz bandwidth limitation in the applicable bands. There are multiple bands in the amateur radio service that have baud rate limitations and were not discussed in the Notice of Proposed Rulemaking (NPRM) underlying the Report and Order. Two bands—135.7–137.8 kHz (2200 meter) and 472–479 kHz (630 meter)—were allocated for use in the amateur radio service after the Commission released the NPRM in 2016. There are also multiple very high frequency (VHF) bands and one ultra-high frequency (UHF) band that have baud rate limitations. In the Further Notice of Proposed Rulemaking (FNPRM) the Commission proposes to remove the baud rate limitation in the two bands allocated for amateur radio use after the Commission released the NPRM in 2016 and in the VHF/UHF bands. Additionally, the Commission seeks comment on the appropriate bandwidth limitation for the 2200 meter and 630 meter bands, and proposes to maintain the existing bandwidth limitations in the Commission's rules for VHF/UHF bands.

2. In 2016, the Commission released the NPRM seeking comment on eliminating the baud rate limit in certain amateur bands and amending part 97 of the Commission's rules accordingly. The NPRM also tentatively concluded that a 2.8 kilohertz bandwidth limitation for RTTY and data emissions in the MF/HF bands was not necessary, but sought comment on this conclusion. The NPRM did not seek comment on eliminating the baud rate limit in the VHF or UHF bands allocated for amateur radio service. In 2017, the Commission adopted rules permitting fixed amateur radio operations in 135.7–137.8 kHz (2200 meter) and 472–479 kHz (630 meter) bands. These bands are allocated to the amateur radio service on a secondary basis. Consistent with the part 97 rules in effect for other amateur bands at that time, the Commission adopted a 300 baud rate limitation for both the 2200 meter band and the 630 meter band.

3. For the reasons outlined in the Report and Order, the Commission tentatively concludes that it should eliminate the baud rate limitation in the 2200 meter and 630 meter bands as well as the VHF and UHF amateur radio bands. These bands present the same technological opportunities for experimentation and innovation as the amateur radio service bands that are the subject of the Report and Order and likewise will be limited if a baud rate limitation is allowed to remain for these bands. Concomitantly, the Commission seeks comment on the appropriate bandwidth limitation for the 2200 meter band and the 630 meter band as well as on maintaining the bandwidth limitations already in the VHF and UHF bands. The Commission specifically seeks comment on these proposals. Alternatively, should it consider changing any of the existing bandwidth limitations in the VHF and UHF bands allocated to the amateur radio service? Commenters seeking to modify existing bandwidth limitations must provide support for the modification, including any associated costs and benefits. Commenters should focus their comments on the VHF and UHF bands and the 2200 meter band and the 630

meter band that were allocated for amateur radio service after the release of the NPRM. The Commission does not seek comment on other, unrelated issues in the docket at this time.

4. *Digital Equity and Inclusion.* Finally, the Commission, as part of its continuing effort to advance digital equity for all, including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, the Commission seeks comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the Commission's relevant legal authority.

Procedural Matters

5. *Regulatory Flexibility Certification.* The Regulatory Flexibility Act of 1980, as amended (RFA) requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

6. In the FNPRM, the Commission proposes to amend the amateur service rules to change technical rules applicable to data emissions that an amateur radio operator may use in his or her communications with other amateur radio operators in the 135.7–137.8 kHz (2200 meter) and 472–479 kHz (630 meter) bands, and VHF and UHF bands. As discussed above, the RFA's definition of ''small entities'' does not include a ''person'' or an individual, as the terms are used in this proceeding. As a result, the proposed rules do not apply to ''small entities,'' but instead apply exclusively to individuals who hold certain Commission authorizations. Accordingly, applying the statutorily mandated criteria the Commission concludes and, therefore, certifies in this Initial Regulatory Flexibility Certification, that the rules adopted in the FNPRM will not have a significant economic impact on a substantial number of small entities.

7. The Commission will send copies of the FNPRM, including copies of the Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the SBA.

8. *Paperwork Reduction Act.* This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4).

9. *Providing Accountability Through Transparency Act:* The Providing Accountability Through Transparency Act requires each agency, in providing notice of a rulemaking, to post online a brief plain-language summary of the proposed rule. Accordingly, the Commission will publish the required summary of this Further Notice of Proposed Rulemaking on *https://www.fcc.gov/proposed-rulemakings.*

Ordering Clauses

10. Accordingly, *it is ordered* that, pursuant to Sections 4(i), 5, 303(r), and 403 of the Communications Act of 1934, 47 U.S.C. 154(i), 155, 303(r), and 403 of the Commission's rules, that this Further Notice of Proposed Rulemaking *is hereby adopted.* Proceeding RM–11708 is *terminated.*

11. *It is further ordered* that the Office of the Secretary, Reference Information Center, *shall send* a copy of the Further Notice of Proposed Rulemaking including the Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 97

Radio.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 97 as follows:

PART 97—AMATEUR RADIO SERVICE

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

Authority: 47 U.S.C. 151–155, 301–609, unless otherwise noted.

■ 2. Section 97.307 is amended by revising paragraphs (f)(3), (5), and (6) to read as follows:

§ 97.307 Emission standards.

* * * * *

(f) * * *

(3) Only a RTTY or data emission using a specified digital code listed in § 97.309(a) may be transmitted.

* * * * *

(5) A RTTY, data or multiplexed emission using a specified digital code listed in § 97.309(a), or using an unspecified digital code under the limitations listed in § 97.309(b), may be transmitted. The authorized bandwidth is 20 kHz.

(6) A RTTY, data or multiplexed emission using a specified digital code listed in § 97.309(a), or using an unspecified digital code under the limitations listed in § 97.309(b), may be transmitted. The authorized bandwidth is 100 kHz.

* * * * *

[FR Doc. 2023–26769 Filed 12–6–23; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

48 CFR Parts 1401, 1402, 1403, 1405, 1414, 1416, 1419, 1426, 1431, 1442, 1443, and 1449

[Docket No. DOI–2023–0012; 234D0102DM, DS62400000, DLSN00000.000000, DX62401]

RIN 1090–AB25

Department of the Interior Acquisition Regulation Governance Titles

AGENCY: Office of Acquisition and Property Management, Interior.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of the Interior proposes changes to the Department of the Interior acquisition regulations to update its nomenclature to align with recent changes to agency procurement governance. This proposal enables acquisition programs to more efficiently meet the Department's mission needs and comply with all applicable law and regulations.

DATES: Comments must be received on or before February 5, 2024.

ADDRESSES: You may submit comments, identified by Docket No. DOI–2023–0012 on the rulemaking through the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the instructions on the website for submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Antonia Giammo, Senior Procurement Analyst; telephone (202) 208–5250 or email *pam_policy@ios.doi.gov.* Individuals in the United States who are deaf, blind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

I. Background

As part of a broader effort to improve the Department of Interior's (DOI's) procurement function and strengthen its workforce, the Department recently made changes to its procurement governance. These updates were made in accordance with 41 U.S.C. 1702, Chief Acquisition Officers and senior procurement executives, and Departmental Manual 205 DM 11, General Delegations, Procurement and Contracting. In amending its procurement governance, DOI created consistency in organizational structure and leadership roles across its bureaus and offices, and reassigned roles established by the Federal Acquisition Regulation to better streamline acquisition approval processes. This proposed rule amends the Department of the Interior Acquisition Regulation to reflect the changes in procurement governance by removing role designations no longer used and replacing with the appropriate procurement roles.

II. Description of Changes

The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the codification of uniform policies and procedures for acquisition by all executive agencies, and agency acquisition regulations, such as the Department of the Interior Acquisition Regulation (DIAR), that implement or supplement the FAR. The Federal Acquisition Regulations System is codified in Title 48 of the Code of Federal Regulations (CFR).

Part 2 of the FAR defines the following key procurement roles: agency head, Chief Acquisition Officer (in accordance with 41 U.S.C. 1702), senior procurement executive (in accordance with 41 U.S.C. 1702), head of the contracting activity, and contracting officer. The FAR uses the term ''chief of the contracting office'' without defining it. Part 1402 of the current DIAR identifies within the Department the agency head, senior procurement executive, and heads of the contracting activity. Part 1402 of the DIAR also defines the terms ''bureau procurement chief'' and ''chief of the contracting office''.

This rule proposes to revise the DIAR in the following ways:

- Remove the term ''bureau procurement chief'' and replace with ''head of contracting activity''.
- Amend the Department's definition of ''head of contract activity''.
- Add and define the term ''bureau procurement executive''.
- Update references to the above terms as used throughout the DIAR.

The term ''bureau procurement chief'' (BPC) is not used in the FAR or across executive agencies broadly. DOI defined the term in the DIAR to mean the senior General Schedule (GS) Series 1102 (contracting) official in a bureau or office. The term ''head of contracting activity'' (HCA) is defined in the FAR as the official who has overall responsibility for managing the contracting activity. The current DIAR further specifies that the HCA is the assistant or associate administrative head of each bureau and office who has overall responsibility for managing contracting. Within DOI, the BPC would be in a direct reporting line to the HCA. Except for the Interior Business Center, the HCA would not necessarily have a GS–1102 background and would also be responsible for other areas beyond procurement.

Both the FAR and DIAR require HCA review and approval of certain procurement actions. In practice, HCAs delegated their approvals to the BPC in most cases allowed under regulation. When HCA approval was required, it would still come through the BPC, but the additional layer of review would result in additional time to coordinate HCA briefing and approval.

When reevaluating DOI's procurement governance, the Department determined that in practice, the BPC was indeed the individual responsible for *managing* the contracting activity and the HCA was the senior executive accountable for the contracting activity but not involved in the day-to-day management of the function. The Chief Acquisition Officer, senior procurement executive, HCAs, and BPCs all concurred that accordingly, the senior GS–1102 in a bureau (or office equivalent) should be designated as the HCA rather than the DIAR specific term BPC. It was determined that this change would also streamline procurement actions requiring HCA approval by removing a layer of review that was either delegated or offered nominal additional benefit. The senior executives who had been designated as HCAs would now be designated as 'bureau procurement executives' (BPEs) and would still be accountable for the bureau's contracting function.

These changes are part of a broader Departmental effort to provide greater consistency across bureau and office procurement organizations and to empower procurement leadership. The changes to the titles bureau procurement chief, head of contracting activity, and bureau procurement executive do not result in any change to reporting chains or key duties of those holding these positions. The changes also do not impose any new requirements on or change the manner in which DOI interacts with its contractors and the public.

III. Required Determinations

A. Regulatory Planning and Review (Executive Orders 12866, 13563, and 14094)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this proposed rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive Order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public, where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Executive Order 14094 reaffirms the principles of E.O. 12866 while calling for improvements in public participation, inclusiveness, and regulatory analysis. We have developed this rule in a manner consistent with E.O. 14094.

B. Regulatory Flexibility Act

The Secretary certifies that the adoption of this proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory

Flexibility Act (5 U.S.C. 601 *et seq.*). Therefore, under 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

C. Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)). This rule:

(a) Will not have an annual effect on the economy of $100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates Reform Act

This proposed rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments, or the private sector nor does the rule impose requirements on State, local, or tribal governments. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

E. Takings (E.O. 12630)

This proposed rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630. A takings implication assessment is not required.

F. Federalism (E.O. 13132)

Under the criteria in section 1 of E.O. 13132, this proposed rule does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement. It would not substantially and directly affect the relationship between the Federal and state governments. A Federalism summary impact statement is not required.

G. Civil Justice Reform (E.O. 12988)

This proposed rule complies with the requirements of E.O. 12988. Specifically, this rule:

(a) meets the criteria of section 3(a) of this E.O. requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) meets the criteria of section 3(b)(2) of this E.O. requiring that all regulations be written in clear language and contain clear legal standards.

H. Consultation With Indian Tribes (E.O. 13175)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in E.O. 13175 and have determined there will not be 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. Consultation with Indian tribes is not required.

I. Paperwork Reduction Act

This proposed rule does not cause any collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) A Paperwork Reduction Act clearance is not required.

J. National Environmental Policy Act

This proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because the rule is covered by the categorical exclusion listed in 43 CFR 46.210(f). We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

K. Effects on the Energy Supply (E.O. 13211)

This proposed rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

L. Clarity of This Regulation (Plain Language)

We are required by Executive Orders 12866 (section 1(b)(12)), and 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

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

(c) Use common, everyday words and clear language rather than jargon;

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

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **FOR FURTHER INFORMATION CONTACT** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the number of section or paragraphs that you find unclear, which section or sentences are too long, the sections where you feel lists or tables would be useful, etc.

M. Public Availability of Comments

You may submit your comments and materials regarding this proposed rule by the method listed in the Addresses section. We will post all comments on *https://www.regulations.gov.* Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information may be publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

List of Subjects in 48 CFR Parts 1401, 1402, 1403, 1405, 1414, 1416, 1419, 1426, 1431, 1442, 1443, and 1449

Government procurement.

Regulation Promulgation

For the reasons set out in the preamble, the Department of the Interior, Office of Acquisition and Property Management, proposes to amend 48 CFR chapter 14 as follows:

PART 1401—DEPARTMENT OF THE INTERIOR ACQUISITION REGULATION SYSTEM

■ 1. The authority citation for part 1401 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

■ 2. Revise section 1401.303 to read as follows:

1401.303 Publication and codification.

(a)(1) Implementing and supplementing regulations issued under the DIAR System are codified under chapter 14 in title 48, Code of Federal Regulations and shall parallel the FAR in format, arrangement, and numbering system.

(2)(i) Department-wide regulations are assigned 14 CFR parts 1401 through 1479.

(ii) Where material in the FAR requires no implementation, there will be no corresponding number in the DIAR. Thus, there are gaps in the DIAR sequence of numbers where the FAR, as written, is deemed adequate. Supplemental material shall be numbered as specified in FAR 1.303.

(3) Bureau-wide regulations are authorized for codification in Appendices to Chapter 14, as assigned by the Director, PAM, in accordance with 1401.304(a)(3).

(b) Regulations implementing the FAR or DIAR are numbered using 48 CFR parts 1401 through 1479. Supplemental material is numbered using 48 CFR parts 1480 through 1499. Numbers for implementing or supplementing regulations by bureaus/offices are preceded by a prefix to the number 14 (indicating chapter 14–DIAR) for the organization indicated by lettered appendices as follows:

(1) Bureau of Indian Affairs—BIA
(2) Bureau of Reclamation—WBR
(3) Interior Business Center—IBC
(4) Bureau of Land Management—LLM
(5) U.S. Geological Survey—WGS
(6) Office of Surface Mining Reclamation & Enforcement—LSM
(7) Minerals Management Service—LMS
(8) National Park Service—FNP
(9) U.S. Fish and Wildlife Service—FWS

(c) *e.g.,* FAR 1.3 (48 CFR 1.3) then DIAR 1401.3 [Department level] then in Appendix A, BIA 1401.3 [Bureau level].

■ 3. Revise section 1401.370 to read as follows:

1401.370 Acquisition Managers' Partnership.

(a) The Acquisition Managers' Partnership (AMP) is a forum for DOI's senior acquisition management community to work cooperatively and continuously to improve the management, efficiency and effectiveness of its procurement services in support of DOI's mission.

(b) The AMP consists of the HCAs and representatives from PAM and OSDBU.

(c) The AMP Charter provides that the Chairperson and Associate Chairperson are leadership roles that will rotate annually. The AMP Chairperson determines when the partnership will meet and develops meeting agendas. The Chairperson will distribute the meeting minutes to all members.

■ 4. Revise section 1401.403 to read as follows:

1401.403 Individual deviations.

(a) The Director, PAM, is authorized to approve deviations of FAR provisions (see FAR 1.4) or DIAR provisions which affect only one contracting action.

(b) Requests for deviations under paragraph (a) of this section shall be submitted by the HCA and include justification for the deviation.

(c) A copy of the approved deviation shall be included in the contract file.

■ 5. Revise section 1401.603–1 to read as follows:

1401.603–1 General.

HCAs are authorized to select and appoint COs and terminate their appointment as prescribed in the Department's Certificate of Appointment (COA) Manual. Copies of the manual may be obtained at *http://www.doi.gov/pam/Acqworkfor.html*.

■ 6. Revise section 1401.603–2 to read as follows:

1401.603–2 Selection.

COs, regardless of series or organizational placement, must be certified at a level commensurate with their appointment level, as prescribed in the Department's Federal Acquisition Certification in Contracting (FAC–C) Program Manual. Director, PAM, is the approving authority for all new and reinstated FAC–C certifications. HCAs are authorized to approve renewal FAC–C certifications.

■ 7. Revise section 1401.7001–4 to read as follows:

1401.7001–4 Acquisition performance measurement systems.

(a) The acquisition performance measurement system is a three-pronged approach that includes self assessment, statistical data for validation and flexible quality reviews and assessment techniques. This system is required to:

(1) Evaluate the effectiveness and efficiency of bureau and office acquisition systems;

(2) Assess the adequacy of policies, procedures and regulations governing the acquisition process; and

(3) Identify and implement changes necessary to improve the systems.

(b) BPEs are responsible for ensuring contracting activity compliance with law and regulations through the review and oversight process.

PART 1402—DEFINITIONS OF WORDS AND TERMS

■ 8. The authority citation for part 1402 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

■ 9. Revise subpart 1402.1 to read as follows:

Subpart 1402.1—Definitions

Sec.
1402.101 Definitions.
1402.170 Acronyms.

Subpart 1402.1—Definitions

1402.101 Definitions.

As used in this part:

Bureau Procurement Executive (BPE) is defined as the assistant or associate administrative head who has overall responsibility for the contracting activity. In reference to the Office of the Secretary (OS), the BPEs are the Assistant Inspector General for Management and Policy and the Director, Interior Business Center (IBC).

Chief of the contracting office (CCO) is defined as the senior GS–1102 within a contracting office unless otherwise specified by bureau/office regulation. If the CCO is also the Contracting Officer (CO) for an action requiring approval of the CCO, then approval shall be at a level above the CCO in accordance with bureau procedures.

Contracting activity is defined as an office with delegated procurement authority. Within the Office of the Secretary (OS), the Office of Inspector General (OIG) is a contracting activity. The Interior Business Center (IBC) contracts for the OS.

Head of the agency (also called ''agency head'') is defined as the Secretary of the Interior and the Assistant Secretary—Policy, Management and Budget (AS/PMB).

Head of the contracting activity (HCA) is defined as the senior GS 1102 official in the contracting activity who has the overall responsibility for managing the contracting activity. The HCA authority may be delegated, unless specified otherwise, to the CCO. If the HCA is the Contracting Officer (CO) for an action requiring approval of the HCA, then approval shall be at the BPE level.

Senior procurement executive is defined as the Director, Office of Acquisition and Property Management (PAM).

1402.170 Acronyms.

A&E Architect & Engineering
ACMIS Acquisition Career Management Information System
AMP Acquisition Manager's Partnership
AMR Acquisition Management Review
AS/PMB Assistant Secretary—Policy, Management and Budget
BPA Blanket Purchase Agreement
BPE Bureau Procurement Executive
CA Competition Advocate
CAAC Civilian Agency Acquisition Council
CAS Cost Accounting Standards
CASB Cost Accounting Standards Board
CBCA Civilian Board of Contract Appeals
CCO Chief of the Contracting Office
CERCLA Comprehensive Environmental Response, Compensation and Liability Act
CFR Code of Federal Regulations
CIO Chief Information Officer
CO Contracting Officer
COA Certificate of Appointment

COI Conflicts of Interest
COR Contracting Officer's Representative
COTR Contracting Officer's Technical Representative
DISP Defense Industrial Security Program
DM Departmental Manual
DOI Department of the Interior
DOL Department of Labor
EC Electronic Commerce
FAR Federal Acquisition Regulation
FBMS Financial Business Management System
FPDS—NG Federal Procurement Data System—Next Generation
GAO Government Accountability Office
GIDEP Government-Industry Data Exchange Program
GPE Government Point of Entry
GPO Government Printing Office
GSA General Services Administration
GSBCA General Services Board of Contract Appeals
HCA Head of the Contracting Activity
IT Information Technology
IPMD Interior Property Management Directives
MBDA Minority Business Development Agency
OCIO Office of Chief Information Officer
OIG/IG Office of Inspector General/ Inspector General
OFPP Office of Federal Procurement Policy
OHA Office of Hearings and Appeals
OMB Office of Management and Budget
OS Office of the Secretary
OSDBU Office of Small and Disadvantaged Business Utilization
PAM Office of Acquisition and Property Management
PMO Property Management Officer
PNM Procurement Negotiation Memorandum
SAT Simplified Acquisition Threshold
SBA Small Business Administration
SBS Small Business Specialist
SOL Office of the Solicitor
TFM Treasury Financial Manual
U.S.C. United States Code
VECP Value Engineering Change Proposal

PART 1403—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 10. The authority citation for part 1403 continues to read:

Authority: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

■ 11. Revise section 1403.104–7 to read as follows:

1403.104–7 Violations or possible violations.

(a)(1) The CO's determination that there is no impact on the procurement due to a possible violation of the Procurement Integrity Act and decision to proceed with contract award shall receive concurrence from an individual one level above the CO.

(2) In case of nonconcurrence with the CO's determination, the HCA shall provide a copy of the reported violation and recommended action to the OIG in accordance with Part 111 DM 3. The CO, in consultation with the SOL and the OIG, must justify the compelling circumstances for immediate award and obtain approval to proceed from the HCA without the power of redelegation. Copies of the determination to proceed with the award will be sent to the Director, PAM, for submission to the AS/PMB.

(b) [Reserved]

■ 12. Revise section 1403.804 to read as follows:

1403.804 Policy.

The HCA shall receive copies of contractor disclosures and forward them to the Director, PAM, for submission to Congress.

PART 1405—PUBLICIZING CONTRACT ACTIONS

■ 13. The authority citation for part 1405 continues to read:

Authority: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

■ 14. Revise section 1405.403 to read as follows:

1405.403 Requests from Members of Congress.

For purposes of this subpart, the agency head is the HCA.

PART 1414—SEALED BIDDING

■ 15. The authority citation for part 1414 continues to read:

Authority: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

■ 16. Revise section 1414.407–3 to read as follows:

1414.407–3 Other mistakes disclosed before award.

(a) The HCA is authorized to make the administrative determinations under FAR 14.407–3, except as set forth in paragraph (b) of this section. This authority is not redelegable.

(b) The CCO has the authority outlined in FAR 14.407–3(c) (48 CFR 14.407–3(c)) to make the written determination permitting a bidder to withdraw a bid, after review by the SOL.

(c) The CO shall submit a report on suspected or alleged mistakes in bids together with the supporting data to the HCA. The CO may also include a report on bids where evidence of the intended bid is clear and convincing but the bidder has not requested permission to correct the bid. Incomplete reports may result in a delay in obtaining a determination.

(d) The HCA is responsible for maintaining records of administrative determinations.

PART 1416—TYPES OF CONTRACTS

■ 17. The authority citation for part 1416 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

■ 18. Revise section 1416.405 to read as follows:

1416.405 Contract clauses.

The HCA, without the power of redelegation, is authorized to approve an award fee clause to use in a solicitation when a cost-plus-award-fee contract is contemplated.

PART 1419—SMALL BUSINESS PROGRAMS

■ 19. The authority citation for part 1419 continues to read as follows:

Authority: 40 U.S.C. 121(c); 40 U.S.C. 486(c); and 5 U.S.C. 301.

■ 20. Revise section 1419.503–70 to read as follows:

1419.503–70 Class set-aside for construction acquisitions.

(a) Acquisitions for construction (as defined in Federal Acquisition Regulation (FAR) 2.101) estimated to cost $2 million or less must be set-aside on a class basis for exclusive participation by small business or disadvantaged business concerns. This class set-aside does not apply when:

(1) The acquisition is procured using simplified acquisition procedures;

(2) A non-competitive acquisition has been approved under the procedures of FAR 6.3;

(3) Work is to be performed outside the U.S.; or

(4) The HCA determines that adequate competition is not likely to be obtained if the acquisition is restricted to small business concerns.

(b) [Reserved]

PART 1426—OTHER SOCIOECONOMIC PROGRAMS

■ 21. The authority citation for part 1426 continues to read:

Authority: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

■ 22. Revise section 1426.7102–2 to read as follows:

1426.7102–2 Requirements.

(a) MBDA–91 Plan. The HCA is required to submit the Plan on form MBDA–91 to the OSDBU by no later than November 15 of each year. Section 1 of the form, ''Procurement Program Activities,'' will be completed by OSDBU. Sections 2 through 5 must be completed by bureaus and offices.

(b) MBDA–91 Reports. The HCA must submit reports to the OSDBU within 30

days following the end of a fiscal quarter. Reports are cumulative from October 1 of the reporting fiscal year, and monetary figures should be rounded to whole dollars in each section of the report.

(c) ''Negative report'' means when the Bureau had no reportable activity during the quarter. Submit such a report using the MBDA–91 report form.

■ 23. Revise section 1426.7103–2 to read as follows:

1426.7103–2 Requirements.

The contracting offices shall report designated projects funded with EPA monies, involving the actual award of contracts, subcontracts, financial assistance instruments, subagreements, etc. by DOI. Do not include Departmental projects covered by Superfund and funded solely with Departmental appropriations. The HCA must submit one of the following reports inclusive of all projects, as applicable, to the OSDBU by no later than November 8 of each year:

(a) EPA Forms 6005–3 and 6005–3A for applicable Superfund contract awards, including partial awards to minority businesses.

(b) EPA Form 6005–3A only, for applicable Superfund contract awards when no awards were made to minority firms, to report the efforts made to promote minority business participation in the designated projects.

(c) ''Negative Report'' when the reporting Bureau did not award contracts using Superfund monies.

PART 1431—CONTRACT COST PRINCIPLES AND PROCEDURES

■ 24. The authority citation for part 1431 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

■ 25. Revise section 1431.101 to read as follows:

1431.101 Objectives.

Individual deviations concerning cost principles and procedures shall require the approval of the cognizant Assistant Secretary, with further redelegation authorized. Redelegation is limited to the HCA.

PART 1442—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 26. The authority citation for part 1442 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

■ 27. Revise section 1442.602 to read as follows:

1442.602 Assignment and location.

The HCA has the authority to approve the appointment of a Corporate Administrative Contracting Officer.

PART 1443—CONTRACT MODIFICATIONS

■ 28. The authority citation for part 1443 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

■ 29. Revise section 1443.205 to read as follows:

1443.205 Contract clauses.

HCAs may establish procedures, when appropriate, for authorizing the CO to vary the 30-day period for submission of requests for adjustment prescribed by FAR 43.205 (48 CFR 43.205).

PART 1449—TERMINATION OF CONTRACTS

■ 30. The authority citation for part 1449 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

■ 31. Revise section 1449.106 to read as follows:

1449.106 Fraud or other criminal conduct.

When fraud or other criminal conduct is suspected, the CO will submit a report documenting the incident to the HCA for transmittal to the OIG. Informational copies will be forwarded to the Director, PAM.

■ 32. Revise section 1449.111 to read as follows:

1449.111 Review of proposed settlements.

All proposed settlement agreements shall be reviewed by the SOL and approved at one level above the CO. Settlement agreements of $250,000 or more shall be approved by the HCA.

Joan M. Mooney,

Principal Deputy Assistant Secretary, Exercising the Delegated Authority of the Assistant Secretary—Policy, Management and Budget.

[FR Doc. 2023–26443 Filed 12–6–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2023–0069; FF09E21000 FXES1111090FEDR 245]

RIN 1018–BE77

Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Toothless Blindcat and the Widemouth Blindcat; Extension of Comment Period

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are reopening the comment period on our August 22, 2023, proposed rule to list the toothless blindcat (Trogloglanis pattersoni) and widemouth blindcat (Satan eurystomus), two cavefish species from the Edwards Aquifer in Bexar County, Texas, as endangered species under the Endangered Species Act of 1973, as amended (Act). We are reopening the proposed rule's comment period to give all interested parties an additional opportunity to comment on the proposed rule. Comments previously submitted need not be resubmitted, as they are already incorporated into the public record and will be fully considered in our final determinations.

DATES: The comment period on the proposed rule that published August 22, 2023, at 88 FR 57046, is reopened. We will accept comments received or postmarked on or before January 8, 2024. Comments submitted using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. eastern time on the closing date.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Search box, enter FWS–R2–ES–2023–0069, which is the docket number for the August 22, 2023, proposed rule and this document. Then click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rule box to locate the correct 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–R2–ES–2023–0069, 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 Public Comments, below, for more information).

FOR FURTHER INFORMATION CONTACT: Karen Myers, Field Supervisor, U.S. Fish and Wildlife Service, Austin Ecological Services Field Office, 1505 Ferguson Lane, Austin, TX 78754; telephone 512–937–7371. 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. Please see Docket No. FWS–R2–ES–2023–0069 on *https://www.regulations.gov* for a document that summarizes the August 22, 2023, proposed rule.

SUPPLEMENTARY INFORMATION:

Background

On August 22, 2023, we published a proposed rule (88 FR 57046) to list the toothless blindcat and widemouth blindcat as endangered species under the Act (16 U.S.C. 1531 *et seq.*). The proposed rule opened a 60-day comment period, ending October 23, 2023. On October 12, 2023, we received a request to extend the public comment period. With this document, we reopen the public comment period for an additional 30 days, as specified above in **DATES**.

For a description of previous Federal actions concerning the toothless blindcat and widemouth blindcat and information on the types of comments that would be helpful to us in making final determinations on our proposal, please refer to the August 22, 2023, proposed rule (88 FR 57046 at 57046–57047).

Public Comments

We will accept written comments and information during the reopened comment period on our August 22, 2023, proposed rule to list the toothless blindcat and widemouth blindcat. We will consider information and recommendations from all interested parties. We intend that any final action resulting from the proposal will be based on the best scientific and commercial data available and will be as accurate and as effective as possible. Our final determinations will take into consideration all comments and any additional information we receive during both comment periods on the proposed rule.

Because we will consider all comments and information we receive during both open comment periods, our final determinations may differ from our August 22, 2023, proposed rule (88 FR 57046). Based on the new information we receive (and, if relevant, any comments on that new information), we may conclude that one or both of the species is threatened instead of endangered, or we may conclude that one or both of 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 decisions, including why we made changes, if any, that differ from the August 22, 2023, proposal.

If you already submitted comments or information on the August 22, 2023, proposed rule, please do not resubmit them. Any such comments are incorporated as part of the public record of the rulemaking proceeding, and we will fully consider them in the preparation of our final determinations.

Comments should be as specific as possible. 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 assert. Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered species or a threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your comments and materials 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 your 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 the proposed rule, will be available for public inspection on *https://www.regulations.gov* at FWS–R2–ES–2023–0069.

Authors

The primary authors of this document are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Austin Ecological Services Field Office.

Authority

The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), is the authority for this action.

Martha Williams,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–26853 Filed 12–6–23; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 231201–0285; RTID 0648–XR129]

Endangered and Threatened Wildlife; 90-Day Finding on a Petition To List Chinook Salmon on the Washington Coast as Threatened or Endangered Under the Endangered Species Act

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

ACTION: 90-Day petition finding, request for information, and initiation of status review.

SUMMARY: We, NMFS, announce a 90-day finding on a petition to list spring-run Chinook salmon (*Oncorhynchus tshawytscha*) on the Washington Coast (WC) as threatened or endangered under the Endangered Species Act (ESA) or, alternatively, list the existing WC Chinook salmon Evolutionarily Significant Unit (ESU) as currently defined (inclusive of all run types) as threatened or endangered under the ESA. The petition also requests that we designate critical habitat concurrently with the listing. We find that the petition presents substantial scientific or commercial information indicating the petitioned action to list may be warranted. We will conduct an ESU analysis and status review to determine whether the petitioned action is warranted. To ensure that the status review is comprehensive, we are

soliciting scientific and commercial data, including traditional ecological knowledge pertaining to Chinook salmon that spawn north of the Columbia River and west of the Elwha River from any interested party.

DATES: Scientific and commercial data pertinent to the petitioned action must be received by February 5, 2024.

ADDRESSES: You may submit scientific and commercial data relevant to our review of the status of Chinook salmon on the WC, identified by ''Washington Coast Chinook Salmon Petition'' or by the docket number NOAA–NMFS–2023–0148, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2023–0148 in the Search box (note: copying and pasting the FDMS Docket Number directly from this document may not yield search results). Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.
- *Mail or Hand-Delivery:* Protected Resources Division, West Coast Region, NMFS, 1201 NE Lloyd Blvd., Suite #1100, Portland, OR 97232. Attn: Shivonne Nesbit.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *https://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, *etc.*), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Electronic copies of the petition and related materials are available from the NMFS website at *https://www.fisheries.noaa.gov/endangered-species-conservation/candidate-species-under-endangered-species-act*.

FOR FURTHER INFORMATION CONTACT: Shivonne Nesbit, NMFS West Coast Region, at *shivonne.nesbit@noaa.gov,* (503) 231–6741; or Margaret Miller, NMFS Office of Protected Resources, at *margaret.h.miller@noaa.gov,* (301) 427–8457.

SUPPLEMENTARY INFORMATION:

Background

On July 17, 2023, the Secretary of Commerce received a petition from the Center for Biological Diversity and Pacific Rivers (hereafter, the Petitioners) to list the spring-run Chinook salmon on the WC as a threatened or endangered ESU under the ESA or, alternatively, list WC Chinook salmon (inclusive of all run types) as a threatened or endangered ESU. The Petitioners also request the designation of critical habitat concurrent with ESA listing.

Previously, in 1999, we identified the WC Chinook salmon ESU as comprised of coastal populations of spring-, summer- and fall-run Chinook salmon spawning north of the Columbia River and west of the Elwha River and determined that the ESU did not warrant listing as threatened or endangered under the ESA (63 FR 14308, March 24, 1999). The Petitioners are requesting that spring-run Chinook salmon on the WC be considered as a separate ESU and listed as threatened or endangered. The Petitioners assert that new research into the genomic basis for premature migration in salmonids demonstrates that significant genetic differences underlie the spring- and fall-run life history types, and that the unique evolutionary lineage of spring-run Chinook salmon warrants their listing as a separate ESU. The petition includes an overview of new research into the genomic basis for premature migration in salmonids, as well as general biological information about spring-run Chinook salmon on the WC including their distribution and range, life history characteristics, habitat requirements, as well as basin-level population status and trends and factors contributing to the populations' status. The Petitioners assert that spring-run Chinook salmon are facing existential threats, and therefore, if NMFS does not delineate and list the spring-run WC Chinook salmon population as threatened and endangered under the ESA, the current WC Chinook salmon ESU that includes spring-, summer- and fall-run populations should be listed as threatened or endangered under the ESA. Copies of the petition are available as described above (see **ADDRESSES**).

ESA Statutory, Regulatory, and Policy Provisions, and Evaluation Framework

Section 4(b)(3)(A) of the ESA of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires, to the maximum extent practicable, that within 90 days of receipt of a petition to list a species as threatened or endangered, the Secretary of Commerce makes a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, and to promptly publish such finding in the **Federal Register** (16 U.S.C. 1533(b)(3)(A)). When it is found that substantial scientific or commercial information in a petition indicates the petitioned action may be warranted (a ''positive 90-day finding''), we are required to promptly commence a review of the status of the species concerned during which we will conduct a comprehensive review of the best available scientific and commercial data. In such cases, we conclude the review with a finding as to whether the petitioned action is warranted within 12 months of receipt of the petition. Because the finding at the 12-month stage is based on a more thorough review of the available information, as compared to the narrow scope of review at the 90-day stage, a ''may be warranted'' finding does not prejudge the outcome of the status review.

Under the ESA, a listing determination may address a species, which is defined to also include subspecies and, for any vertebrate species, any distinct population segment (DPS) that interbreeds when mature (16 U.S.C. 1532(16)). In 1991, we issued the Policy on Applying the Definition of Species Under the Endangered Species Act to Pacific Salmon (ESU Policy; 56 FR 58612, November 20, 1991), which explains that Pacific salmon populations will be considered a DPS, and hence a ''species'' under the ESA, if it represents an ''evolutionarily significant unit'' of the biological species. The two criteria for delineating an ESU are: (1) It is substantially reproductively isolated from other conspecific populations; and (2) it represents an important component in the evolutionary legacy of the species. The ESU Policy was used to define the WC Chinook salmon ESU in 1999 (64 FR 50394, September 16, 1999), and we use it exclusively for defining DPSs of Pacific salmon. A joint NMFS–U.S. Fish and Wildlife Service (USFWS) (jointly, ''the Services'') policy clarifies the Services' interpretation of the phrase ''distinct population segment'' for the purposes of listing, delisting, and reclassifying a species under the ESA (DPS Policy; 61 FR 4722, February 7, 1996). In announcing this policy, the Services indicated that the ESU Policy for Pacific salmon was consistent with the DPS Policy and that NMFS would continue to use the ESU Policy for Pacific salmon.

A species, subspecies, or DPS is ''endangered'' if it is in danger of extinction throughout all or a significant portion of its range, and ''threatened'' if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA

sections 3(6) and 3(20), respectively, 16 U.S.C. 1532(6) and (20)). Pursuant to the ESA and our implementing regulations, we determine whether species are threatened or endangered based on any one or a combination of the following five section 4(a)(1) factors: the present or threatened destruction, modification, or curtailment of habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; inadequacy of existing regulatory mechanisms to address identified threats; or any other natural or manmade factors affecting the species' existence (16 U.S.C. 1533(a)(1), 50 CFR 424.11(c)).

ESA-implementing regulations issued jointly by the Services (50 CFR 424.14(h)(1)(i)) define ''substantial scientific or commercial information'' in the context of reviewing a petition to list, delist, or reclassify a species as ''credible scientific or commercial information in support of the petitioner's claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted. Conclusions drawn in the petition without the support of credible scientific or commercial information will not be considered 'substantial information.' '' In reaching the initial (90-day) finding on the petition, we consider the information described in sections 50 CFR 424.14(c), (d), and (g) (if applicable), and information readily available at the time the determination is made § 424.14(h)(1)(ii).

Our determination as to whether the petition provides substantial scientific or commercial information indicating that the petitioned action may be warranted will depend in part on the degree to which the petition includes the following types of information: (1) Information on current population status and trends and estimates of current population sizes and distributions, both in captivity and the wild, if available; (2) identification of the factors under section 4(a)(1) of the ESA that may affect the species and where these factors are acting upon the species; (3) whether and to what extent any or all of the factors alone or in combination identified in section 4(a)(1) of the ESA may cause the species to be an endangered species or threatened species (*i.e.,* the species is currently in danger of extinction or is likely to become so within the foreseeable future), and, if so, how high in magnitude and how imminent the threats to the species and its habitat are; (4) information on adequacy of regulatory protections and effectiveness of conservation activities by States as well as other parties, that have been initiated or that are ongoing, that may protect the species or its habitat; and (5) a complete, balanced representation of the relevant facts, including information that may contradict claims in the petition. See 50 CFR 424.14(d).

If the petitioner provides supplemental information before the initial finding is made and states that it is part of the petition, the new information, along with the previously submitted information, is treated as a new petition that supersedes the original petition, and the statutory timeframes will begin when such supplemental information is received. See 50 CFR 424.14(g).

We may also consider information readily available at the time the determination is made (§ 424.14(h)(1)(ii)). We are not required to consider any supporting materials cited by the petitioner if the petitioner does not provide electronic or hard copies, to the extent permitted by U.S. copyright law, or appropriate excerpts or quotations from those materials (*e.g.,* publications, maps, reports, letters from authorities). See 50 CFR 424.14(h)(1)(ii) and 50 CFR 424.14(c)(6).

The ''substantial scientific or commercial information'' standard must be applied in light of any prior reviews or findings we have made on the listing status of the species that is the subject of the petition. Where we have already conducted a finding on, or review of, the listing status of that species (whether in response to a petition or on our own initiative), we will evaluate any petition received thereafter seeking to list, delist, or reclassify that species to determine whether a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted despite the previous review or finding. Where the prior review resulted in a final agency action—such as a final listing determination, 90-day not-substantial finding, or 12-month not-warranted finding—a petitioned action will generally not be considered to present substantial scientific and commercial information indicating that the action may be warranted unless the petition provides new information or analysis not previously considered. See 50 CFR 424.14(h)(1)(iii).

During the 90-day finding stage, we do not conduct additional research, and we do not solicit information from parties outside the agency to help us in evaluating the petition. We will accept the Petitioner's sources and characterizations of the information presented if they appear to be based on accepted scientific principles, unless we have specific information in our files that indicates the petition's information is incorrect, unreliable, obsolete, or otherwise irrelevant to the requested action. Information that is susceptible to more than one interpretation or that is contradicted by other available information will not be dismissed at the 90-day finding stage, so long as it is reliable and a reasonable person conducting an impartial scientific review would conclude it supports the petitioner's assertions. In other words, conclusive information indicating that the species may meet the ESA's requirements for listing is not required to make a positive 90-day finding. We will not conclude that a lack of specific information alone necessitates a negative 90-day finding if a reasonable person conducting an impartial scientific review would conclude that the unknown information itself suggests the species may be at risk of extinction presently or within the foreseeable future.

To make a 90-day finding on a petition to list a species, we evaluate whether the petition presents substantial scientific or commercial information indicating the subject species may be either threatened or endangered, as defined by the ESA. First, we evaluate whether the information presented in the petition, in light of the information readily available in our files, indicates that the petitioned entity constitutes a ''species'' eligible for listing under the ESA. Next, we evaluate whether the information indicates that the species faces an extinction risk such that listing, delisting, or reclassification may be warranted; this may be indicated in information expressly discussing the species' status and trends, or in information describing impacts and threats to the species. We evaluate any information on specific demographic factors pertinent to evaluating extinction risk for the species (*e.g.,* population abundance and trends, productivity, spatial structure, age structure, sex ratio, diversity, current and historical range, habitat integrity or fragmentation), and the potential contribution of identified demographic risks to extinction risk for the species. We then evaluate the potential links between these demographic risks and the causative impacts and threats identified in section 4(a)(1) of the ESA.

Information presented on impacts or threats should be specific to the species and should reasonably suggest that one or more of these factors may be operative threats that act or have acted on the species to the point that it may

warrant protection under the ESA. Broad statements about generalized threats to the species, or identification of factors that could negatively impact a species, alone, do not constitute substantial information indicating that listing may be warranted. We look for information indicating that not only is the particular species exposed to a factor, but that the species may be responding in a negative fashion; then we assess the potential significance of that negative response.

Many petitions identify risk classifications made by nongovernmental organizations, such as the International Union for Conservation of Nature (IUCN), the American Fisheries Society, or NatureServe, as evidence of extinction risk for a species. Risk classifications by such organizations or made under other Federal or State statutes may be informative, but such classification alone may not provide the rationale for a positive 90-day finding under the ESA. For example, as explained by NatureServe, their assessments of a species' conservation status do ''not constitute a recommendation by NatureServe for listing under the U.S. Endangered Species Act'' because NatureServe assessments ''have different criteria, evidence requirements, purposes and taxonomic coverage than government lists of endangered and threatened species, and therefore these two types of lists should not be expected to coincide'' (*https://explorer.natureserve.org/AboutTheData/DataTypes/ConservationStatusCategories*). Additionally, species classifications under IUCN and the ESA are not equivalent; data standards, criteria used to evaluate species, and treatment of uncertainty are also not necessarily the same. Thus, when a petition cites such classifications, we will evaluate the source of information that the classification is based upon in light of the standards on extinction risk and impacts or threats discussed above.

Previous Federal Actions

On March 9, 1998, following the completion of a comprehensive status review of Chinook salmon (*Oncorhynchus tshawytscha*) populations in Washington, Oregon, Idaho, and California, we identified a total of 15 ESUs of Chinook salmon and published a proposed rule to list 7 Chinook salmon ESUs as threatened or endangered under the ESA (63 FR 11482). We also identified the WC Chinook salmon ESU as comprised of coastal populations of spring-, summer- and fall-run Chinook salmon spawning north of the Columbia River and west of the Elwha River. We did not propose to list the WC ESU, concluding that the ESU is distributed among a relatively large number of populations, most of which are large enough to avoid serious genetic and demographic risks associated with small populations. Thus, we made the determination that the ESU was neither in danger of extinction nor likely to become endangered in the foreseeable future (63 FR 11482, 11494, March 9, 1998).

Evaluation of Petition and Information Readily Available in NMFS' Files

The petition contains information and assertions in support of listing Chinook salmon under the two alternatives requested by the Petitioners. As discussed above, based on biological, genetic, and ecological information compiled and reviewed as part of a previous West Coast Chinook salmon status review (Myers *et al.,* 1998), we included all spring-, summer- and fall-run Chinook salmon populations in river basins north of the Columbia River and west of the Elwha River in the WC Chinook salmon ESU (63 FR 11482, March 9, 1998). While run-timing was recognized as having a heritable basis, review of genetic data at that time did not identify clear sub-groups associated with migration timing within the WC Chinook salmon ESU. Spring- and fall-run Chinook salmon were found to be separate ESUs in other areas (*e.g.,* in the upper Columbia River, Snake River, and Sacramento River drainages). However, in coastal areas, life-history and genetic differences between runs were found to be modest, with spring- and fall-run fish exhibiting similar ocean distribution patterns and genetic characteristics (Myers *et al.,* 1998).

The Petitioners present new information on the genomics of run-timing and assert that the spring-run populations of the WC Chinook salmon ESU meet the two ESU criteria outlined by the above-described ESU policy. Relying on inferred evidence from outside the WC ESU, the Petitioners assert that spring-run Chinook salmon in the WC ESU have been sufficiently isolated from fall-run Chinook salmon for evolutionarily important differences to have arisen and been maintained. The Petitioners present genetic evidence from populations outside the WC Chinook salmon ESU to suggest the spring-run Chinook salmon populations on the WC may qualify as a separate ESU from the fall-run populations. The Petitioners assert that findings from recently published articles on the evolutionary basis of premature migration in Pacific salmon (Prince *et al.,* 2017; Narum *et al.,* 2018; and Thompson *et al.,* 2019; Koch and Narum 2020; Thompson *et al.,* 2020; Willis *et al.,* 2021; Waples *et al.,* 2022) indicate that spring-run Chinook salmon in the WC ESU should be considered a separate ESU. Specifically, Prince *et al.,* (2017) reported on a survey of genetic variation between mature (fall-run) and premature (spring- and summer-run) migrating populations of steelhead and Chinook salmon from California, Oregon, and Washington. Thompson *et al.,* (2019) provide additional information about genetic differentiation between mature- and premature-migrating Chinook salmon in the Rogue River, Oregon, and in the Klamath River, California, particularly in response to anthropogenic changes. The Petitioners suggest that the results of these studies indicate that premature migration arose from a single evolutionary event within the species and, if lost, is not likely to re-evolve in time frames relevant to conservation planning. Petitioners further assert that spring-run Chinook salmon have a unique evolutionary history that is distinct from fall-run Chinook salmon in the same watersheds (Prince *et al.,* 2017; Thompson *et al.,* 2020).

The Petitioners also assert that the Chinook salmon spring-run life history represents an important component of the evolutionary legacy of the species. In support of this assertion, the Petitioners describe specific ecological (Quinn *et al.,* 2016) and evolutionary benefits of the life history variation provided by spring-run populations within the WC Chinook salmon ESU. The Petitioners describe how spring-run Chinook salmon tend to spawn higher up in the watershed than fall-run and how this adds to the spatial distribution of the species. We find that the petition presents scientific or commercial information indicating that spring-run Chinook salmon on the WC may qualify as an ESU pursuant to our ESU Policy.

WC Chinook Salmon Status and Trends

The Petitioners' listing request is focused on spring-run Chinook salmon declines in abundance, and they provide their analysis on the viability of and threats facing spring-run populations. Less information is provided regarding the fall-run populations.

The Petitioners assert that spring-run Chinook salmon populations in the WC ESU have suffered significant declines in numbers from historical abundance. The Petitioners cited findings by Nicholas and Hankin (1989) that all spring-run Chinook salmon populations on the WC are depressed from historical

population sizes. Historically, spring-run Chinook salmon were abundant in the Chehalis, Quinault, Queets, and Hoh basins on the WC. The Petitioners use estimated in-river run size data from the Pacific Fishery Management Council (PFMC 2018) for the Chehalis, Queets, and Hoh basins and unpublished data from the Quinault Indian Nation for the Upper Quinault River. For all four basins, the data purportedly demonstrate downward population trends for spring-run Chinook salmon. The Petitioners also cite catch data from Tribal gillnet fishery records from 1953–1970 provided by the Washington Department of Fish and Wildlife (WDFW) and assert that the spring-run populations declined more rapidly than the fall-run populations during this time period. The petitioners attribute this decline to a rapid rise in the ocean salmon fisheries, both commercial and recreational. In particular, they note the growth in the troll fisheries off the WC as a factor contributing to the decline of all populations of WC Chinook spring-run salmon populations. The Petitioners assert that the spatial and temporal patterns of the fisheries (commercial, recreational, and tribal) are likely a major factor that affected the spring-run populations of the WC Chinook salmon.

A previous West Coast Chinook salmon status review (Myers *et al.,* 1998) concluded that the long-term trends for most populations in this WC ESU were upward; however, several smaller populations (associated run types is unclear) were experiencing sharply downward trends. The status review concluded that fall-run populations were predominant and tended to be at a lower risk than spring- or summer-runs. The status review concluded that Chinook salmon in this ESU were not in danger of extinction nor were they likely to become so in the foreseeable future. However, it has been over 20 years since this status review was published and recent information on its status is incomplete.

The data in our files indicates that the WC Chinook salmon ESU consists of numerous fall-run populations and a smaller number of spring/summer-run populations. Overall abundance has been variable over the past several decades, but most populations do not have significant trends. The spring/summer-run populations make up about 10 percent of the total ESU abundance, and most populations are small with a few hundred or fewer spawners annually. If the spring/summer runs on the WC were to be considered a separate ESU, the extinction risk associated with these small populations would warrant evaluation. If both spring/summer- and fall-run were to be considered part of the same ESU, the contribution of run-timing diversity to that ESU's viability would warrant further evaluation based on updated science related to the genetic basis of run-timing.

Analysis of ESA Section 4(a)(1) Factors for Washington Coast Chinook Salmon

The Petitioners assert that all five ESA section 4(a)(1) factors contribute to the need to list spring-run Chinook salmon on the WC or, alternatively, the WC Chinook salmon ESU (inclusive of all run types) as a threatened or endangered species under the ESA. While the petition presents information on each of the ESA section 4(a)(1) factors, we find that the information presented, including information within our files, regarding the destruction, modification, or curtailment of the species habitat or range; the inadequacy of existing regulatory mechanisms; and other natural or manmade factors affecting the species continued existence is substantial enough to make a determination that a reasonable person would conclude that the species may warrant listing as endangered or threatened based on these factors alone. As such, we focus our below discussion on the evidence and present our evaluation of the information regarding these factors and their impact on the extinction risk of the species. Each of these factors is discussed in further detail below.

The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The Petitioners assert that WC Chinook salmon face numerous threats to suitable habitat, including impacts from historical and ongoing logging practices, road development, dams, water diversions, migration barriers, pollutants, and channelization.

The Petitioners assert that habitat degradation due to logging and road development alters streamflow, sediment loading, sediment transport and deposition, channel stability and shape, substrate composition, stream temperatures, water quality, and riparian conditions within a watershed. This is supported by similar conclusions in NMFS' 1998 determination for the WC chinook salmon ESU that evaluated the status of habitat threats over an area within the range of the WC Chinook salmon ESU and concluded that degraded habitat conditions in this area continue to be of concern, largely related to forestry practice (63 FR 11482, March 9, 1998). The Petitioners specifically assert that extensive logging can be harmful to Chinook salmon populations by causing depletion of summer and early fall streamflows needed for adult migration, holding, spawning, and rearing. Perry and Jones (2017) found that after an initial delay, base streamflows were substantially decreased for decades in logged areas as compared to streamflows under pre-logging conditions.

The Petitioners further assert that large and small dams, water diversions, and other migration barriers impact WC Chinook salmon by significantly reducing the amount of spawning and rearing habitat, altering downstream river flows and temperature regimes, and delaying and impeding migration. Petitioners specifically describe dams in the Chehalis River that were built without fish passage and that have blocked access to historical habitats.

The Petitioners also highlight other ongoing anthropogenic disturbances that may cause habitat degradation including pollutants and channelization. The Petitioners cite numerous studies (Sedell and Froggatt 1984, Hulse *et al.,* 2002, and Lestelle *et al.,* 2005) that describe habitat impacts including decreased habitat complexity, decreased summer flows and water quality, and increased water temperatures.

The Petitioners cite Myers *et al.,* (1998), noting that all basins in the ESU were affected by habitat degradation, largely related to forestry practices, and that only the Queets and Quinault River basins were determined not to have substantial habitat problems. While the Petitioners provide general descriptions of ongoing habitat degradation from various sources, they do not provide specific information that would suggest that habitat conditions overall have markedly deteriorated since our last review in the 1990s. In fact, while we know that individual instances of habitat modification have taken place since the 1990s, over the past couple of decades conditions may have improved as a result of new forest harvest regulations, fish passage requirements, and habitat restoration efforts. However, it is reasonable to assume that the persistence of degraded habitat conditions may be exerting sustained negative effects on Chinook salmon on the WC, and disproportionately so on spring-run populations. Consequently, changes in overall habitat condition and distribution are inconclusive and may be open to interpretation.

Inadequacy of Existing Regulatory Mechanisms

The Petitioners assert that existing international, Federal and State regulatory mechanisms are not

sufficient to protect and ensure recovery of spring-run Chinook salmon occurring on the WC and their habitat. With respect to international regulatory mechanisms, the Petitioners assert that the Pacific Salmon Treaty does not require consideration of the condition of individual populations or the impacts on spring-run Chinook salmon populations from the WC in the determination of harvest allocations. The Petitioners state that, at the Federal level, the National Environmental Policy Act (NEPA), the ESA, the National Forest Management Act and Northwest Forest Plan, Olympic National Park, the Clean Water Act (CWA), and the Federal Energy Regulatory Commission (FERC) do not adequately protect spring-run Chinook salmon on the WC. Petitioners note that although the NEPA process requires Federal agencies to identify potential environmental impacts, NEPA analyses do not prohibit agencies from choosing project alternatives that may adversely affect spring-run Chinook salmon on the WC or their habitats. As a result, Petitioners assert that the NEPA process often affords little to no protections or alternatives to avoid harm to spring-run Chinook salmon. The Petitioners cite a proposed new dam on the mainstem of the Chehalis River as an example of a project that may adversely affect spring-run Chinook salmon on the WC. The proposed dam is designed to hold back flows and create a temporary reservoir when flows exceed a threshold level to ameliorate flooding downstream. When formed, the temporary reservoir would inundate more than 6 miles of the upper mainstem Chehalis River and the lower reaches of several major tributaries. The area of inundation would encompass historical spring-run Chinook salmon spawning grounds in the upper river (Phinney and Bucknell 1975; Weyerhaeuser 1994; Lestelle *et al.,* 2019). The Petitioners note that, under section 404 of the Clean Water Act, the U.S. Army Corps of Engineers determined that the proposed dam project may have significant impacts on the environment and released a draft environmental impact statement (EIS) on the proposed dam project in 2020. The draft EIS used an Ecosystem Diagnosis and Treatment model (McConnaha *et al.,* 2017; ACOE 2020) to analyze the potential impacts of the proposed dam and concluded that during the 5-year construction period Chinook salmon returning to the upper mainstem river could be reduced by up to 80 percent. The draft EIS also concluded that impacts from the proposed dam at a basin-wide scale were predicted to be minimal for most modeled species and that habitat in the upper watershed above Crim Creek is currently beneficial salmonid habitat that can provide a buffer against future potential degradation (ACOE 2020). The final EIS has not been completed.

Petitioners assert that the spring-run Chinook salmon on the WC could be better protected under the ESA through Habitat Conservation Plans (HCP). Petitioners assert that the National Forest Management Act does not effectively limit the long-term impacts on salmonid habitat in Washington coastal watersheds from activities like logging, road-building, and mining. In 1990, the USFS adopted a Land and Resource Management Plan (LRMP) for the Olympic National Forest, which aimed to increase fish production potential through habitat enhancement projects. In 1998, the LRMP was amended to be consistent with the Northwest Forest Plan that includes an Aquatic Conservation Strategy (ACS) intended to maintain and protect native fish and their habitat (Thomas *et al.,* 1993; Reeves *et al.,* 2006). The ACS included designation of riparian management zones, activity-specific management standards, watershed assessments, watershed restoration, and identification of key watersheds. Among other things, the ACS requires the USFS to ‘‘maintain and restore the sediment regime under which aquatic ecosystems evolved’’ (USDA 1994). The Petitioners assert that there is little evidence to suggest that the habitat improvements described in the LRMP or ACS have resulted in increased salmon production.

Petitioners assert further that portions of spring-run Chinook salmon populations spawn and rear within the Olympic National Park, benefiting from relatively pristine aquatic habitat conditions (Halofsky *et al.,* 2011). However, maintenance and repair of park roads adjacent to rivers have caused significant impacts on fish and aquatic life. Petitioners also note that spring-run Chinook salmon habitat in the park is still impacted by legacy effects of past logging and roads, leading to ongoing impairment of salmonid habitat, and that logging roads and associated channel crossings are still major issues for fish habitat quality (Halofsky *et al.,* 2011).

Petitioners call attention to Section 404 of the CWA as not adequately protecting spring-run Chinook salmon on the WC, particularly with respect to nonpoint sources of pollution like logging and farming (WDOE 2016; NIFWC 2020). The Petitioners assert that, in many areas, the Environmental Protection Agency-approved CWA water quality standards are not being met. In addition, Total Maximum Daily Loads (TMDLs) have not yet been developed and approved for many water bodies where the salmon are found; as a result, nonpoint source pollution is driving water quality issues in those water bodies.

Petitioners assert that FERC has provided inadequate protection for anadromous fish during its licensing, and relicensing processes. Petitioners use the Wynoochee Dam in the Chehalis River basin as an example. Wynoochee Dam was constructed in 1972 for flood control, irrigation, and industrial water storage; a powerhouse was added by Tacoma Power for hydroelectric energy in 1994. A FERC permit was issued for the dam in 1987, at which time there were no federally listed species. Tacoma Power operates a fish collection facility downstream, but the Petitioners assert that there are no requirements to ensure adequate downstream flows or water quality for the benefit of salmonids downstream of the dam.

The Petitioners reference several Washington state laws, initiatives, plans, and programs. This includes Washington state laws for salmon recovery and fish passage, the Washington Forest Practices Act, and the Washington State Environmental Policy Act; the Salmon Recovery Funding Board and affiliated Salmon Recovery Funding Program; the Grays Harbor Basin Salmon Management Plan; the Chehalis Basin Strategy; the Washington Coast Sustainable Salmon Plan; the State Wildlife Action Plan; and the salmon monitoring program conducted by WDFW and tribal biologists. However, the Petitioners assert that, despite the extensive efforts of these state and tribal management entities to protect the fisheries-related resources of the Washington coastal river basins, the wild spring-run Chinook salmon populations in those basins are in decline and are threatened with extinction.

We conclude that regulations are dynamic and are frequently modified over time. In general, since the listing of multiple species of salmon and steelhead along the West Coast in the 1990s, regulations have been revised to better protect these anadromous species. However, to the degree that habitat degradation can be an indicator of regulatory inadequacy, and given that we have found above that habitat degradation may be a threat to WC Chinook salmon, it stands to reason that regulatory mechanisms may be inadequate to protect WC Chinook salmon.

Other Natural or Manmade Factors Affecting Its Continued Existence

Climate Change and Ocean Conditions

The Petitioners assert climate change is impacting the quantity and quality of habitat for WC Chinook salmon, especially spring-run populations, with the melting of glaciers on the Olympic Peninsula, changes in precipitation patterns, lower summer stream flows, higher water temperatures, and reduction in food due to changing ocean conditions. Citing the Intergovernmental Panel on Climate Change (IPCC) 2021 report, Petitioners call out the last four decades of successive air temperature increases, and the projected rise in global temperatures. Petitioners also assert that climate change will profoundly affect the Pacific Northwest. With a focus on the Olympic Peninsula, impacts such as warming, sea level rise, erosion, and changes in stream flows will not be uncommon (Halofsky *et al.,* 2011; Dalton *et al.,* 2016). Petitioners state freshwater habitat changes due to climate change will adversely affect WC Chinook salmon, especially spring-run populations. Citing Halofsky *et al.,* 2011, the Petitioners note it is uncertain whether salmon populations can adapt quickly enough to cope with the combined effects of anthropogenic climate change. Using a 2011 NMFS study as support, the Petitioners also assert that throughout the life cycle of salmon along the WC, the main predicted effects include warmer, drier summers, reduced snowpack, lower summer flows, higher summer stream temperatures, and increased winter floods. The Petitioners assert that climate change is altering offshore and nearshore habitat of the WC including warming sea surface temperatures (Mote and Salathe 2010; Miller *et al.,* 2013; USFWS 2020), upwelling pattern changes (Miller *et al.,* 2013), and increased acidification (Miller *et al.,* 2013) leading to limited ocean productivity for salmon (Ford 2022).

The Petitioners assert that ongoing threats of poor ocean conditions and climate change are likely to threaten the continued existence of WC Chinook salmon, including spring-run populations. As described in NMFS' 5-year reviews (Stout *et al.,* 2012; NMFS 2016; NMFS 2022) variability in ocean conditions in the Pacific Northwest is a concern for the persistence of WC salmon because it is uncertain how populations will fare in periods of poor ocean survival when freshwater and estuarine habitats are degraded. Petitioners also assert there are correlations between oceanic changes and salmon abundance in the Pacific Northwest, and concerns about how prolonged periods of poor marine survival due to unfavorable ocean conditions may impact the population abundance, productivity, spatial structure, and diversity of WC salmonids (Stout *et al.,* 2010).

Petition Finding

After reviewing the information contained in the petition, as well as information readily available in our files, we conclude that substantial scientific and commercial information indicates that the petitioned action to list spring-run Chinook salmon on the WC as threatened or endangered under the ESA or, alternatively, list the WC Chinook salmon ESU (inclusive of all run types) as a threatened or endangered species under the ESA may be warranted. Therefore, in accordance with section 4(b)(3)(A) of the ESA and NMFS' implementing regulations (50 CFR424.14(h)(2)), we will commence a status review of Chinook salmon on the WC. During our status review, we will include an ESU analysis to determine the appropriate ESU(s) and evaluate the ESU containing spring-run fish to determine if listing as a threatened or endangered species is warranted. As required by section 4(b)(3)(B) of the ESA, within 12 months of the receipt of the petition, we will make a finding as to whether listing WC Chinook salmon under the ESA is warranted.

Information Solicited

To ensure that our status reviews are informed by the best available scientific and commercial data, we are opening a 60-day public comment period to solicit relevant new information since the 1998 status review (Myers *et al.,* 1998) or information not considered before on populations of Chinook salmon within the previously identified WC Chinook salmon ESU, which consists of Chinook salmon that spawn north of the Columbia River and west of the Elwha River. We request information from the public, concerned governmental agencies, Native American tribes, the scientific community, agricultural and forestry groups, conservation groups, fishing groups, industry, or any other interested parties concerning the current and/or historical status of Chinook salmon on the WC. Specifically, we request information regarding: (1) species abundance; (2) species productivity; (3) species distribution or population spatial structure; (4) patterns of phenotypic, genotypic, and life history diversity; (5) habitat conditions and associated limiting factors and threats; (6) ongoing or planned efforts to protect and restore the species and their habitats; (7) information on the adequacy of existing regulatory mechanisms, whether protections are being implemented, and whether they are proving effective in conserving the species; (8) data concerning the status and trends of identified limiting factors or threats; (9) information on targeted harvest (commercial and recreational) and bycatch of the species; (10) other new information, data, or corrections including, but not limited to, taxonomic or nomenclatural changes; and (11) information concerning the impacts of environmental variability and climate change on survival, recruitment, distribution, and/or extinction risk; and traditional ecological knowledge related to any of the previous 11 categories of information regarding this species.

We request that all information be accompanied by: (1) supporting documentation such as maps, bibliographic references, or reprints of pertinent publications; and (2) the submitter's name, and any association, institution, or business that the person represents.

References

A complete list of all references cited herein is available upon request (See **FOR FURTHER INFORMATION CONTACT**).

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: December 4, 2023.

Samuel D. Rauch, III,

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

[FR Doc. 2023–26852 Filed 12–6–23; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 231201–0284; RTID 0648–XD436]

Fisheries of the Exclusive Economic Zone Off Alaska; Gulf of Alaska; Proposed 2024 and 2025 Harvest Specifications for Groundfish

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

ACTION: Proposed rule; harvest specifications and request for comments.

SUMMARY: NMFS proposes 2024 and 2025 harvest specifications,

apportionments, and Pacific halibut prohibited species catch limits for the groundfish fishery of the Gulf of Alaska (GOA). This action is necessary to establish harvest limits for groundfish during the 2024 and 2025 fishing years and to accomplish the goals and objectives of the Fishery Management Plan for Groundfish of the Gulf of Alaska. The 2024 harvest specifications supersede those previously set in the final 2023 and 2024 harvest specifications, and the 2025 harvest specifications will be superseded in early 2025 when the final 2025 and 2026 harvest specifications are published. The intended effect of this action is to conserve and manage the groundfish resources in the GOA in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: Comments must be received by January 8, 2024.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2023–0133, by any of the following methods:

• *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2023–0133 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.

• *Mail:* Submit written comments to Gretchen Harrington, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *https://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, *etc.*), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A''; in the required fields if you wish to remain anonymous).

Electronic copies of the Alaska Groundfish Harvest Specifications Final Environmental Impact Statement (Final EIS), Record of Decision (ROD) for the Final EIS, and the annual Supplementary Information Reports (SIR) to the Final EIS prepared for this action are available from *https://www.regulations.gov.* An updated 2024 SIR for the final 2024 and 2025 harvest specifications will be available from the same source. The final 2022 Stock Assessment and Fishery Evaluation (SAFE) report for the groundfish resources of the GOA, dated December 2022, is available from the North Pacific Fishery Management Council (Council) at 1007 West Third, Suite 400, Anchorage, AK 99501–2252, phone 907–271–2809, or from the Council's website at *https://www.npfmc.org.* The 2023 SAFE report for the GOA will be available from the same source.

FOR FURTHER INFORMATION CONTACT: Abby Jahn, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the GOA groundfish fisheries in the exclusive economic zone (EEZ) of the GOA under the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP). The Council prepared the FMP under the authority of the Magnuson-Stevens Act (16 U.S.C. 1801 *et seq.*). Regulations governing U.S. fisheries and implementing the FMP appear at 50 CFR parts 600, 679, and 680.

The FMP and its implementing regulations require that NMFS, after consultation with the Council, specify the total allowable catch (TAC) for each target species, the sum of which must be within the optimum yield (OY) range of 116,000 to 800,000 metric tons (mt) (§§ 679.20(a)(1)(i)(B) and 679.20(a)(2)). Section 679.20(c)(1) further requires NMFS to publish and solicit public comment on proposed annual TACs and apportionments thereof for each target species, Pacific halibut prohibited species catch (PSC) limits, and seasonal allowances of pollock and Pacific cod. The proposed harvest specifications in tables 1 through 19 of this rule satisfy these requirements. For 2024 and 2025, the sum of the proposed TAC amounts is 476,537 mt.

Under § 679.20(c)(3), NMFS will publish the final 2024 and 2025 harvest specifications after (1) considering comments received within the comment period (see **DATES**), (2) consulting with the Council at its December 2023 meeting, (3) considering information presented in the 2024 SIR to the Final EIS that assesses the need to prepare a Supplemental EIS (see **ADDRESSES**), and (4) considering information presented in the final 2023 SAFE report prepared for the 2024 and 2025 groundfish fisheries.

Other Actions Affecting the 2024 and 2025 GOA Harvest Specifications

Pacific Cod Trawl Cooperative Program

NMFS published a final rule implementing Amendment 122 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (BSAI) (88 FR 53704, August 8, 2023), establishing the Pacific Cod Trawl Cooperative Program (PCTC Program) to allocate BSAI Pacific cod quota share to qualifying groundfish License Limitation Program (LLP) license holders and qualifying processors. The PCTC Program is a limited access privilege program for the harvest of Pacific cod in the BSAI trawl catcher vessel (CV) sector.

The PCTC Program modifies existing GOA sideboard limits and associated GOA halibut PSC limits for non-exempt American Fisheries Act (AFA) CVs and LLP license holders and closes directed fishing where the revised sideboard limits are too small to support a directed fishery. All GOA non-exempt AFA CVs and associated AFA LLP licenses are sideboarded in aggregate for all GOA groundfish fishing activity and for GOA halibut PSC based on their GOA catch history during the qualifying years 2009 through 2019, except when participating in the Central Gulf of Alaska (CGOA) Rockfish Program. In addition, the ratio used to apportion GOA halibut PSC limits is modified and the five seasonal apportionments based on that sideboard ratio is reduced to a single aggregate annual amount. Amendment 122 also closes directed fishing to all GOA non-exempt AFA CVs and LLP licenses for the following species categories: Southeast Outside (SEO) District of the Eastern GOA pollock, Western GOA shallow-water flatfish, Central and Eastern GOA deep-water flatfish, Central GOA dusky rockfish, and Eastern GOA and Central GOA Pacific ocean perch. NMFS will no longer publish AFA Program sideboard limits for these specific species or species groups in the **Federal Register** as part of the annual groundfish harvest specifications and instead Table 56 to 50 CFR part 679 lists that directed fishing for these species is prohibited to non-exempt AFA CVs. Amendment 122 and its implementing regulations affect the calculation and establishment of the groundfish sideboard limits and halibut PSC limits discussed below under *American Fisheries Act (AFA) Catcher/Processor and Catcher Vessel Groundfish Harvest and PSC Limits.*

Proposed Acceptable Biological Catch (ABC) and TAC Specifications

In October 2023, the Council's Scientific and Statistical Committee (SSC), its Advisory Panel (AP), and the Council reviewed the most recent biological and harvest information about the condition of the GOA groundfish stocks. The Council's GOA Groundfish

Plan Team (Plan Team) compiled and presented this information in the final 2022 SAFE report for the GOA groundfish fisheries, dated December 2022 (see **ADDRESSES**). The SAFE report contains a review of the latest scientific analyses and estimates of each species' biomass and other biological parameters including possible future condition of the stocks, as well as summaries of the available information on the GOA ecosystem and the economic condition of the groundfish fisheries off Alaska. The SAFE provides information to the Council and NMFS for recommending and setting, respectively, annual harvest levels for each stock; documenting significant trends or changes in the resource, marine ecosystems, and fisheries over time; and assessing the relative success of existing Federal fishery management programs. An appendix to the SAFE is the Ecosystem Status Reports (ESRs). The ESRs compile and summarize information about the status of the Alaska marine ecosystems for the SSC, AP, Council, NMFS, and the public, and they are updated annually. These ESRs include ecosystem report cards, ecosystem assessments, and ecosystem status indicators (*i.e.,* climate indices, sea surface temperature), which together provide context for ecosystem-based fisheries management in Alaska. The ESR informs stock assessments and is integrated in the annual harvest recommendations through inclusion in stock assessment-specific risk tables. Also, the ESR information provides context for the SSC's recommendations for Overfishing Level (OFL) and ABC, as well as for the Council's TAC recommendations. The SAFE reports and the ESRs are presented at the October and December Council meetings before the SSC, AP, and the Council make groundfish harvest recommendations and aid NMFS in implementing these annual groundfish harvest specifications.

The Plan Team, SSC, and Council also reviewed preliminary survey data from 2023 surveys, updates on ecological and socioeconomic profiles for certain species, summaries of potential changes to models and methodologies, and preliminary revised ESRs. From these data and analyses, the Plan Team recommends, and the SSC sets, an OFL and ABC for each species and species group. The amounts proposed for the 2024 and 2025 OFLs and ABCs are based on the 2022 SAFE report. The AP and Council recommended that the proposed 2024 and 2025 TACs be set equal to proposed ABCs for all species and species groups, with the exception of the species and species groups further discussed below. The proposed OFLs, ABCs, and TACs could be changed in the final harvest specifications depending on the most recent scientific information contained in the final 2023 SAFE report. The individual stock assessments that comprise, in part, the 2022 SAFE report are available at *https://www.fisheries.noaa.gov/alaska/population-assessments/north-pacific-groundfish-stock-assessment-and-fishery-evaluation.* The final 2023 SAFE report will be available from the same source.

In November 2023, the Plan Team will update the 2022 SAFE report to include new information collected during 2023, such as NMFS stock surveys, revised stock assessments, and catch data. The Plan Team will compile this information and present the draft 2023 SAFE report at the December 2023 Council meeting. At that meeting, the SSC and the Council will review the 2023 SAFE report, and the Council will approve the 2023 SAFE report. The Council will consider information in the 2023 SAFE report, recommendations from the November 2023 Plan Team meeting and December 2023 SSC and AP meetings, public testimony, and relevant written public comments in making its recommendations for the final 2024 and 2025 harvest specifications. Pursuant to § 679.20(a)(2) and (3), the Council could recommend adjusting the final TACs, if warranted, based on the biological condition of groundfish stocks or a variety of socioeconomic considerations, or if required to cause the sum of TACs to fall within the OY range.

Potential Changes Between Proposed and Final Specifications

In previous years, the most significant changes (relative to the amount of assessed tonnage of fish) to the OFLs and ABCs from the proposed to the final harvest specifications have been based on the most recent NMFS stock surveys. These surveys provide updated estimates of stock biomass and spatial distribution, and inform changes to the models used for producing stock assessments. At the September 2023 Plan Team meeting, NMFS scientists presented updated and new survey results. Scientists also discussed potential changes to assessment models, and accompanying preliminary stock estimates. At the October 2023 Council meeting, the SSC reviewed this information. Species and species groups with proposed changes to assessment models include pollock, demersal shelf rockfish, other rockfish, and shortraker rockfish. Model changes may result in changes to final OFLs, ABCs, and TACs.

In November 2023, the Plan Team will consider updated survey results and updated stock assessments for groundfish, which will be included in the draft 2023 SAFE report. If the 2023 SAFE report indicates that the stock biomass trend is increasing for a species, then the final 2024 and 2025 harvest specifications for that species may reflect an increase from the proposed harvest specifications. Conversely, if the 2023 SAFE report indicates that the stock biomass trend is decreasing for a species, then the final 2024 and 2025 harvest specifications may reflect a decrease from the proposed harvest specifications.

The proposed 2024 and 2025 OFLs and ABCs are based on the best available biological and scientific information, including projected biomass trends, information on assumed distribution of stock biomass, and revised technical methods used to calculate stock biomass. The FMP specifies the tiers to be used to calculate OFLs and ABCs. The tier applicable to a particular stock or stock complex is determined by the level of reliable information available to the fisheries scientists. This information is categorized into a successive series of six tiers to define OFLs and ABCs, with Tier 1 representing the highest level of information quality available and Tier 6 representing the lowest level of information quality available. The Plan Team used the FMP tier structure to calculate OFLs and ABCs for each groundfish species. The SSC adopted the proposed 2024 and 2025 OFLs and ABCs recommended by the Plan Team for all groundfish species. The proposed 2024 and 2025 TACs are based on the best available biological and socioeconomic information. In making its recommendations, the Council adopted the SSC's OFL and ABC recommendations and the AP's TAC recommendations for all groundfish species.

Specification and Apportionment of TAC Amounts

The combined Western and Central Regulatory Areas and the West Yakutat (WYK) District of the Eastern Regulatory Area (the W/C/WYK) pollock TAC and the GOA Pacific cod TACs are set to account for the State of Alaska's (State) guideline harvest levels (GHL) for the State waters pollock and Pacific cod fisheries so that the ABCs are not exceeded. These reductions are described below. The shallow-water flatfish TAC in the Western RegulatoryArea, arrowtooth flounder

TACs in the Western Regulatory Area and the SEO District, and flathead sole TAC in the Western Regulatory Area are set to allow for increased harvest opportunities for these target species while conserving the halibut PSC limit for use in other fisheries. The Atka mackerel TAC is set to accommodate incidental catch amounts (ICA) in other fisheries. The other rockfish TAC in the SEO District of the Eastern Regulatory Area is set to reduce the amount of discards of the species in that complex.

NMFS's proposed apportionments of groundfish species are based on the distribution of biomass among the regulatory areas over which NMFS manages the species. Additional regulations govern the apportionment of pollock, Pacific cod, and sablefish. Additional detail on apportionments of pollock, Pacific cod, and sablefish are described below.

The ABC for the pollock stock in the W/C/WYK Regulatory Area accounts for the GHL established by the State for the Prince William Sound (PWS) pollock fishery. The Plan Team, SSC, AP, and Council have recommended that the sum of all State waters and Federal waters pollock removals from the GOA not exceed ABC recommendations. At the November 2018 Plan Team meeting, State fisheries managers recommended setting the future PWS GHL at 2.5 percent of the annual W/C/WYK pollock ABC. For 2024 and 2025, this yields a PWS pollock GHL of 4,027 mt, an increase of 8.17 percent from the 2023 PWS GHL of 3,723 mt. After reductions for the PWS GHL, the remaining 2024 and 2025 pollock ABC for the combined W/C/WYK areas is then apportioned among four statistical areas (Areas 610, 620, 630, and 640) as both ABCs and TACs, as described below and detailed in table 1. The total ABCs and TACs for the four statistical areas, plus the State GHL, do not exceed the combined W/C/WYK ABC. The proposed W/C/WYK 2024 and 2025 pollock ABC is 161,080 mt, and the proposed TAC is 157,053 mt.

Apportionments of pollock to the W/C/WYK management areas are considered to be apportionments of annual catch limits (ACLs) rather than apportionments of ABCs. This more accurately reflects that such apportionments address management concerns, rather than biological or conservation concerns. In addition, apportionments of the ACL in this manner allow NMFS to balance any transfer of TAC among Areas 610, 620, and 630 pursuant to § 679.20(a)(5)(iv)(B) to ensure that the combined W/C/WYK ACL, ABC, and TAC are not exceeded.

NMFS proposes pollock TACs in the Western (Area 610) and Central (Areas 620 and 630) Regulatory Areas and the West Yakutat (Area 640) and the SEO (Area 650) Districts of the GOA (see table 1). NMFS also proposes seasonal apportionment of the annual pollock TAC in the Western and Central Regulatory Areas of the GOA among Statistical Areas 610, 620, and 630. These apportionments are divided equally among the following two seasons: the A season (January 20 through May 31) and the B season (September 1 through November 1) (§§ 679.23(d)(2) and 679.20(a)(5)(iv)). Additional detail is provided below; table 2 lists these amounts.

The proposed 2024 and 2025 Pacific cod TACs are set to accommodate the State's GHLs for Pacific cod in State waters in the Western and Central Regulatory Areas, as well as in PWS (in the Eastern Regulatory Area) (see table 1). The Plan Team, SSC, AP, and Council recommended that the sum of all State waters and Federal waters Pacific cod removals from the GOA not exceed ABC recommendations. Accordingly, the Council recommended the 2024 and 2025 Pacific cod TACs in the Western, Central, and Eastern Regulatory Areas to account for State GHLs. Therefore, the proposed 2024 and 2025 Pacific cod TACs are less than the proposed ABCs by the following amounts: (1) Western GOA, 2,062 mt; (2) Central GOA, 3,414 mt; and (3) Eastern GOA, 539 mt. These amounts reflect the State's 2024 and 2025 GHLs in these areas, which are 30 percent of the Western GOA proposed ABC, and 25 percent of the Eastern and Central GOA proposed ABCs.

The Western and Central GOA Pacific cod TACs are allocated among various gear and operational sectors. NMFS also establishes seasonal apportionments of the annual Pacific cod TACs in the Western and Central Regulatory Areas. The Pacific cod sector and seasonal apportionments are discussed in detail in a subsequent section and in table 4 of this rule.

The Council's recommendation for sablefish area apportionments takes into account the prohibition on the use of trawl gear in the SEO District of the Eastern Regulatory Area (§ 679.7(b)(1)) and makes available 5 percent of the Eastern Regulatory Area (WYK and SEO Districts combined) TAC to vessels using trawl gear for use as incidental catch in other trawl groundfish fisheries in the WYK District (§ 679.20(a)(4)(i)). Additional detail is provided below. tables 5 and 6 list the proposed 2024 and 2025 allocations of the sablefish TAC to fixed gear and trawl gear in the GOA.

For 2024 and 2025, the Council recommends, and NMFS proposes, the OFLs, ABCs, and TACs listed in table 1. These amounts are consistent with the biological condition of groundfish stocks as described in the 2022 SAFE report. The proposed ABCs reflect harvest amounts that are less than the specified overfishing levels. The proposed TACs are adjusted for other biological and socioeconomic considerations. The sum of the proposed TACs for all GOA groundfish is 476,537 mt for 2024 and 2025, which is within the OY range specified by the FMP. These proposed amounts and apportionments by area, season, and sector are subject to change pending consideration of the 2023 SAFE report, public comment, and the Council's recommendations for the final 2024 and 2025 harvest specifications during its December 2023 meeting.

TABLE 1—PROPOSED 2024 AND 2025 OFLS, ABCS, AND TACS OF GROUNDFISH FOR THE WESTERN/CENTRAL/WEST YAKUTAT, WESTERN, CENTRAL, AND EASTERN REGULATORY AREAS, THE WEST YAKUTAT AND SOUTHEAST OUTSIDE DISTRICTS OF THE EASTERN REGULATORY AREA, AND GULFWIDE DISTRICT OF THE GULF OF ALASKA

[Values are rounded to the nearest metric ton]

Species	Area [1]	OFL	ABC	TAC [2]
Pollock [2]	Shumagin (610)	n/a	29,156	29,156
	Chirikof (620)	n/a	83,283	83,283
	Kodiak (630)	n/a	36,478	36,478
	WYK (640)	n/a	8,136	8,136
	W/C/WYK (subtotal)	186,101	161,080	157,053

TABLE 1—PROPOSED 2024 AND 2025 OFLS, ABCS, AND TACS OF GROUNDFISH FOR THE WESTERN/CENTRAL/WEST YAKUTAT, WESTERN, CENTRAL, AND EASTERN REGULATORY AREAS, THE WEST YAKUTAT AND SOUTHEAST OUTSIDE DISTRICTS OF THE EASTERN REGULATORY AREA, AND GULFWIDE DISTRICT OF THE GULF OF ALASKA—Continued

[Values are rounded to the nearest metric ton]

Species	Area [1]	OFL	ABC	TAC [2]
	SEO (650)	15,150	11,363	11,363
	Total	201,251	172,443	168,416
Pacific cod [3]	W	n/a	6,873	4,811
	C	n/a	13,655	10,241
	E	n/a	2,155	1,616
	Total	27,507	22,683	16,668
Sablefish [4]	W	n/a	4,626	4,626
	C	n/a	8,819	8,819
	WYK	n/a	2,669	2,669
	SEO	n/a	4,981	4,981
	Subtotal TAC	n/a	n/a	21,095
	Total	48,561	41,539	n/a
Shallow-water flatfish [5]	W	n/a	23,299	13,250
	C	n/a	27,737	27,737
	WYK	n/a	2,774	2,774
	SEO	n/a	1,664	1,664
	Total	68,015	55,474	45,425
Deep-water flatfish [6]	W	n/a	255	255
	C	n/a	2,068	2,068
	WYK	n/a	1,383	1,383
	SEO	n/a	2,013	2,013
	Total	6,802	5,719	5,719
Rex sole	W	n/a	3,314	3,314
	C	n/a	13,425	13,425
	WYK	n/a	1,453	1,453
	SEO	n/a	2,905	2,905
	Total	25,652	21,097	21,097
Arrowtooth flounder	W	n/a	30,093	14,500
	C	n/a	64,200	64,200
	WYK	n/a	7,789	7,789
	SEO	n/a	15,932	6,900
	Total	141,008	118,014	93,389
Flathead sole	W	n/a	13,033	8,650
	C	n/a	21,892	21,892
	WYK	n/a	2,363	2,363
	SEO	n/a	2,934	2,934
	Total	49,073	40,222	35,839
Pacific ocean perch [7]	W	n/a	2,461	2,461
	C	n/a	29,138	29,138
	WYK	n/a	1,333	1,333
	W/C/WYK	39,229	32,932	32,932
	SEO	3,888	3,264	3,264
	Total	43,117	36,196	36,196
Northern rockfish [8]	W	n/a	2,497	2,497
	C	n/a	2,244	2,244
	E	n/a		
	Total	5,661	4,741	4,741
Shortraker rockfish [9]	W	n/a	51	51
	C	n/a	280	280

TABLE 1—PROPOSED 2024 AND 2025 OFLS, ABCS, AND TACS OF GROUNDFISH FOR THE WESTERN/CENTRAL/WEST YAKUTAT, WESTERN, CENTRAL, AND EASTERN REGULATORY AREAS, THE WEST YAKUTAT AND SOUTHEAST OUTSIDE DISTRICTS OF THE EASTERN REGULATORY AREA, AND GULFWIDE DISTRICT OF THE GULF OF ALASKA—Continued

[Values are rounded to the nearest metric ton]

Species	Area [1]	OFL	ABC	TAC [2]
	E	n/a	374	374
	Total	940	705	705
Dusky rockfish [10]	W	n/a	141	141
	C	n/a	7,264	7,264
	WYK	n/a	85	85
	SEO	n/a	30	30
	Total	9,154	7,520	7,520
Rougheye and blackspotted rockfish [11]	W	n/a	180	180
	C	n/a	231	231
	E	n/a	361	361
	Total	927	772	772
Demersal shelf rockfish [12]	SEO	376	283	283
Thornyhead rockfish [13]	W	n/a	314	314
	C	n/a	693	693
	E	n/a	621	621
	Total	2,170	1,628	1,628
Other rockfish [14] [15]	W/C combined	n/a	940	940
	WYK	n/a	370	370
	SEO	n/a	2,744	300
	Total	5,320	4,054	1,610
Atka mackerel	GW	6,200	4,700	3,000
Big skates [16]	W	n/a	591	591
	C	n/a	1,482	1,482
	E	n/a	794	794
	Total	3,822	2,867	2,867
Longnose skates [17]	W	n/a	151	151
	C	n/a	2,044	2,044
	E	n/a	517	517
	Total	3,616	2,712	2,712
Other skates [18]	GW	1,311	984	984
Sharks	GW	6,521	4,891	4,891
Octopuses	GW	1,307	980	980
Total		658,311	550,224	476,537

[1] Regulatory areas and districts are defined at § 679.2. (W=Western Gulf of Alaska; C=Central Gulf of Alaska; E=Eastern Gulf of Alaska; WYK=West Yakutat District; SEO=Southeast Outside District; GW=Gulfwide).

[2] The total for the W/C/WYK Regulatory Areas pollock ABC is 161,080 mt. After deducting 2.5 percent (4,027 mt) of that ABC for the State's pollock GHL fishery, the remaining pollock ABC of 157,053 mt (for the W/C/WYK Regulatory Areas) is apportioned among four statistical areas (Areas 610, 620, 630, and 640). These apportionments are considered subarea ACLs, rather than ABCs, for specification and reapportionment purposes. The ACLs in Areas 610, 620, and 630 are further divided by season, as detailed in table 2 (proposed 2024 and 2025 seasonal biomass distribution of pollock in the Western and Central Regulatory Areas, area apportionments, and seasonal allowances). In the West Yakutat (Area 640) and Southeast Outside (Area 650) Districts of the Eastern Regulatory Area, pollock is not divided into seasonal allowances.

[3] The annual Pacific cod TAC is apportioned, after seasonal apportionment to the jig sector, as follows: (1) 63.84 percent to the A season and 36.16 percent to the B season and (2) 64.16 percent to the A season and 35.84 percent to the B season in the Western and Central Regulatory Areas of the GOA, respectively. The Pacific cod TAC in the Eastern Regulatory Area of the GOA is allocated 90 percent to vessels harvesting Pacific cod for processing by the inshore component and 10 percent to vessels harvesting Pacific cod for processing by the offshore component. Table 4 lists the proposed 2024 and 2025 Pacific cod seasonal apportionments and sector allocations.

[4] The sablefish OFL and ABC are set Alaska-wide (48,561 mt and 41,539 mt, respectively) and the GOA sablefish TAC is 21,095 mt. Tables 5 and 6 list the proposed 2024 and 2025 allocations of sablefish TACs.

[5] "Shallow-water flatfish" means flatfish not including "deep-water flatfish," flathead sole, rex sole, or arrowtooth flounder.

[6] "Deep-water flatfish" means Dover sole, Greenland turbot, Kamchatka flounder, and deepsea sole.

[7] "Pacific ocean perch" means *Sebastes alutus.*

[8] "Northern rockfish" means *Sebastes polyspinous.* For management purposes, the one mt apportionment of ABC to the WYK District of the Eastern Regulatory Area has been included in the other rockfish species group.

[9] "Shortraker rockfish" means *Sebastes borealis.*

[10] "Dusky rockfish" means *Sebastes variabilis.*
[11] "Rougheye and blackspotted rockfish" means *Sebastes aleutianus* (rougheye) and *Sebastes melanostictus* (blackspotted).
[12] "Demersal shelf rockfish" means *Sebastes pinniger* (canary), *S. nebulosus* (china), *S. caurinus* (copper), *S. maliger* (quillback), *S. helvomaculatus* (rosethorn), *S. nigrocinctus* (tiger), and *S. ruberrimus* (yelloweye).
[13] "Thornyhead rockfish" means *Sebastolobus spp.*
[14] "Other rockfish" means *Sebastes aurora* (aurora), *S. melanostomus* (blackgill), *S. paucispinis* (bocaccio), *S. goodei* (chilipepper), *S. crameri* (darkblotch), *S. elongatus* (greenstriped), *S. variegatus* (harlequin), *S. wilsoni* (pygmy), *S. babcocki* (redbanded), *S. proriger* (redstripe), *S. zacentrus* (sharpchin), *S. jordani* (shortbelly), *S. brevispinis* (silvergray), *S. diploproa* (splitnose), *S. saxicola* (stripetail), *S. miniatus* (vermilion), *S. reedi* (yellowmouth), *S. entomelas* (widow), and *S. flavidus* (yellowtail). In the Eastern GOA only, other rockfish also includes northern rockfish (*S. polyspinous).*
[15] Other rockfish in the Western and Central Regulatory Areas and in the West Yakutat District of the Eastern Regulatory Area means all rockfish species included in the other rockfish and demersal shelf rockfish categories. The other rockfish species group in the SEO District only includes other rockfish.
[16] "Big skates" means *Beringraja binoculata.*
[17] "Longnose skates" means *Raja rhina.*
[18] "Other skates" means *Bathyraja spp.*

Proposed Apportionment of Reserves

Section 679.20(b)(2) requires NMFS to set aside 20 percent of each TAC for pollock, Pacific cod, flatfish, sharks, and octopuses in reserve for possible apportionment at a later date during the fishing year. Section 679.20(b)(3) authorizes NMFS to reapportion all or part of these reserves. In 2023, NMFS reapportioned all of the reserves in the final harvest specifications. For 2024 and 2025, NMFS proposes reapportionment of each of the reserves for pollock, Pacific cod, flatfish, sharks, and octopuses back into the original TAC from which the reserve was derived. NMFS expects, based on recent harvest patterns, that such reserves will not be necessary and that the entire TAC for each of these species will be caught or are needed to promote efficient fisheries. The TACs in table 1 reflect this proposed reapportionment of reserve amounts to the original TAC for these species and species groups, *i.e.,* each proposed TAC for the above-mentioned species or species groups contains the full TAC recommended by the Council.

Proposed Apportionments of Pollock TAC Among Seasons and Regulatory Areas, and Allocations for Processing by Inshore and Offshore Components

In the GOA, pollock is apportioned by season and area, and is further allocated for processing by inshore and offshore components. Pursuant to § 679.20(a)(5)(iv)(B), the annual pollock TAC specified for the Western and Central Regulatory Areas of the GOA is apportioned into two seasonal allowances of 50 percent. As established by § 679.23(d)(2), the A and B season allowances are available from January 20 through May 31 and September 1 through November 1, respectively.

The GOA pollock stock assessment continues to use a four-season methodology to determine pollock distribution in the Western and Central Regulatory Areas of the GOA to maintain continuity in the historical pollock apportionment time-series. Pollock TACs in the Western and Central Regulatory Areas of the GOA are apportioned among Statistical Areas 610, 620, and 630 in proportion to the distribution of pollock biomass determined by the most recent NMFS surveys, pursuant to § 679.20(a)(5)(iv)(A). The pollock chapter of the 2022 SAFE report (see **ADDRESSES**) contains a comprehensive description of the apportionment and reasons for the minor changes from past apportionments. For purposes of specifying pollock between two seasons for the Western and Central Regulatory Areas of the GOA, NMFS has summed the A and B season apportionments and the C and D season apportionments as calculated in the 2022 GOA pollock assessment. This yields the seasonal amounts specified for the A season and the B season, respectively.

Within any fishing year, the amount by which a seasonal allowance is underharvested or overharvested may be added to, or subtracted from, subsequent seasonal allowances in a manner to be determined by the Regional Administrator (§ 679.20(a)(5)(iv)(B)). The rollover amount is limited to 20 percent of the subsequent seasonal TAC apportionment for the statistical area. Any unharvested pollock above the 20-percent limit could be further distributed to the subsequent season in the other statistical areas, in proportion to the estimated biomass of the subsequent season and in an amount no more than 20 percent of the seasonal TAC apportionment in those statistical areas (§ 679.20(a)(5)(iv)(B)). The proposed 2024 and 2025 pollock TACs in the WYK District of 8,136 mt and the SEO District of 11,363 mt are not allocated by season.

Table 2 lists the proposed 2024 and 2025 area apportionments and seasonal allowances of pollock in the Western and Central Regulatory Areas. The amounts of pollock for processing by the inshore and offshore components are not shown. Section 679.20(a)(6)(i) requires allocation of 100 percent of the pollock TAC in all regulatory areas and all seasonal allowances to vessels catching pollock for processing by the inshore component after subtraction of amounts projected by the Regional Administrator to be caught by, or delivered to, the offshore component incidental to directed fishing for other groundfish species. Thus, the amount of pollock available for harvest by vessels harvesting pollock for processing by the offshore component is the amount that will be taken as incidental catch during directed fishing for groundfish species other than pollock, up to the maximum retainable amounts allowed by § 679.20(e) and (f). At this time, these ICAs of pollock are unknown and will be determined during the fishing year during the course of fishing activities by the offshore component.

TABLE 2—PROPOSED 2024 AND 2025 DISTRIBUTION OF POLLOCK IN THE CENTRAL AND WESTERN REGULATORY AREAS OF THE GULF OF ALASKA; AREA APPORTIONMENTS; AND SEASONAL ALLOWANCES OF ANNUAL TAC [1]

[Values are rounded to the nearest metric ton]

Season [2]	Shumigan (Area 610)	Chirikof (Area 620)	Kodiak (Area 630)	Total [3]
A (January 20–May 31)	1,823	62,771	9,864	74,459
B (September 1–November 1)	27,333	20,511	26,614	74,459

TABLE 2—PROPOSED 2024 AND 2025 DISTRIBUTION OF POLLOCK IN THE CENTRAL AND WESTERN REGULATORY AREAS OF THE GULF OF ALASKA; AREA APPORTIONMENTS; AND SEASONAL ALLOWANCES OF ANNUAL TAC [1]—Continued

[Values are rounded to the nearest metric ton]

Season [2]	Shumigan (Area 610)	Chirikof (Area 620)	Kodiak (Area 630)	Total [3]
Annual Total	29,156	83,283	36,478	148,917

[1] Area apportionments and seasonal allowances may not total precisely due to rounding.
[2] As established by § 679.23(d)(2), the A and B season allowances are available from January 20 through May 31 and September 1 through November 1, respectively. The amounts of pollock for processing by the inshore and offshore components are not shown in this table.
[3] The West Yakutat and Southeast Outside District pollock TACs are not allocated by season and are not included in the total pollock TACs shown in this table.

Proposed Annual and Seasonal Apportionments of Pacific Cod TAC

Pursuant to § 679.20(a)(12)(i), NMFS proposes allocations for the 2024 and 2025 Pacific cod TACs in the Western and Central Regulatory Areas of the GOA among gear and operational sectors. NMFS also proposes seasonal apportionments of the Pacific cod TACs in the Western and Central Regulatory Areas. A portion of the annual TAC is apportioned to the A season for hook-and-line, pot, and jig gear from January 1 through June 10, and for trawl gear from January 20 through June 10. The remainder of the annual TAC is apportioned to the B season for jig gear from June 10 through December 31, for hook-and-line and pot gear from September 1 through December 31, and for trawl gear from September 1 through November 1 (§§ 679.23(d)(3) and 679.20(a)(12)). NMFS also proposes allocating the 2024 and 2025 Pacific cod TACs annually between the inshore (90 percent) and offshore (10 percent) components in the Eastern Regulatory Area of the GOA (§ 679.20(a)(6)(ii)).

In the Western GOA, the Pacific cod TAC is apportioned seasonally first to vessels using jig gear, and then among CVs using hook-and-line gear, catcher/processors (CP) using hook-and-line gear, CVs using trawl gear, CPs using trawl gear, and vessels using pot gear (§ 679.20(a)(12)(i)(A)). In the Central GOA, the Pacific cod TAC is apportioned seasonally first to vessels using jig gear, and then among CVs less than 50 feet (15.2 meters (m)) in length overall using hook-and-line gear, CVs equal to or greater than 50 feet (15.2 m) in length overall using hook-and-line gear, CPs using hook-and-line gear, CVs using trawl gear, CPs using trawl gear, and vessels using pot gear (§ 679.20(a)(12)(i)(B)). For 2024 and 2025, NMFS proposes apportioning the jig sector allocations for the Western and Central GOA between the A season (60 percent) and the B season (40 percent) (§ 679.20(a)(12)(i)). Excluding seasonal apportionments to the jig gear sector, NMFS proposes apportioning the remainder of the annual Pacific cod TACs as follows: the seasonal apportionments of the annual TAC in the Western GOA are 63.84 percent to the A season and 36.16 percent to the B season, and in the Central GOA are 64.16 percent to the A season and 35.84 percent to the B season.

Under § 679.20(a)(12)(ii), any overage or underage of the Pacific cod allowance from the A season may be subtracted from, or added to, the subsequent B season allowance. In addition, any portion of the hook-and-line, trawl, pot, or jig sector allocations that is determined by NMFS as likely to go unharvested by a sector may be reallocated to other sectors for harvest during the remainder of the fishing year.

Pursuant to § 679.20(a)(12)(i)(A) and (B), a portion of the annual Pacific cod TACs in the Western and Central GOA will be allocated to vessels with a Federal fisheries permit that use jig gear before the TACs are apportioned among other non-jig sectors. In accordance with the FMP, the annual jig sector allocations may increase to up to 6 percent of the annual Western and Central GOA Pacific cod TACs, depending on the annual performance of the jig sector (see table 1 of Amendment 83 to the FMP for a detailed discussion of the jig sector allocation process (76 FR 74670, December 1, 2011)). Jig sector allocation increases are established for a minimum of 2 years.

NMFS has evaluated the historical harvest performance of the jig sector in the Western and Central GOA, and is proposing the 2024 and 2025 Pacific cod apportionments to this sector based on its historical harvest performance through 2022. For 2024 and 2025, NMFS proposes that the jig sector receive 2.5 percent of the annual Pacific cod TAC in the Western GOA. The 2024 and 2025 allocations consist of a base allocation of 1.5 percent of the Western GOA Pacific cod TAC and a harvest performance increase of 1.0 percent. For 2024 and 2025, NMFS also proposes that the jig sector receive 1.0 percent of the annual Pacific cod TAC in the Central GOA. The 2024 and 2025 allocations consist of a base allocation of 1.0 percent and no additional performance increases. The 2014 through 2023 Pacific cod jig allocations, catch, and percent allocation changes are listed in table 3 (and, as explained below, NMFS will update the 2023 summary once the fishing year is complete).

TABLE 3—SUMMARY OF WESTERN GOA AND CENTRAL GOA PACIFIC COD CATCH BY JIG GEAR IN 2014 THROUGH 2023, AND CORRESPONDING PERCENT ALLOCATION CHANGES

Area	Year	Initial percent of TAC	Initial TAC allocation	Catch (mt)	Percent of initial allocation	>90% of initial allocation?	Change to percent allocation
Western GOA	2014	2.5	573	785	137	Y	Increase 1%.
	2015	3.5	948	55	6	N	None.
	2016	3.5	992	52	5	N	Decrease 1%.
	2017	2.5	635	49	8	N	Decrease 1%.
	2018	1.5	125	121	97	Y	Increase 1%.
	2019	2.5	134	134	100	Y	Increase 1%.
	2020	[1] n/a					
	2021	3.5	195	26	13	N	None.
	2022	3.5	243	2	1	N	Decrease 1%.

TABLE 3—SUMMARY OF WESTERN GOA AND CENTRAL GOA PACIFIC COD CATCH BY JIG GEAR IN 2014 THROUGH 2023, AND CORRESPONDING PERCENT ALLOCATION CHANGES—Continued

Area	Year	Initial percent of TAC	Initial TAC allocation	Catch (mt)	Percent of initial allocation	>90% of initial allocation?	Change to percent allocation
	2023	2.5	131	131	101	Y	Increase 1%.
Central GOA	2014	2.0	797	262	33	N	Decrease 1%.
	2015	1.0	460	355	77	N	None.
	2016	1.0	370	267	72	N	None.
	2017	1.0	331	18	6	N	None.
	2018	1.0	61	0	0	N	None.
	2019	1.0	58	30	52	N	None.
	2020	[1] n/a					
	2021	1.0	102	26	26	N	None.
	2022	1.0	113	3	3	N	None.
	2023	1.0	111	246	222	Y	Increase 1%.

[1] NMFS did not evaluate the 2020 performance of the jig sectors in the Western and Central GOA because NMFS prohibited directed fishing for all Pacific cod sectors in 2020 (84 FR 70438, December 23, 2019).

NMFS will re-evaluate the annual 2023 harvest performance of the jig sector in the Western and Central GOA when the 2023 fishing year is complete to determine whether to change the jig sector allocations proposed by this action in conjunction with the final 2024 and 2025 harvest specifications. The current catch through October 2023 by the Western and Central GOA jig sectors indicates that the Pacific cod allocation percentage to these sectors would each increase by 1 percent. Table 4 lists the seasonal apportionments and allocations of the proposed 2024 and 2025 Pacific cod TACs.

TABLE 4—PROPOSED 2024 AND 2025 SEASONAL APPORTIONMENTS AND ALLOCATIONS OF PACIFIC COD TAC AMOUNTS IN THE GOA; ALLOCATIONS TO THE WESTERN GOA AND CENTRAL GOA SECTORS, AND THE EASTERN GOA INSHORE AND OFFSHORE PROCESSING COMPONENTS

[Values are rounded to the nearest metric ton]

Regulatory area and sector	Annual allocation (mt)	A Season		B Season	
		Sector percentage of annual non-jig TAC	Seasonal allowances (mt)	Sector percentage of annual non-jig TAC	Seasonal allowances (mt)
Western GOA:					
Jig (2.5% of TAC)	120	N/A	72	N/A	48
Hook-and-line CV	66	0.7	33	0.70	33
Hook-and-line CP	929	10.9	511	8.90	417
Trawl CV	1,801	31.54	1,479	6.86	322
Trawl CP	113	0.9	42	1.50	70
Pot CV and Pot CP	1,783	19.80	929	18.20	854
Total	4,811	63.84	3,067	36.16	1,744
Central GOA:					
Jig (1.0% of TAC)	102	N/A	61	N/A	41
Hook-and-line <50 CV	1,481	9.32	944	5.29	536
Hook-and-line ≥50 CV	680	5.61	569	1.10	111
Hook-and-line CP	518	4.11	416	0.9975	101
Trawl CV [1]	4,216	25.29	2,564	16.29	1,652
Trawl CP	426	2.00	203	2.19	222
Pot CV and Pot CP	2,819	17.83	1,808	9.98	1,011
Total	10,241	64.16	6,566	35.84	3,675
Eastern GOA		Inshore (90% of annual TAC)		Offshore (10% of annual TAC)	
	1,616	1,455		162	

[1] Trawl catcher vessels participating in Rockfish Program cooperatives receive 3.81 percent, or 390 mt, of the annual Central GOA Pacific cod TAC (see Table 28c to 50 CFR part 679). This apportionment is deducted from the Trawl CV B season allowance (see Table 9: Proposed 2024 and 2025 Apportionments of Rockfish Secondary Species in the Central GOA and Table 28c to 50 CFR part 679).

Proposed Allocations of the Sablefish TAC Amounts to Vessels Using Fixed Gear and Trawl Gear

Section 679.20(a)(4)(i) and (ii) requires allocations of sablefish TACs for each of the regulatory areas and districts to fixed and trawl gear. In the Western and Central Regulatory Areas, 80 percent of each TAC is allocated to fixed gear, and 20 percent of each TAC is allocated to trawl gear. In the Eastern Regulatory Area, 95 percent of the TAC is allocated to fixed gear, and 5 percent is allocated to trawl gear. The trawl gear allocation in the Eastern Regulatory Area may be used only to support incidental catch of sablefish while directed fishing for other target species using trawl gear (§ 679.20(a)(4)(i)).

In recognition of the prohibition against trawl gear in the SEO District of

the Eastern Regulatory Area, the Council recommended, and NMFS proposes, specifying for incidental catch the allocation of 5 percent of the Eastern Regulatory Area sablefish (WYK and SEO Districts combined) TAC to trawl gear in the WYK District of the Eastern Regulatory Area. The remainder of the WYK District sablefish TAC is allocated to vessels using fixed gear. This proposed action allocates 100 percent of the sablefish TAC in the SEO District to vessels using fixed gear. This results in proposed 2024 allocations of 383 mt to trawl gear and 2,287 mt to fixed gear in the WYK District, and a proposed 2024 allocation of 4,981 mt to fixed gear in the SEO District. table 5 lists the allocations of the proposed 2024 sablefish TACs to fixed and trawl gear. Table 6 lists the allocations of the proposed 2025 sablefish TACs to trawl gear.

The Council recommended that the trawl sablefish TAC be established for 2 years so that retention of incidental catch of sablefish by trawl gear could commence in January in the second year of the groundfish harvest specifications. Tables 5 and 6 list the proposed 2024 and 2025 trawl allocations, respectively.

The Council also recommended that the fixed gear sablefish TAC be established annually to ensure that the sablefish individual fishing quota (IFQ) fishery is conducted concurrently with the halibut IFQ fishery and is based on the most recent survey information. Since there is an annual assessment for sablefish and since the final harvest specifications are expected to be published before the IFQ season begins (typically, in early March), the Council recommended that the fixed gear sablefish TAC be set annually, rather than for 2 years. Accordingly, table 5 lists the proposed 2024 fixed gear allocations, and the 2025 fixed gear allocations will be specified in the 2025 and 2026 harvest specifications.

With the exception of the trawl allocations that are provided to the Rockfish Program (see Table 28c to 50 CFR part 679), directed fishing for sablefish with trawl gear is closed during the fishing year. Also, fishing for groundfish with trawl gear is prohibited prior to January 20 (§ 679.23(c)). Therefore, it is not likely that the sablefish allocation to trawl gear would be reached before the effective date of the final 2024 and 2025 harvest specifications.

TABLE 5—PROPOSED 2024 SABLEFISH TAC AMOUNTS IN THE GULF OF ALASKA AND ALLOCATIONS TO FIXED AND TRAWL GEAR

[Values are rounded to the nearest metric ton]

Area/district	TAC	Fixed gear allocation	Trawl allocation
Western	4,626	3,701	925
Central [1]	8,819	7,055	1,764
West Yakutat [2]	2,669	2,287	383
Southeast Outside	4,981	4,981	0
Total	21,095	18,024	3,072

[1] The proposed trawl allocation of sablefish to the Central Regulatory Area is further apportioned to the Rockfish Program cooperatives (907 mt). See Table 9: Proposed 2024 and 2025 Apportionments of Rockfish Secondary Species in the Central GOA. This results in 856 mt being available for the non-Rockfish Program trawl fisheries.

[2] The proposed trawl allocation is based on allocating 5 percent of the Eastern Regulatory Area (West Yakutat and Southeast Outside Districts combined) sablefish TAC as incidental catch to trawl gear in the West Yakutat District.

TABLE 6—PROPOSED 2025 SABLEFISH TAC AMOUNTS IN THE GULF OF ALASKA AND ALLOCATION TO TRAWL GEAR [1]

[Values are rounded to the nearest metric ton]

Area/district	TAC	Fixed gear allocation	Trawl allocation
Western	4,626	n/a	925
Central [2]	8,819	n/a	1,764
West Yakutat [3]	2,669	n/a	383
Southeast Outside	4,981	n/a	0
Total	21,095	n/a	3,072

[1] The Council recommended that the proposed 2025 harvest specifications for the fixed gear sablefish Individual Fishing Quota fisheries not be specified in the 2024 and 2025 harvest specifications.

[2] The proposed trawl allocation of sablefish to the Central Regulatory Area is further apportioned to the Rockfish Program cooperatives (907 mt). See Table 9: Proposed 2024 and 2025 Apportionments of Rockfish Secondary Species in the Central GOA. This results in 856 mt being available for the non-Rockfish Program trawl fisheries.

[3] The proposed trawl allocation is based on allocating 5 percent of the Eastern Regulatory Area (West Yakutat and Southeast Outside Districts combined) sablefish TAC as incidental catch to trawl gear in the West Yakutat District.

Proposed Allocations, Apportionments, and Sideboard Limitations for the Rockfish Program

These proposed 2024 and 2025 harvest specifications for the GOA include the fishery cooperative allocations and sideboard limitations established by the Rockfish Program. Program participants are primarily trawl CVs and trawl CPs, with limited participation by vessels using longline gear. The Rockfish Program assigns quota share and cooperative quota to trawl participants for primary species (Pacific ocean perch, northern rockfish, and dusky rockfish) and secondary species (Pacific cod, rougheye rockfish, sablefish, shortraker rockfish, and thornyhead rockfish), allows a participant holding a LLP license with rockfish quota share to form a rockfish cooperative with other persons, and allows holders of CP LLP licenses to opt out of the fishery. The Rockfish Program also has an entry level fishery for rockfish primary species for vessels using longline gear. Longline gear includes hook-and-line, jig, troll, and handline gear.

Under the Rockfish Program, rockfish primary species in the Central GOA are allocated to participants after deducting

for incidental catch needs in other directed fisheries (§ 679.81(a)(2)). Participants in the Rockfish Program also receive a portion of the Central GOA TAC of specific secondary species. In addition to groundfish species, the Rockfish Program allocates a portion of the halibut PSC limit (191 mt) from the third season deep-water species fishery allowance for the GOA trawl fisheries to Rockfish Program participants (§ 679.81(d) and Table 28d to 50 CFR part 679). The Rockfish Program also establishes sideboard limits to restrict the ability of harvesters operating under the Rockfish Program to increase their participation in other, non-Rockfish Program fisheries. These restrictions and halibut PSC limits are discussed in the *Rockfish Program Groundfish Sideboard and Halibut PSC Limitations* section of this rule.

Section 679.81(a)(2)(ii) and Table 28e to 50 CFR part 679 require allocations of 5 mt of Pacific ocean perch, 5 mt of northern rockfish, and 50 mt of dusky rockfish to the entry level longline fishery in 2024 and 2025. The allocations of primary species to the entry level longline fishery may increase incrementally each year if the catch exceeds 90 percent of the allocation of a species. The incremental increase in the allocations would continue each year until reaching the maximum percentage of the TAC for that species. In 2023, the catch for all three primary species did not exceed 90 percent of any allocated rockfish species. Therefore, NMFS is not proposing any increases to the entry level longline fishery 2024 and 2025 allocations in the Central GOA. The remainder of the TACs for the rockfish primary species, after subtracting the ICAs, would be allocated to the CV and CP cooperatives (§ 679.81(a)(2)(iii)). Table 7 lists the allocations of the proposed 2024 and 2025 TACs for each rockfish primary species to the entry level longline fishery, the potential incremental increases for future years, and the maximum percentage allocations of the TACs of the rockfish primary species to the entry level longline fishery.

TABLE 7—PROPOSED 2024 AND 2025 ALLOCATIONS OF ROCKFISH PRIMARY SPECIES TO THE ENTRY LEVEL LONGLINE FISHERY IN THE CENTRAL GULF OF ALASKA

Rockfish primary species	Proposed 2024 and 2025 allocations (metric tons)	Incremental increase in 2025 if >90 percent of 2024 allocation is harvested (metric tons)	Up to maximum percent of each TAC of
Pacific ocean perch	5	5	1
Northern rockfish	5	5	2
Dusky rockfish	50	20	5

Section 679.81 requires allocations of rockfish primary species among various sectors of the Rockfish Program. Table 8 lists the proposed 2024 and 2025 allocations of rockfish primary species in the Central GOA to the entry level longline fishery and rockfish CV and CP cooperatives in the Rockfish Program. NMFS also proposes setting aside ICAs for other directed fisheries in the Central GOA of 3,000 mt of Pacific ocean perch, 300 mt of northern rockfish, and 250 mt of dusky rockfish. These amounts are based on recent average incidental catches in the Central GOA by other groundfish fisheries.

Allocations among vessels belonging to CV or CP cooperatives are not included in these proposed harvest specifications. Rockfish Program applications for CV cooperatives and CP cooperatives are not due to NMFS until March 1 of each calendar year; therefore, NMFS cannot calculate 2024 and 2025 allocations in conjunction with these proposed harvest specifications. NMFS will announce the 2024 allocations after March 1.

TABLE 8—PROPOSED 2024 AND 2025 ALLOCATIONS OF ROCKFISH PRIMARY SPECIES IN THE CENTRAL GULF OF ALASKA TO THE ENTRY LEVEL LONGLINE FISHERY AND ROCKFISH COOPERATIVES IN THE ROCKFISH PROGRAM

[Values are rounded to the nearest metric ton]

Rockfish primary species	Central GOA TAC	Incidental catch allowance (ICA)	TAC minus ICA	Allocation to the entry level longline [1] fishery	Allocation to the rockfish cooperatives [2]
Pacific ocean perch	29,138	3,000	26,138	5	26,133
Northern rockfish	2,244	300	1,944	5	1,939
Dusky rockfish	7,264	250	7,014	50	6,964
Total	38,646	3,550	35,096	60	35,036

[1] Longline gear includes hook-and-line, jig, troll, and handline gear (50 CFR 679.2).
[2] Rockfish cooperatives include vessels in CV and CP cooperatives (50 CFR 679.81).

Section 679.81(c) and Table 28c to 50 CFR part 679 requires allocations of rockfish secondary species to CV and CP cooperatives in the Central GOA. CV cooperatives receive allocations of Pacific cod, sablefish from the trawl gear allocation, and thornyhead rockfish. CP cooperatives receive allocations of sablefish from the trawl gear allocation, rougheye and blackspotted rockfish, shortraker rockfish, and thornyhead rockfish. Table 9 lists the apportionments of the proposed 2024 and 2025 TACs of rockfish secondary species in the Central GOA to CV and CP cooperatives.

TABLE 9—PROPOSED 2024 AND 2025 APPORTIONMENTS OF ROCKFISH SECONDARY SPECIES IN THE CENTRAL GOA TO CATCHER VESSEL AND CATCHER/PROCESSOR COOPERATIVES

[Values are in metric tons]

Rockfish secondary species	Central GOA annual TAC	Catcher vessel cooperatives		Catcher/processor cooperatives	
		Percentage of TAC	Apportionment (mt)	Percentage of TAC	Apportionment (mt)
Pacific cod	10,241	3.81	390	0.00	
Sablefish	8,819	6.78	598	3.51	310
Shortraker rockfish	280	0.00	0	40.00	112
Rougheye and blackspotted rockfish	231	0.00	0	58.87	136
Thornyhead rockfish	693	7.84	54	26.50	184

Halibut PSC Limits

Section 679.21(d) establishes annual halibut PSC limit apportionments to trawl and hook-and-line gear, and authorizes the establishment of apportionments for pot gear. In October 2023, the Council recommended, and NMFS proposes, halibut PSC limits of 1,705 mt for trawl gear, 257 mt for hook-and-line gear, and 9 mt for the demersal shelf rockfish (DSR) fishery in the SEO District for both 2024 and 2025.

The DSR fishery in the SEO District is defined at § 679.21(d)(2)(ii)(A). This fishery is apportioned 9 mt of the halibut PSC limit in recognition of its small-scale harvests of groundfish (§ 679.21(d)(2)(i)(A)). The separate halibut PSC limit for the DSR fishery is intended to prevent that fishery from being impacted from the halibut PSC incurred by other GOA fisheries. NMFS estimates low halibut bycatch in the DSR fishery because (1) the duration of the DSR fisheries and the gear soak times are short; (2) the DSR fishery occurs in the winter when there is less overlap in the distribution of DSR and halibut; and (3) the directed commercial DSR fishery has a low DSR TAC. The Alaska Department of Fish and Game sets the commercial GHL for the DSR fishery after deducting (1) estimates of DSR incidental catch in all fisheries (including halibut and subsistence); and (2) the allocation to the DSR sport fish fishery. In 2023, the commercial fishery for DSR was closed due to concerns about declining DSR biomass.

The FMP authorizes the Council to exempt specific gear from the halibut PSC limits. NMFS, after consultation with the Council, proposes to exempt pot gear, jig gear, and the sablefish IFQ hook-and-line gear fishery categories from the non-trawl halibut PSC limit for 2024 and 2025. The Council recommended, and NMFS is proposing, these exemptions because (1) pot gear fisheries have low annual halibut bycatch mortality; (2) IFQ program regulations prohibit discard of halibut if any halibut IFQ permit holder on board a CV holds unused halibut IFQ for that vessel category and the IFQ regulatory area in which the vessel is operating (§ 679.7(f)(11)); (3) some sablefish IFQ permit holders hold halibut IFQ permits and are therefore required to retain the halibut they catch while fishing sablefish IFQ; and (4) NMFS estimates negligible halibut mortality for the jig gear fisheries given the small amount of groundfish harvested by jig gear, the selective nature of jig gear, and the high survival rates of halibut caught and released with jig gear.

The best available information on estimated halibut bycatch consists of data collected by fisheries observers during 2023. The calculated halibut bycatch mortality through November 8, 2023 is 292 mt for trawl gear and 23 mt for hook-and-line gear, for a total halibut mortality of 271 mt. This halibut mortality was calculated using groundfish and IFQ halibut catch data from the NMFS Alaska Region's catch accounting system. This accounting system contains historical and recent catch information compiled from each Alaska groundfish and IFQ halibut fishery.

Section 679.21(d)(4)(i) and (ii) authorizes NMFS to seasonally apportion the halibut PSC limits after consultation with the Council. The FMP and regulations require that the Council and NMFS consider the following information in seasonally apportioning halibut PSC limits: (1) seasonal distribution of halibut; (2) seasonal distribution of target groundfish species relative to halibut distribution; (3) expected halibut bycatch needs on a seasonal basis relative to changes in halibut biomass and expected catch of target groundfish species; (4) expected bycatch rates on a seasonal basis; (5) expected changes in directed groundfish fishing seasons; (6) expected actual start of fishing effort; and (7) economic effects of establishing seasonal halibut allocations on segments of the target groundfish industry. Based on public comment, information presented in the 2023 SAFE report, NMFS catch data, State catch data, and International Pacific Halibut Commission (IPHC) stock assessment and mortality data, the Council may recommend, or NMFS may make changes, to the seasonal, gear-type, or fishery category apportionments of halibut PSC limits for the final 2024 and 2025 harvest specifications pursuant to § 679.21(d)(1) and (d)(4).

The final 2023 and 2024 harvest specifications (88 FR 13238, March 2, 2023) list the Council and NMFS's seasonal apportionments based on these FMP and regulatory considerations with respect to halibut PSC limits. The Council and NMFS's seasonal apportionments for these proposed 2024 and 2025 harvest specifications are unchanged from the final 2023 and 2024 harvest specifications. Table 10 lists the proposed 2024 and 2025 Pacific halibut PSC limits, allowances, and apportionments. The halibut PSC limits in tables 10, 11, and 12 reflect the halibut PSC limits set forth at § 679.21(d)(2) and (3). Section 679.21(d)(4)(iii) and (iv) specifies that any underages or overages of a seasonal apportionment of a halibut PSC limit will be added to or deducted from the next respective seasonal apportionment within the fishing year.

TABLE 10—PROPOSED 2024 AND 2025 PACIFIC HALIBUT PSC LIMITS, ALLOWANCES, AND APPORTIONMENTS

[Values are in metric tons]

Trawl gear			Hook-and-line gear [1]				
			Other than DSR			DSR	
Season	Percent	Amount	Season	Percent	Amount	Season	Amount
January 20–April 1	30.5	520	January 1–June 10	86	220	January 1–December 31	9
April 1–July 1	20	341	June 10–September 1	2	5		
July 1–August 1	27	460	September 1–December 31	12	31		
August 1–October 1	7.5	128					
October 1–December 31	15	256					
Total		1,705			256		9

[1] The Pacific halibut prohibited species catch (PSC) limit for hook-and-line gear is allocated to the demersal shelf rockfish (DSR) fishery in the SEO District and to hook-and-line fisheries other than the DSR fishery. The Council recommended, and NMFS proposes, that the hook-and-line sablefish IFQ fishery, and the pot and jig gear groundfish fisheries, be exempt from halibut PSC limits.

Section 679.21(d)(3)(ii) authorizes further apportionment of the trawl halibut PSC limit as bycatch allowances to trawl fishery categories listed in § 679.21(d)(3)(iii). The annual apportionments are based on each category's share of the anticipated halibut bycatch mortality during a fishing year and optimization of the total amount of groundfish harvest under the halibut PSC limit. The fishery categories for the trawl halibut PSC limits are: (1) a deep-water species fishery, composed of sablefish, rockfish, deep-water flatfish, rex sole, and arrowtooth flounder; and (2) a shallow-water species fishery, composed of pollock, Pacific cod, shallow-water flatfish, flathead sole, Atka mackerel, skates, and ''other species'' (sharks and octopuses) (§ 679.21(d)(3)(iii)). Halibut mortality incurred while directed fishing for skates with trawl gear accrues towards the shallow-water species fishery halibut PSC limit (69 FR 26320, May 12, 2004).

NMFS will combine available trawl halibut PSC limit apportionments in part of the second season deep-water and shallow-water species fisheries for use in either fishery from May 15 through June 30 (§ 679.21(d)(4)(iii)(D)). This is intended to maintain groundfish harvest while minimizing halibut bycatch by these sectors to the extent practicable. This provides the trawl gear deep-water and shallow-water species fisheries additional flexibility and the incentive to participate in fisheries at times of the year that may have lower halibut PSC rates relative to other times of the year.

Table 11 lists the proposed 2024 and 2025 seasonal apportionments of trawl halibut PSC limits between the trawl gear deep-water and the shallow-water species fisheries.

Table 28d to 50 CFR part 679 specifies the amount of the trawl halibut PSC limit that is assigned to the CV and CP sectors that are participating in the Central GOA Rockfish Program. This includes 117 mt of halibut PSC limit to the CV sector and 74 mt of halibut PSC limit to the CP sector. These amounts are allocated from the trawl deep-water species fishery's halibut PSC third seasonal apportionment. After the combined CV and CP halibut PSC limit allocation of 191 mt to the Rockfish Program, 150 mt remains for the trawl deep-water species fishery's halibut PSC third seasonal apportionment.

Section 679.21(d)(4)(iii)(B) limits the amount of the halibut PSC limit allocated to Rockfish Program participants that could be re-apportioned to the general GOA trawl fisheries for the last seasonal apportionment during the current fishing year to no more than 55 percent of the unused annual halibut PSC limit apportioned to Rockfish Program participants. The remainder of the unused Rockfish Program halibut PSC limit is unavailable for use by any person for the remainder of the fishing year (§ 679.21(d)(4)(iii)(C)).

TABLE 11—PROPOSED 2024 AND 2025 APPORTIONMENT OF THE PACIFIC HALIBUT PSC LIMITS BETWEEN THE TRAWL GEAR SHALLOW-WATER AND DEEP-WATER SPECIES FISHERY CATEGORIES

[Values are in metric tons]

Season	Shallow-water	Deep-water [1]	Total
January 20–April 1	385	135	520
April 1–July 1	85	256	341
July 1–August 1	120	340	460
August 1–October 1	53	75	128
Subtotal, January 20–October 1	643	806	1,449
October 1–December 31 [2]			256
Total			1,705

[1] Vessels participating in cooperatives in the Central GOA Rockfish Program will receive 191 mt of the third season (July 1 through August 1) deep-water species fishery halibut PSC apportionment.

[2] There is no apportionment between trawl shallow-water and deep-water species fisheries during the fifth season (October 1 through December 31).

Section 679.21(d)(2)(i)(B) requires that the ''other hook-and-line fishery'' halibut PSC limit apportionment to vessels using hook-and-line gear must be apportioned between CVs and CPs in accordance with § 679.21(d)(2)(iii) in

conjunction with these harvest specifications. A comprehensive description and example of the calculations necessary to apportion the ''other hook-and-line fishery'' halibut PSC limit between the hook-and-line CV and CP sectors were included in the proposed rule to implement Amendment 83 to the FMP (76 FR 44700, July 26, 2011) and are not repeated here.

Pursuant to § 679.21(d)(2)(iii), the hook-and-line halibut PSC limit for the ''other hook-and-line fishery'' is apportioned between the CV and CP sectors in proportion to the total Western and Central GOA Pacific cod allocations, which vary annually based on the proportion of the Pacific cod biomass between the Western, Central, and Eastern GOA. Pacific cod is apportioned among these three management areas based on the percentage of overall biomass per area, as calculated in the 2022 Pacific cod stock assessment. Updated information in the final 2022 SAFE report describes this distributional calculation, which allocates ABC among GOA regulatory areas on the basis of the three most recent stock surveys. For 2024 and 2025, the proposed distribution of the total GOA Pacific cod ABC is 30.3 percent to the Western GOA, 60.2 percent to the Central GOA, and 9.5 percent to the Eastern GOA. Therefore, the calculations made in accordance with § 679.21(d)(2)(iii) incorporate the most recent information on GOA Pacific cod distribution and allocations with respect to the proposed annual halibut PSC limits for the CV and CP hook-and-line sectors. Additionally, the annual halibut PSC limits for both the CV and CP sectors of the ''other hook-and-line fishery'' are proposed to be divided into three seasonal apportionments, using seasonal percentages of 86 percent, 2 percent, and 12 percent.

For 2024 and 2025, NMFS proposes annual halibut PSC limits of 150 mt and 107 mt to the hook-and-line CV and hook-and-line CP sectors, respectively. Table 12 lists the proposed 2024 and 2025 apportionments of halibut PSC limits between the hook-and-line CV and the hook-and-line CP sectors of the ''other hook-and-line fishery.''

No later than November 1 of each year, NMFS will calculate the projected unused amount of halibut PSC limit by either of the CV or CP hook-and-line sectors of the ''other hook-and-line fishery'' for the remainder of the year. The projected unused amount of halibut PSC limit is made available to the other hook-and-line sector for the remainder of that fishing year (§ 679.21(d)(2)(iii)(C)), if NMFS determines that an additional amount of halibut PSC is necessary for that sector to continue its directed fishing operations.

TABLE 12—PROPOSED 2024 AND 2025 APPORTIONMENTS OF THE ''OTHER HOOK-AND-LINE FISHERY'' ANNUAL HALIBUT PSC ALLOWANCE BETWEEN THE HOOK-AND-LINE GEAR CATCHER VESSEL AND CATCHER/PROCESSOR SECTORS

[Values are in metric tons]

''Other than DSR'' allowance	Hook-and-line sector	Sector annual amount	Season	Seasonal percentage	Sector seasonal amount
257	Catcher Vessel	150	January 1–June 10	86	129
			June 10–September 1	2	3
			September 1–December 31.	12	18
	Catcher/Processor	107	January 1–June 10	86	92
			June 10–September 1	2	2
			September 1–December 31.	12	13

Halibut Discard Mortality Rates

To monitor halibut bycatch mortality allowances and apportionments, the Regional Administrator uses observed halibut incidental catch rates, halibut discard mortality rates (DMR), and estimates of groundfish catch to project when a fishery's halibut bycatch mortality allowance or seasonal apportionment is reached. Halibut incidental catch rates are based on observed estimates of halibut incidental catch in the groundfish fishery. DMRs are estimates of the proportion of incidentally caught halibut that do not survive after being returned to the sea. The cumulative halibut mortality that accrues to a particular halibut PSC limit is the product of a DMR multiplied by the estimated halibut PSC. DMRs are estimated using the best scientific information available in conjunction with the annual GOA stock assessment process. The DMR methodology and findings are included as an appendix to the annual GOA groundfish SAFE report.

In 2016, the DMR estimation methodology underwent revisions per the Council's directive. An interagency halibut working group (IPHC, Council, and NMFS staff) developed improved estimation methods that have undergone review by the Plan Team, the SSC, and the Council. A summary of the revised methodology is contained in the GOA proposed 2017 and 2018 harvest specifications (81 FR 87881, December 6, 2016), and the comprehensive discussion of the working group's statistical methodology is available from the Council (see **ADDRESSES**). The DMR working group's revised methodology is intended to improve estimation accuracy, transparency, and transferability for calculating DMRs. The working group will continue to consider improvements to the methodology used to calculate halibut mortality, including potential changes to the reference period (the period of data used for calculating the DMRs). Future DMRs may change based on additional years of observer sampling, which could provide more recent and accurate data and which could improve the accuracy of estimation and progress on methodology. The methodology will continue to ensure that NMFS is using DMRs that more accurately reflect halibut mortality, which will inform the different sectors of their estimated halibut mortality and allow specific sectors to respond with methods that could reduce mortality and, eventually, the DMR for that sector.

In October 2023, the Council recommended halibut DMRs reviewed by the Plan Team and SSC, which are derived from the revised methodology. The proposed 2024 and 2025 DMRs use an updated 2-year and 4-year reference period depending data availability. Consistent with the Council's intent, NMFS is proposing the DMRs recommended by the Plan Team and reviewed by the SSC for the proposed

2024 and 2025 DMRs. Comparing the proposed 2024 and 2025 DMRs to the final DMRs from the final 2023 and 2024 harvest specifications, the proposed DMR for Rockfish Program CVs using non-pelagic trawl gear increased to 56 percent from 55 percent, the proposed DMR for non-Rockfish Program CVs using non-pelagic trawl gear decreased to 69 percent from 74 percent, the proposed DMR for CPs using hook-and-line gear decreased to 11 percent from 13 percent, the proposed DMR for CVs using hook-and-line gear increased to 10 percent from 9 percent, and the proposed DMR for CPs and CVs using pot gear decreased to 26 percent from 27 percent. For pelagic trawl gear CVs and CPs, and non-pelagic trawl gear mothership and CPs, the DMRs remained the same. Table 13 lists the proposed 2024 and 2025 DMRs.

TABLE 13—PROPOSED 2024 AND 2025 HALIBUT DISCARD MORTALITY RATES FOR VESSELS FISHING IN THE GULF OF ALASKA

[Values are percent of halibut assumed to be dead]

Gear	Sector	Groundfish fishery	Halibut discard mortality rate (percent)
Pelagic trawl	Catcher vessel	All	100
	Catcher/processor	All	100
Non-pelagic trawl	Catcher vessel	Rockfish Program	56
	Catcher vessel	All others	69
	Mothership and catcher/processor	All	83
Hook-and-line	Catcher/processor	All	11
	Catcher vessel	All	10
Pot	Catcher vessel and catcher/processor	All	26

Chinook Salmon Prohibited Species Catch Limits

Section 679.21(h)(2) establishes separate Chinook salmon PSC limits in the Western and Central regulatory areas of the GOA in the trawl pollock directed fishery. These limits require that NMFS close directed fishing for pollock in the Western and Central GOA if the applicable Chinook salmon PSC limit is reached (§ 679.21(h)(8)). The annual Chinook salmon PSC limits in the trawl pollock directed fishery of 6,684 salmon in the Western GOA and 18,316 salmon in the Central GOA are set in § 679.21(h)(2)(i) and (ii).

Section 679.21(h)(3) and (4) established an initial annual PSC limit of 7,500 Chinook salmon for the non-pollock groundfish trawl fisheries in the Western and Central GOA. This limit is apportioned among the three sectors that conduct directed fishing for groundfish species other than pollock: 3,600 Chinook salmon to trawl CPs; 1,200 Chinook salmon to trawl CVs participating in the Rockfish Program; and 2,700 Chinook salmon to trawl CVs not participating in the Rockfish Program (§ 679.21(h)(4)). NMFS will monitor the Chinook salmon PSC in the trawl non-pollock GOA groundfish fisheries and close an applicable sector if it reaches its Chinook salmon PSC limit.

The Chinook salmon PSC limit for two sectors, trawl CPs and trawl CVs not participating in the Rockfish Program, may be increased in subsequent years based on the performance of these two sectors and their ability to minimize their use of their respective Chinook salmon PSC limits. If either or both of these two sectors limit its use of Chinook salmon PSC to a certain threshold amount in 2023 (3,120 for trawl CPs and 2,340 for non-Rockfish Program trawl CVs), that sector will receive an incremental increase to its 2024 Chinook salmon PSC limit (4,080 for trawl CPs and 3,060 for non-Rockfish Program trawl CVs) (§ 679.21(h)(4)). NMFS will evaluate the annual Chinook salmon PSC by trawl CPs and non-Rockfish Program trawl CVs when the 2023 fishing year is complete to determine whether to increase the Chinook salmon PSC limits for these two sectors. Based on preliminary 2023 Chinook salmon PSC data, the trawl CP sector may receive an incremental increase of Chinook salmon PSC limit in 2024, and the non-Rockfish Program trawl CV sector may receive an incremental increase of Chinook salmon PSC limit in 2024. This evaluation will be completed in conjunction with the final 2024 and 2025 harvest specifications.

American Fisheries Act (AFA) CP and CV Groundfish Harvest and PSC Limits

Section 679.64 establishes groundfish harvesting and processing sideboard limits on AFA CPs and CVs in the GOA. These sideboard limits are necessary to protect the interests of fishermen and processors who do not directly benefit from the AFA from those fishermen and processors who receive exclusive harvesting and processing privileges under the AFA. Section 679.7(k)(1)(ii) prohibits listed AFA CPs and CPs designated on a listed AFA CP permit from harvesting any species of fish in the GOA. Additionally, § 679.7(k)(1)(iv) prohibits listed AFA CPs and CPs designated on a listed AFA CP permit from processing any pollock harvested in a directed pollock fishery in the GOA and any groundfish harvested in Statistical Area 630 of the GOA.

AFA CVs that are less than 125 feet (38.1 meters) length overall, have annual landings of pollock in the Bering Sea and Aleutian Islands of less than 5,100 mt, and have made at least 40 landings of GOA groundfish from 1995 through 1997 are exempt from GOA CV groundfish sideboard limits under § 679.64(b)(2)(ii). Sideboard limits for non-exempt AFA CVs in the GOA are based on their traditional harvest levels of TAC in groundfish fisheries covered by the FMP. Section 679.64(b)(3)(iv) establishes the CV groundfish sideboard limits in the GOA based on the aggregate retained catch by non-exempt AFA CVs of each sideboard species from 2009 through 2019 divided by the TAC for that species available to catcher vessels from 2009 through 2019. Under the PCTC Program, NMFS modified the calculation of the sideboard ratios for non-exempt AFA CVs, using the qualifying years of 2009 through 2019 (88 FR 53704, August 8, 2023). Previously, sideboard limits were based on the ratio of catch to the TAC during the years 1995 through 1997.

NMFS published a final rule (84 FR 2723, February 8, 2019) that implemented regulations to prohibit non-exempt AFA CVs from directed fishing for specific groundfish species or species groups subject to sideboard

limits (§ 679.20(d)(1)(iv)(D) and Table 56 to 50 CFR part 679). Under the PCTC Program, NMFS also promulgated regulations to prohibit non-exempt AFA CVs from directed fishing for additional groundfish species or species groups subject to sideboard limits (88 FR 53704, August 8, 2023). All of these prohibitions are found in the revised Table 56 to 50 CFR part 679. Sideboard limits not subject to these final rules continue to be calculated and included in the GOA annual harvest specifications.

Table 14 lists the proposed 2024 and 2025 groundfish sideboard limits for non-exempt AFA CVs. NMFS will deduct all targeted or incidental catch of sideboard species made by non-exempt AFA CVs from the sideboard limits listed in table 14.

TABLE 14—PROPOSED 2024 AND 2025 GOA NON-EXEMPT AMERICAN FISHERIES ACT CATCHER VESSEL (CV) GROUNDFISH SIDEBOARD LIMITS

[Values are rounded to the nearest metric ton]

Species	Apportionments by season/gear	Area/component	Ratio of 2009–2019 non-exempt AFA CV retained catch to 2009–2019 TAC	Proposed 2024 and 2025 TACs [3]	Proposed 2024 and 2025 non-exempt AFA CV sideboard limit
Pollock	A Season: January 20–May 31	Shumagin (610)	0.057	1,823	104
		Chirikof (620)	0.064	62,771	4,017
		Kodiak (630)	0.091	9,864	898
	B Season: September 1–November 1	Shumagin (610)	0.057	27,333	1,558
		Chirikof (620)	0.064	20,511	1,313
		Kodiak (630)	0.091	26,614	2,422
	Annual	WYK (640)	0.026	8,136	212
Pacific cod	A Season: [1] January 1–June 10	W	0.009	3,067	28
		C	0.011	6,562	72
	B Season: [2] September 1–December 31	W	0.009	1,744	16
		C	0.011	3,679	40
Flatfish, shallow-water.	Annual	C	0.011	27,737	305
Rex sole	Annual	C	0.014	13,425	188
Arrowtooth flounder	Annual	C	0.011	64,200	706
Flathead sole	Annual	C	0.007	21,892	153

[1] The Pacific cod A season for trawl gear does not open until January 20.
[2] The Pacific cod B season for trawl gear closes November 1.
[3] The Western and Central GOA and WYK District area apportionments of pollock are considered Annual Catch Limits.

Non-Exempt AFA Catcher Vessel Halibut PSC Limit

The non-exempt AFA catcher vessels and the associated LLP licenses PSC limit for halibut in the GOA will be an annual amount based on a static ratio of 0.072, which was derived from the aggregate retained groundfish catch by non-exempt AFA CVs in each PSC target category from 2009 through 2019 (§ 679.64(b)(4)(ii)). This change was implemented with the PCTC Program (88 FR 53704, August 8, 2023). Prior to the publication of these proposed harvest specifications, the halibut PSC sideboard limits for non-exempt AFA CVs in the GOA were based on the aggregate retained groundfish catch by non-exempt AFA CVs in each PSC target category from 1995 through 1997 divided by the retained catch of all vessels in that fishery from 1995 through 1997. Table 15 lists the proposed 2024 and 2025 non-exempt AFA CV halibut PSC sideboard limits for vessels using trawl gear in the GOA.

TABLE 15—PROPOSED 2024 AND 2025 NON-EXEMPT AMERICAN FISHERIES ACT CATCHER VESSEL (CV) HALIBUT PSC SIDEBOARD LIMITS

Ratio (percent)	Annual trawl gear halibut PSC limit (mt)	Annual non-exempt AFA CV halibut PSC limit (mt)
0.072	1,705	123

Non-AFA Crab Vessel Groundfish Harvest Limitations

Section 680.22 establishes groundfish sideboard limits for vessels with a history of participation in the Bering Sea snow crab fishery to prevent these vessels from using the increased flexibility provided by the Crab Rationalization (CR) Program to expand their level of participation in the GOA groundfish fisheries. Sideboard harvest limits restrict these vessels' catch to their collective historical landings in each GOA groundfish fishery (except the fixed-gear sablefish fishery). Sideboard limits also apply to landings made using an LLP license derived from the history of a restricted vessel, even if that LLP license is used on another vessel.

The basis for these sideboard harvest limits is described in detail in the final rules implementing the major provisions of the CR Program, including Amendments 18 and 19 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (Crab FMP) (70 FR 10174, March 2, 2005), Amendment 34 to the Crab FMP (76 FR 35772, June 20, 2011), Amendment 83 to the GOA FMP (76 FR 74670, December 1, 2011), and Amendment 45 to the Crab FMP (80 FR 28539, May 19, 2015). Also, NMFS published a final rule (84 FR 2723, February 8, 2019) that implemented regulations to prohibit non-AFA crab vessels from directed fishing for all groundfish species or species groups subject to sideboard limits, except for Pacific cod apportioned to CVs using pot gear in the Western and Central Regulatory Areas (§ 680.22(e)(1)(iii)). Accordingly, the GOA annual harvest specifications include only the non-

AFA crab vessel groundfish sideboard limits for Pacific cod apportioned to CVs using pot gear in the Western and Central Regulatory Areas.

Table 16 lists the proposed 2024 and 2025 groundfish sideboard limits for non-AFA crab vessels. All targeted or incidental catch of sideboard species made by non-AFA crab vessels or associated LLP licenses will be deducted from these sideboard limits.

TABLE 16—PROPOSED 2024 AND 2025 GOA NON-AMERICAN FISHERIES ACT CRAB VESSEL GROUNDFISH SIDEBOARD LIMITS

[Values are rounded to the nearest metric ton]

Species	Season	Area/gear	Ratio of 1996–2000 non-AFA crab vessel catch to 1996–2000 total harvest	Proposed 2024 and 2025 TACs	Proposed 2024 and 2025 non-AFA crab vessel sideboard limit
Pacific cod	A Season: January 1–June 10	Western Pot CV	0.0997	3,067	306
		Central Pot CV	0.0474	6,566	311
	B Season: September 1–December 31	Western Pot CV	0.0997	1,744	174
		Central Pot CV	0.0474	3,675	174

Rockfish Program Groundfish Sideboard and Halibut PSC Limitations

The Rockfish Program establishes three classes of sideboard provisions: CV groundfish sideboard restrictions, CP rockfish sideboard restrictions, and CP opt-out vessel sideboard restrictions (§ 679.82(c)(1)). These sideboards are intended to limit the ability of rockfish harvesters to expand into other fisheries.

CVs participating in the Rockfish Program may not participate in directed fishing for dusky rockfish, Pacific ocean perch, and northern rockfish in the Western GOA and West Yakutat District from July 1 through July 31. Also, CVs may not participate in directed fishing for arrowtooth flounder, deep-water flatfish, and rex sole in the GOA from July 1 through July 31 (§ 679.82(d)).

Prior to 2021, CPs participating in Rockfish Program cooperatives were restricted by rockfish sideboard limits in the Western GOA. A final rule that implemented Amendment 111 to the FMP (86 FR 11895, March 1, 2021) removed Western GOA rockfish sideboard limits for Rockfish Program CPs from regulation. That rule also revised and clarified the establishment of West Yakutat District rockfish sideboard ratios in regulation, rather than specifying the West Yakutat District rockfish sideboard ratios in the annual GOA harvest specifications.

CPs participating in Rockfish Program cooperatives are restricted by rockfish and halibut PSC sideboard limits. These CPs are prohibited from directed fishing for dusky rockfish, Pacific ocean perch, and northern rockfish in the Western GOA and West Yakutat District from July 1 through July 31 (§ 679.82(e)(2)). The sideboard ratio for each rockfish fishery in the West Yakutat District is set forth in § 679.82(e)(4). The rockfish sideboard ratio for each rockfish fishery in the West Yakutat District is an established percentage of the TAC for catcher/processors in the directed fishery for dusky rockfish and Pacific ocean perch. These percentages are confidential. Holders of CP-designated LLP licenses that opt out of participating in a Rockfish Program cooperative will be able to access that portion of each rockfish sideboard limits that is not assigned to Rockfish Program cooperatives (§ 679.82(e)(7)).

Under the Rockfish Program, the CP sector is subject to halibut PSC sideboard limits for the trawl deep-water and shallow-water species fisheries from July 1 through July 31 (§ 679.82(e)(3) and (e)(5)). Halibut PSC sideboard ratios by fishery are set forth in § 679.82(e)(5). No halibut PSC sideboard limits apply to the CV sector, as vessels participating in a rockfish cooperative receive a portion of the annual halibut PSC limit. CPs that opt out of the Rockfish Program would be able to access that portion of the deep-water and shallow-water halibut PSC sideboard limit not assigned to CP rockfish cooperatives. The sideboard provisions for CPs that elect to opt out of participating in a rockfish cooperative are described in § 679.82(c), (e), and (f). Sideboard limits are linked to the catch history of specific vessels that may choose to opt out. After March 1, NMFS will determine which CPs have opted-out of the Rockfish Program in 2024, and will know the ratios and amounts used to calculate opt-out sideboard ratios. NMFS will then calculate any applicable opt-out sideboard limits for 2024 and announce these limits after March 1. Table 17 lists the proposed 2024 and 2025 Rockfish Program halibut PSC sideboard limits for the CP sector.

TABLE 17—PROPOSED 2024 AND 2025 ROCKFISH PROGRAM HALIBUT PSC SIDEBOARD LIMITS FOR THE CATCHER/PROCESSOR SECTOR

[Values are rounded to the nearest metric ton]

Sector	Shallow-water species fishery halibut PSC sideboard ratio (percent)	Deep-water species fishery halibut PSC sideboard ratio (percent)	Annual trawl gear halibut PSC limit (mt)	Annual shallow-water species fishery halibut PSC sideboard limit (mt)	Annual deep-water species fishery halibut PSC sideboard limit (mt)
Catcher/processor	0.10	2.50	1,705	2	43

Amendment 80 Program Groundfish and PSC Sideboard Limits

Amendment 80 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (Amendment 80 Program) established a limited access privilege program for the non-AFA trawl CP sector. The Amendment 80 Program established groundfish and halibut PSC limits for Amendment 80 Program participants to limit the ability of participants eligible for the Amendment 80 Program to expand their harvest efforts in the GOA.

Section 679.92 establishes groundfish harvesting sideboard limits on all Amendment 80 Program vessels, other than the F/V *Golden Fleece,* to amounts no greater than the limits shown in Table 37 to 50 CFR part 679. Under § 679.92(d), the F/V *Golden Fleece* is prohibited from directed fishing for pollock, Pacific cod, Pacific ocean perch, dusky rockfish, and northern rockfish in the GOA.

Groundfish sideboard limits for Amendment 80 Program vessels operating in the GOA are based on their average aggregate harvests from 1998 through 2004 (72 FR 52668, September 14, 2007). Table 18 lists the proposed 2024 and 2025 groundfish sideboard limits for Amendment 80 Program vessels. NMFS will deduct all targeted or incidental catch of sideboard species made by Amendment 80 Program vessels from the sideboard limits in table 18.

TABLE 18—PROPOSED 2024 AND 2025 GOA GROUNDFISH SIDEBOARD LIMITS FOR AMENDMENT 80 PROGRAM VESSELS

[Values are rounded to the nearest metric ton]

Species	Season	Area	Ratio of Amendment 80 sector vessels 1998–2004 catch to TAC	Proposed 2024 and 2025 TAC (mt) [3]	Proposed 2024 and 2025 Amendment 80 vessel sideboard limits (mt)
Pollock	A Season: January 20–May 31	Shumagin (610)	0.003	1,823	5
		Chirikof (620)	0.002	62,771	126
		Kodiak (630)	0.002	9,864	20
	B Season: September 1–November 1	Shumagin (610)	0.003	27,333	82
		Chirikof (620)	0.002	20,511	41
		Kodiak (630)	0.002	26,614	53
	Annual	WYK (640)	0.002	8,136	16
Pacific cod	A Season: [1] January 1–June 10	W	0.020	3,067	61
		C	0.044	6,566	289
	B Season: [2] September 1–December 31	W	0.020	1,744	35
		C	0.044	3,675	162
	Annual	WYK	0.034	1,616	55
Pacific ocean perch	Annual	W	0.994	2,461	2,446
		WYK	0.961	1,333	1,281
Northern rockfish	Annual	W	1.000	2,497	2,497
Dusky rockfish	Annual	W	0.764	141	108
		WYK	0.896	85	76

[1] The Pacific cod A season for trawl gear does not open until January 20.
[2] The Pacific cod B season for trawl gear closes November 1.
[3] The Western and Central GOA and WYK District area apportionments of pollock are considered Annual Catch Limits.

The halibut PSC sideboard limits for Amendment 80 Program vessels in the GOA are based on the historical use of halibut PSC by Amendment 80 Program vessels in each PSC target category from 1998 through 2004. These values are slightly lower than the average historical use to accommodate two factors: allocation of halibut PSC cooperative quota under the Rockfish Program and the exemption of the F/V *Golden Fleece* from this restriction (§ 679.92(b)(2)). Table 19 lists the proposed 2024 and 2025 halibut PSC sideboard limits for Amendment 80 Program vessels. This table incorporates the maximum percentages of the halibut PSC sideboard limits that may be used by Amendment 80 Program vessels as contained in Table 38 to 50 CFR part 679. Any residual amount of a seasonal Amendment 80 halibut PSC sideboard limit may carry forward to the next season limit (§ 679.92(b)(2)).

TABLE 19—PROPOSED 2024 AND 2025 HALIBUT PSC SIDEBOARD LIMITS FOR AMENDMENT 80 PROGRAM VESSELS IN THE GOA

[Values are rounded to the nearest metric ton]

Season	Season dates	Fishery category	Historic Amendment 80 use of the annual halibut PSC limit (ratio)	Annual trawl gear halibut PSC limit (mt)	Proposed 2024 and 2025 Amendment 80 vessel PSC sideboard limit (mt)
1	January 20–April 1	shallow-water	0.0048	1,705	8
		deep-water	0.0115	1,705	20
2	April 1–July 1	shallow-water	0.0189	1,705	32
		deep-water	0.1072	1,705	183
3	July 1–August 1	shallow-water	0.0146	1,705	25
		deep-water	0.0521	1,705	89

TABLE 19—PROPOSED 2024 AND 2025 HALIBUT PSC SIDEBOARD LIMITS FOR AMENDMENT 80 PROGRAM VESSELS IN THE GOA—Continued

[Values are rounded to the nearest metric ton]

Season	Season dates	Fishery category	Historic Amendment 80 use of the annual halibut PSC limit (ratio)	Annual trawl gear halibut PSC limit (mt)	Proposed 2024 and 2025 Amendment 80 vessel PSC sideboard limit (mt)
4	August 1–October 1	shallow-water	0.0074	1,705	13
		deep-water	0.0014	1,705	2
5	October 1–December 31	shallow-water	0.0227	1,705	39
		deep-water	0.0371	1,705	63
Annual		Total shallow-water			117
		Total deep-water			357
		Grand Total, all seasons and categories.			474

Classification

NMFS is issuing this proposed rule pursuant to section 305(d) of the Magnuson-Stevens Act. Through previous actions, the FMP and regulations are designed to authorize NMFS to take this action. See 50 CFR part 679. The NMFS Assistant Administrator has preliminarily determined that the proposed harvest specifications are consistent with the FMP, the Magnuson-Stevens Act, and other applicable laws, subject to further review and consideration after public comment.

This action is authorized under 50 CFR 679.20 and is exempt from review under Executive Order 12866 because it only implements annual catch limits in the GOA.

NMFS prepared an EIS for the Alaska groundfish harvest specifications and alternative harvest strategies (see **ADDRESSES**) and made it available to the public on January 12, 2007 (72 FR 1512). On February 13, 2007, NMFS issued the ROD for the Final EIS. A SIR is being prepared for the final 2024 and 2025 harvest specifications to provide a subsequent assessment of the action and to address the need to prepare a Supplemental EIS (40 CFR 1501.11(b); § 1502.9(d)(1)). Copies of the Final EIS, ROD, and annual SIRs for this action are available from NMFS (see **ADDRESSES**). The Final EIS analyzes the environmental, social, and economic consequences of alternative harvest strategies on resources in the action area. Based on the analysis in the Final EIS, NMFS concluded that the preferred Alternative (Alternative 2) provides the best balance among relevant environmental, social, and economic considerations and allows for continued management of the groundfish fisheries based on the most recent, best scientific information.

Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis (IRFA) was prepared for this proposed rule, as required by Section 603 of the Regulatory Flexibility Act (RFA) (5 U.S.C. 603), to describe the economic impact that this proposed rule, if adopted, would have on small entities. The IRFA describes the action; the reasons why this proposed rule is proposed; the objectives and legal basis for this proposed rule; the estimated number and description of directly regulated small entities to which this proposed rule would apply; the recordkeeping, reporting, and other compliance requirements of this proposed rule; and the relevant Federal rules that may duplicate, overlap, or conflict with this proposed rule. The IRFA also describes significant alternatives to this proposed rule that would accomplish the stated objectives of the Magnuson-Stevens Act, and any other applicable statutes, and that would minimize any significant economic impact of this proposed rule on small entities. The description of the proposed action, its purpose, and the legal basis are explained earlier in the preamble and are not repeated here.

For RFA purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide. A shoreside processor primarily involved in seafood processing (NAICS code 311710) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual employment, counting all individuals employed on a full-time, part-time, or other basis, not in excess of 750 employees for all its affiliated operations worldwide.

Number and Description of Small Entities Regulated by This Proposed Rule

The entities directly regulated by the groundfish harvest specifications include: (a) entities operating vessels with groundfish Federal fisheries permits (FFPs) catching FMP groundfish in Federal waters (including those receiving direction allocations of groundfish); (b) all entities operating vessels, regardless of whether they hold groundfish FFPs, catching FMP groundfish in the State-waters parallel fisheries; and (c) all entities operating vessels fishing for halibut inside 3 miles of the shore (whether or not they have FFPs).

In 2022 (the most recent year of complete data), there were 677 individual CVs and CPs with gross revenues less than or equal to $11 million. This represents the potential suite of directly regulated small entities. This includes an estimated 674 small CV and 3 small CP entities in the GOA groundfish sector. The determination of entity size is based on vessel revenues and affiliated group revenues. This determination also includes an assessment of fisheries cooperative affiliations, although actual vessel

ownership affiliations have not been completely established. However, the estimate of these 677 CVs and CPs may be an overstatement of the number of small entities. The CVs had average gross revenues that varied by gear type. Average gross revenues for hook-and-line CVs, pot gear CVs, and trawl gear CVs are estimated to be $450,000, $860,000, and $1.38 million, respectively. Average gross revenues for hook-and-line CPs and pot gear CPs are estimated to be $7.40 million and $6.87 million, respectively. Trawl gear CP entity revenue data are confidential.

Description of Significant Alternatives That Minimize Adverse Impacts on Small Entities

The action under consideration is the proposed 2024 and 2025 harvest specifications, apportionments, and Pacific halibut prohibited species catch limits for the groundfish fishery of the GOA. This action is necessary to establish harvest limits for groundfish during the 2024 and 2025 fishing years and is taken in accordance with the FMP prepared by the Council pursuant to the Magnuson-Stevens Act. The establishment of the proposed harvest specifications is governed by the Council and NMFS's harvest strategy to govern the catch of groundfish in the GOA. This strategy was selected from among five alternatives, with the preferred alternative harvest strategy being one in which the TACs fall within the range of ABCs recommended by the SSC. Under the preferred harvest strategy, TACs are set to a level that falls within the range of ABCs recommended by the SSC; the sum of the TACs must achieve the OY specified in the FMP. While the specific numbers that the harvest strategy produces may vary from year to year, the methodology used for the preferred harvest strategy remains constant.

The TACs associated with preferred harvest strategy are those recommended by the Council in October 2023. OFLs and ABCs for the species were based on recommendations prepared by the Council's Plan Team in September 2023, and reviewed by the Council's SSC in October 2023. The Council based its TAC recommendations on those of its AP, which were consistent with the SSC's OFL and ABC recommendations. The TACs in these proposed 2024 and 2025 harvest specifications are unchanged from the 2023 TACs in the final 2023 and 2024 harvest specifications (88 FR 13238, March 2, 2023), and the sum of all TACs remains within the OY for the GOA.

The proposed 2024 and 2025 OFLs and ABCs are based on the best biological information available, including projected biomass trends, information on assumed distribution of stock biomass, and revised technical methods to calculate stock biomass. The proposed 2024 and 2025 TACs are based on the best biological and socioeconomic information available. The proposed 2024 and 2025 OFLs, ABCs, and TACs are consistent with the biological condition of groundfish stocks as described in the 2022 SAFE report, which is the most recent, completed SAFE report.

Under this action, the proposed ABCs reflect harvest amounts that are less than the specified overfishing levels. The proposed TACs are within the range of proposed ABCs recommended by the SSC and do not exceed the biological limits recommended by the SSC (the ABCs and OFLs). For most species and species groups in the GOA, the Council recommended, and NMFS proposes, TACs equal to proposed ABCs, which is intended to maximize harvest opportunities in the GOA.

For some species and species groups, however, the Council recommended, and NMFS proposes, TACs that are less than the proposed ABCs, including for pollock in the W/C/WYK Regulatory Area, Pacific cod, shallow-water flatfish in the Western Regulatory Area, arrowtooth flounder in the Western Regulatory Area and SEO District, flathead sole in the Western Regulatory Area, other rockfish in the SEO District, and Atka mackerel. In the GOA, increasing TACs for some species may not result in increased harvest opportunities for those species. This is due to a variety of reasons. There may be a lack of commercial or market interest in some species. Additionally, there are fixed, and therefore constraining, PSC limits associated with the harvest of the GOA groundfish species that can lead to an underharvest of flatfish TACs. For this reason, the shallow-water flatfish, arrowtooth flounder, and flathead sole TACs are set to allow for increased harvest opportunities for these target species while conserving the halibut PSC limit for use in other fisheries. The other rockfish and Atka mackerel TACs are set to accommodate ICAs in other fisheries. Finally, the TACs for two species (pollock and Pacific cod) cannot be set equal to ABC, as the TAC must be set to account for the State's GHLs in these fisheries. The W/C/WYK Regulatory Area pollock TAC and the GOA Pacific cod TACs are therefore set to account for the State's GHLs for the State waters pollock and Pacific cod fisheries so that the ABCs are not exceeded. For all other species in the GOA, the Council recommended, and NMFS proposes, that proposed TACs equal proposed ABCs, unless other conservation or management reasons (described above) support proposed TAC amounts less than the proposed ABCs.

Based upon the best scientific data available, and in consideration of the objectives of this action, it appears that there are no significant alternatives to the proposed rule that have the potential to accomplish the stated objectives of the Magnuson-Stevens Act and any other applicable statutes and that have the potential to minimize any significant adverse economic impact of the proposed rule on small entities. This action is economically beneficial to entities operating in the GOA, including small entities. The action proposes TACs for commercially valuable species in the GOA and allows for the continued prosecution of the fishery, thereby creating the opportunity for fishery revenue. After public process, during which the Council solicited input from stakeholders, the Council recommended the proposed harvest specifications, which NMFS determines would best accomplish the stated objectives articulated in the preamble for this proposed rule, and in applicable statutes, and would minimize to the extent practicable adverse economic impacts on the universe of directly regulated small entities.

This action does not modify recordkeeping or reporting requirements, or duplicate, overlap, or conflict with any Federal rules.

This proposed rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

Adverse impacts on marine mammals or endangered or threatened species resulting from fishing activities conducted under these harvest specifications are discussed in the Final EIS and its accompanying annual SIRs (see **ADDRESSES**).

Authority: 16 U.S.C. 773 *et seq.;* 16 U.S.C. 1540(f); 16 U.S.C. 1801 *et seq.;* 16 U.S.C. 3631 *et seq.;* Pub. L. 105–277; Pub. L. 106–31; Pub. L. 106–554; Pub. L. 108–199; Pub. L. 108–447; Pub. L. 109–241; Pub. L. 109–479.

Dated: December 1, 2023.

Samuel D. Rauch, III,

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

[FR Doc. 2023–26807 Filed 12–4–23; 4:15 pm]

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Notices

Federal Register

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This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture will submit the following information collection requirement(s) to OMB for review and clearance 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 January 8, 2024. Written comments and recommendations for the proposed information collection should be submitted, identified by docket number 0535–0264, within 30 days of the publication of this notice by any of the following methods:

- *Email: ombofficer@nass.usda.gov.* Include docket number above in the subject line of the message.
- *E-fax:* 855–838–6382.
- *Mail:* Mail any paper, disk, or CD–ROM submissions to: Richard Hopper, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.
- *Hand Delivery/Courier:* Hand deliver to: Richard Hopper, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.

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 (NASS)

Title: Agricultural Surveys Program.

OMB Control Number: 0535–0213.

Summary of Collection: National Agriculture Statistics Service (NASS) primary functions are to prepare and issue state and national estimates of crop and livestock production and collect information on related environmental and economic factors. The Agricultural Surveys Program is a series of surveys that contains basic agricultural data from farmers and ranchers throughout the Nation for preparing agricultural estimates and forecasts. The surveys results provide the foundation for setting livestock and poultry inventory numbers. Estimates derived from the surveys supply information needed by farmers to make decisions for both short and long-term planning. The General authority for these data collection is granted under U.S. Code title 7, section 2204(a). Individually identifiable data collected under this authority are governed by section 1770 of the Food Security Act of 1985, as amended, 7 U.S.C, 2276, and title III of Public Law 115–435 (CIPSEA) which requires USDA to afford strict confidentially to non-aggregated data provided by respondents.

Revisions to burden are needed due to changes in the size of the target population, sample design, and minor changes in questionnaire design.

Need and Use of the Information: The surveys provide the basis for estimates of the current season's crop and livestock production and supplies of grain in storage. Crop and livestock statistics help develop a stable economic atmosphere and reduce risk for production, marketing, and distribution operations. These commodities affect the well being of the nation's farmers, commodities markets, and national and global agricultural policy. Users of agricultural statistics are farm organizations, agribusiness, state and national farm policy makers, and foreign buyers of agricultural products but the primary user of the statistical information is the producer. Agricultural statistics are also used to plan and administer other related federal and state programs in such areas as school lunch program, conservation, foreign trade, education, and recreation. Collecting the information less frequent would eliminate needed data to keep the government and agricultural industry abreast of changes at the state and national levels.

Description of Respondents: Farms.

Number of Respondents: 491,600.

Frequency of Responses: Reporting: Quarterly; Semi-annually; Monthly; Annually.

Total Burden Hours: 184,481.

Levi Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–26873 Filed 12–6–23; 8:45 am]

BILLING CODE 3410–20–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 January 8, 2024. 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: Livestock Slaughter.

OMB Control Number: 0535–0005.

Summary of Collection: The primary functions of the National Agricultural Statistics Service (NASS) are to prepare and issue State and national estimates of crop and livestock production, disposition, and prices and to collect information on related environmental and economic factors. Crop and livestock statistics help maintain a stable economic atmosphere and reduce risk for production, marketing, and distribution operations. The agricultural industry increasingly calls upon NASS to supply reliable, timely, and detailed information in its commodity estimation program. General authority for data collection activities is granted under U.S. Code title 7, section 2204(a). This statue specifies the ''The Secretary of Agriculture shall procure and preserve all information concerning agriculture which he can obtain . . . by the collection of statistics . . . and shall distribute them among agriculturists''. Information from federally and non-federally inspected slaughter plants are used to estimate total red meat production. NASS will use a Federally and non-Federally-inspected livestock slaughter survey to collect data.

Need and Use of the Information: Information collected from both types of plants are combined to estimate total red meat production, consisting of the number of head slaughtered and live weights of cattle, calves, hogs, sheep/lambs, goats, and buffalo/bison. Knowing total red meat production, the number of head slaughtered, and live weights allows the industry to prepare and address issues related to supply and pricing. The data are also used at the end of the year to confirm production and disposition information for NASS livestock estimates made during the year.

Description of Respondents: Business or other for-profit.

Number of Respondents: 1,225.

Frequency of Responses: Reporting: Weekly, Monthly, Quarterly and Annually.

Total Burden Hours: 2,302.

National Agricultural Statistics Service

Title: Bee and Honey Survey.

OMB Control Number: 0535–0153.

Summary of Collection: The primary functions of the National Agricultural Statistics Service (NASS) are to prepare and issue State and national estimates of crop and livestock production, disposition, and prices, and to collect information on related environmental and economic factors. Crop and livestock statistics help maintain a stable economic atmosphere and reduce risk for production, marketing, and distribution operations. Modern agriculture increasingly calls upon NASS to supply reliable, timely, and detailed information through its commodity estimation program. As part of this function, estimates are made for honey production, stocks, and prices.

Domestic honeybees are critical to the pollination of U.S. crops, especially fruits, some nuts, vegetables, and some specialty crops. United States honey production in 2022 totaled 125 million pounds, down 1 percent from 2021. There were 2.67 million colonies producing honey in 2022, down 1 percent from 2021. Yield per colony averaged 47.0 pounds, unchanged from 2021. The survival of bees is threatened by parasites, diseases, and other factors. In many areas, the wild European honeybee population is virtually nonexistent. Federal, State and local governments provide programs to assist in the survival of honeybees and to encourage beekeepers to maintain honeybee colonies. The government to administer these programs uses honey production and price data.

General authority for these data collection activities is granted under U.S. Code title 7, section 2204. This statute specifies that ''The Secretary of Agriculture shall procure and preserve all information concerning agriculture which he can obtain . . . by the collection of statistics . . . and shall distribute them among agriculturists.''

Need and Use of the Information: The bee and honey surveys are conducted in all States. These surveys collect data on the number of colonies each operation has, the amount of honey produced and the amount of honey stocks available for sale.

The Agricultural Research Service (ARS), State-level apiarists, and agricultural colleges throughout the U.S. use NASS bee and honey data to administer their honeybee research programs. Current research projects at ARS focus on colony collapse disorder, parasites, Africanized honeybees, foul brood disease, food safety and inspection (including honey), and other topics.

The Agricultural Marketing Service (AMS) uses NASS honey production data as control data for the administration of the research and promotion programs. The Honey Packers and Importers Research, Promotion, Consumer Education, and Industry Information Order (Order) [7 CFR part 1212] is authorized by the Commodity Promotion, Research, and Information Act of 1996 (1996 Act) [7 U.S.C. 7411–7425]. Under the Order, assessments are collected on honey and honey products packed or imported into the 50 states, Puerto Rico, and the District of Columbia. The funds collected are used by the National Honey Board for research and development, advertising and promotion of honey and honey products, consumer education, and industry information, under AMS supervision. The National Honey Board administers the research and promotion programs and reimburses the Federal government for the costs incurred in implementing and administering the program.

The Economic Research Service (ERS) uses NASS honey data to construct U.S. and per capita caloric sweetener consumption estimates. The data are used in the Sugar and Sweeteners Yearbook tables provided by ERS. The data are also utilized in the Situation and Outlook Report and the Food Consumption series, which are mandated by Congress. Economic data published in the Honey report is also used to prepare valuations related to pollinators.

The Farm Service Agency (FSA) uses NASS honey production data as source data. The Farm Security and Rural Investment Act of 2002 provides that the FSA administer the nonrecourse marketing assistance loan and loan deficiency payment (LDP) program for honey. The honey nonrecourse marketing assistance loan and LDP program provides eligible honey producers with two forms of Federal assistance. The program helps to stabilize America's honey industry and ensure the wellbeing of agriculture in

the United States. Nonrecourse marketing assistance loans are administered by FSA on behalf of the Commodity Credit Corporation (CCC). The Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) authorized the Emergency Assistance for Livestock, Honey Bees, and Farm-Raised Fish Program (ELAP). ELAP assistance covers some species, loss conditions, and losses that are not eligible for other disaster assistance programs, including colony collapse disorder. The Agriculture Improvement Act of 2018 (the 2018 Farm Bill) authorized the use of Commodity Credit Corporation funds for the Emergency Assistance for Livestock, Honeybees and Farm-Raised Fish Program (ELAP). ELAP provides emergency assistance to eligible producers of livestock, honeybees and farm-raised fish. It covers losses due to an eligible adverse weather or loss condition, including blizzards and wildfires, as determined by the Secretary of Agriculture. ELAP covers losses that are not covered under other disaster assistance programs authorized by the 2014 Farm Bill, such as the Livestock Forage Disaster Program (LFP) and the Livestock Indemnity Program (LIP).

The Risk Management Agency (RMA) is now offering a pilot insurance program for apiculture. This pilot program uses rainfall and vegetation greenness indices to estimate local rainfall and plant health, allowing beekeepers to purchase insurance protection against production risks. The program will use a 5-year average honey yield at the state level and the annual average honey price at the national level, both based on NASS data, to determine insurance payments.

The Pollinator Health Task Force uses data from the Honey Bee Colonies report to monitor honeybee colony losses during winter. Their goal, as laid out in the Pollinator Research Action Plan, is to reduce these losses to no more than 15 percent within 10 years. The Food and Drug Administration provided some background information on the importance of honeybees in an article they published in July 2018. ‘‘Honey bees are not native to the New World. Most crops grown in the U.S. are not New World natives either. Both the crops and the bees evolved together in other areas of the globe, and were brought here by European settlers. Information suggests that the first honeybee colonies arrived in the Colony of Virginia from England early in 1622.

Today, the commercial production of more than 90 crops relies on bee pollination. Of the approximately 3,600 bee species that live in the U.S., the European honeybee2 (scientific name Apis mellifera) is the most common pollinator, making it the most important bee to domestic agriculture. About one-third of the food eaten by Americans comes from crops pollinated by honey bees, including apples, melons, cranberries, pumpkins, squash, broccoli, and almonds, to name just a few. Without the industrious honey bee, American dinner plates would look quite bare.’’

Description of Respondents: Businesses or other for-profits; Farms.

Number of Respondents: 12,225.

Frequency of Responses: Reporting: Quarterly; Annually.

Total Burden Hours: 7,920.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–26894 Filed 12–6–23; 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 this information collection received by January 8, 2024 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 Safety and Inspection Service

Title: Egg Products HACCP and Sanitation Standard Operating Procedures.

OMB Control Number: 0583–0172.

Summary of Collection: FSIS has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18 and 2.53), as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031, *et seq.*). These statutes mandate that FSIS protect the public by verifying that meat, poultry, and egg products are safe, wholesome, and properly labeled and packaged.

Need and Use of the Information: FSIS requires official plants to develop and maintain HACCP and Sanitation SOP records and plans, as well as various transaction records. The egg products industry's documentation of its processes, first in a plan and thereafter in a continuous record of process performance, is a more effective food safety approach than the sporadic generating of information by inspection program personnel. This documentation gives inspection program personnel a much broader picture of production than they can generate and provides them additional time to perform higher priority tasks. At the same time, it gives plant managers a better view of their own process and more opportunity to adjust it to prevent safety defects. To conduct the information collection less frequently will reduce the effectiveness of the egg products inspection program.

Description of Respondents: Business or other for-profit.

Number of Respondents: 132.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 76,280.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–26848 Filed 12–6–23; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2023–0071]

Addition of Bosnia and Herzegovina and Kosovo to the List of Regions Affected by African Swine Fever

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that we have added Bosnia and Herzegovina and Kosovo to the Animal and Plant Health Inspection Service (APHIS) list maintained on the APHIS website of regions considered to be affected with African swine fever (ASF). We have taken this action because of the confirmation of ASF in those countries.

DATES: Bosnia and Herzegovina was added to the APHIS list of regions considered affected with ASF effective June 26, 2023. Kosovo was added to the APHIS list of regions considered affected with ASF effective August 7, 2023.

FOR FURTHER INFORMATION CONTACT: Dr. Heather Sriranganathan, APHIS Veterinary Services, Regionalization Evaluation Services, 4700 River Road, Riverdale, MD, 20747; phone: (717) 818–3582; email: *AskRegionalization@usda.gov.*

SUPPLEMENTARY INFORMATION: The regulations in 9 CFR part 94 (referred to below as the regulations) govern the importation of specified animals and animal products to prevent the introduction into the United States of various animal diseases, including African swine fever (ASF). ASF is a highly contagious disease of wild and domestic swine that can spread rapidly with extremely high rates of morbidity and mortality. A list of regions where ASF exists or is reasonably believed to exist is maintained on the Animal and Plant Health Inspection Service (APHIS) website at *https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/animal-and-animal-product-import-information/animal-health-status-of-regions/.* This list is referenced in § 94.8(a)(2) of the regulations.

Section 94.8(a)(3) of the regulations states that APHIS will add a region to the list referenced in § 94.8(a)(2) upon determining ASF exists in the region or having reason to believe the disease exists in the region, based on reports APHIS receives of outbreaks of the disease from veterinary officials of the exporting country, from the World Organization for Animal Health (WOAH),[1] or from other sources the Administrator determines to be reliable, or upon determining that there is reason to believe the disease exists in the region. Section 94.8(a)(1) of the regulations specifies the criteria on which the Administrator bases the reason to believe ASF exists in a region. Section 94.8(b) prohibits the importation of pork and pork products from regions listed in accordance with § 94.8 except if processed and treated in accordance with the provisions specified in that section or consigned to an APHIS-approved establishment for further processing. Section 96.2 restricts the importation of swine casings that originated in or were processed in a region where ASF exists, as listed under § 94.8(a).

On June 22, 2023, the veterinary authorities of Bosnia and Herzegovina reported to WOAH the occurrence of ASF in that country. In response to that report, on June 26, 2023, APHIS added Bosnia and Herzegovina to the list of regions where ASF exists or the Administrator has reason to believe that ASF exists, in compliance with § 94.8(a)(3). This notice serves as an official record and public notification of that action.

On July 17, 2023, the veterinary authorities of Kosovo reported to the European Commission the confirmation of ASF in that country. In response to the European Union's Animal Diseases Information System report, on August 7, 2023, APHIS added Kosovo to the list of regions where ASF exists or the Administrator has reason to believe that ASF exists, in compliance with § 94.8(a)(3). This notice serves as an official record and public notification of that action.

As a result, pork and pork products from Bosnia and Herzegovina and Kosovo, including casings, are subject to APHIS import restrictions designed to mitigate the risk of ASF introduction into the United States.

Authority: 7 U.S.C. 1633, 7701–7772, 7781–7786, and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

Done in Washington, DC, this 1st day of December 2023.

Michael Watson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2023–26865 Filed 12–6–23; 8:45 am]

BILLING CODE 3410–34–P

[1] The World Organization for Animal Health internationally follows a British English spelling of ''organisation'' in its name; also, it was formerly the Office International des Epizooties, or OIE, but on May 28, 2022, the Organization announced that the acronym was changed from OIE to WOAH.

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

[Docket No. RBS–23–BUSINESS–0027]

Business and Industry (B&I) Priority Scoring Notice for Fiscal Year 2024

AGENCY: Rural Business-Cooperative Service.

ACTION: Notice.

SUMMARY: The Rural Business-Cooperative Service (RBCS), Rural Housing Service (RHS), and the Rural Utilities Service (RUS), agencies of the Rural Development (RD) mission area within the U.S. Department of Agriculture (USDA), hereinafter collectively referred to as the Agency, offer loan guarantees through four programs: Community Facilities (CF) administered by the RHS; Water and Waste Disposal (WWD) administered by the RUS; and Business and Industry (B&I) and Rural Energy for America Program (REAP) administered by the RBCS. This notice is establishing a minimum priority score of 20 points, not including administrative points, for B&I loan guarantees for Fiscal Year (FY) 2024, to be used when applying for guaranteed loans. This notice is being published prior to the passage of an FY 2024 appropriation.

DATES: The minimum priority score in this notice is effective October 1, 2023.

FOR FURTHER INFORMATION CONTACT: For information specific to this notice contact Brenda Griffin, Chief, Underwriting Branch, Rural Business-Cooperative Service, Rural Development, USDA, 1400 Independence Avenue SW, Washington, DC 20250–1522. Telephone: (202) 720–6802. Email: *Brenda.Griffin@usda.gov.* For information regarding implementation, contact your respective Rural Development State Office listed here: *http://www.rd.usda.gov/browse-state.*

SUPPLEMENTARY INFORMATION: In accordance with 7 CFR 5001.315(c)(2), for FY 2024 the Agency is establishing a minimum priority score of 20 points, not including administrative points, for B&I loan guarantees due to strong demand for program funds. Priority points for B&I loan guarantee applications will be awarded in accordance with the priorities outlined in 7 CFR 5001.318, *B&I Priority Point System.* At the time of application, lenders must provide necessary information related to determining the priority score. To the greatest extent possible, lenders should consider the established priorities of the Agency

when submitting projects for a loan guarantee. All applications that meet the minimum priority score will be processed on an ongoing basis and funds will be awarded continuously through August 30, 2024, subject to the availability of funding.

Beginning on September 3, 2024, all remaining unfunded B&I applications will compete for funds remaining after all state allocations are pooled into the National Office. Applications that do not meet the minimum applicable score will be allowed to compete in this funding competition if funding remains available. Any applications that remain unfunded after the funding competition will be handled as described in 7 CFR 5001.315(e).

Administrative Points

In the event there are not enough funds available to fund all applications during the funding competition beginning on September 3, 2024, projects that have a tie score can be awarded administrative points as outlined in 7 CFR 5001.318(e). These Administrative points will be awarded to applications that help meet the FY2024 Rural Development Priorities to;

1. Assist rural communities to recover economically through more and better market opportunities and through improved infrastructure.
2. Ensure all rural residents have equitable access to RD programs and benefits from RD funded projects.
3. Reduce climate pollution and increase resilience to the impacts of climate change through economic support for rural communities.

The Agency will verify that the project is located in an area that addresses these three priorities using the maps at *https://www.rd.usda.gov/priority-points/rural-development-priorities-fy-2024*. If a tie remains, the Agency will give priority to the project that will create and/or save the most jobs.

Non-Discrimination Statement

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the 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/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA through the 711 Relay Service. Program information may be made available in languages other than English.

To file a program discrimination complaint, a complainant should complete a Form, AD–3027, *USDA Program Discrimination Complaint Form,* which can be obtained online at *https://www.usda.gov/sites/default/files/documents/ad-3027.pdf,* from any USDA office, by calling (866) 632–9992, or by writing a letter addressed to USDA. The letter must contain the complainant's name, address, telephone number, and a written description of the alleged discriminatory action in sufficient detail to inform the Assistant Secretary for Civil Rights (ASCR) about the nature and date of an alleged civil rights violation. The completed AD–3027 form or letter must be submitted to USDA by:

(1) *Mail:* U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; or

(2) *Fax:* (833) 256–1665 or (202)690–7442; or

(3) *email: program.intake@usda.gov*.

USDA is an equal opportunity provider, employer, and lender.

Karama Neal,

Administrator, Rural Business-Cooperative Service, USDA Rural Development.

[FR Doc. 2023–26802 Filed 12–6–23; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF COMMERCE

Office of the Secretary

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Generic Clearance Program Performance Progress Reports

AGENCY: Office of the Secretary, Department of Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before February 5, 2024.

ADDRESSES: Interested persons are invited to submit written comments by mail to the Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, at *PRAcomments@doc.gov.* Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to S. Dumas, Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, at 1401 Constitution Avenue NW, Washington, DC 20230, (202) 482–3306, or *PRAcomments@doc.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This is a request for a new generic clearance to collect performance and progress data from recipients and sub-recipients who receive funding from DOC under a discretionary grant or cooperative agreement. This information is required to monitor and report program performance.

DOC provides grants that promote the economic and social well-being of individuals and communities with partnerships, funding, guidance, training, and technical assistance. Currently, most program offices are using the standard grant forms (SF) for progress reporting, which require grantees to only respond to a common set of questions that often solicits incomplete information. This one-size-fits-all approach does not adequately collect the specific data needed for particular grant programs or allow program offices to assess continuous quality improvement. Different grant programs vary in purpose, target population, and activities. Thus, a need for program offices to customize performance measurements has been identified.

Therefore, this generic Program Specific Performance Progress Report collection is being proposed.

II. Method of Collection

Some program offices may use some form of electronic collection. This could include web pages, email or other online data management systems. Recipients may be required to enter and retrieve information pertinent to their awards through electronic forms closely resembling the paper forms (*i.e.,* fillable PDFs or tailored online data management systems). Such technology support is expected to improve standardization and timeliness of recipient reporting and to ease further analyses of reported data.

III. Data

OMB Control Number: 0690–NEW.

Form Number(s): Varies or None.

Type of Review: Regular submission. This is a new information collection.

Affected Public: Individuals or households; Private Sector; Not-for-profit institutions; State, Local, or Tribal government.

Estimated Number of Respondents: 5,000.

Estimated Time per Response: Varies.

Estimated Total Annual Burden Hours: 50,000.

Respondent's Obligation: Voluntary or Mandatory.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–25750 Filed 12–6–23; 8:45 am]

BILLING CODE 3510–17–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Belavia Belarusian Airlines, 4A, Nemiga str., Minsk, Belarus, 220004; Order Renewing Temporary Denial of Export Privileges

Pursuant to section 766.24 of the Export Administration Regulations, 15 CFR parts 730–774 (''EAR'' or ''the Regulations''),[1] I hereby grant the request of the Office of Export Enforcement (''OEE'') to renew the temporary denial order (''TDO'') issued in this matter on June 7, 2023. I find that renewal of this order is necessary in the public interest to prevent an imminent violation of the Regulations and that renewal for an extended period is appropriate because Belavia Belarusian Airlines (''Belavia'') has engaged in a pattern of repeated, ongoing and/or continuous apparent violations of the EAR.

I. Procedural History

On June 16, 2022, I signed an order denying Belavia's export privileges for a period of 180 days on the ground that issuance of the order was necessary in the public interest to prevent an imminent violation of the Regulations. The order was issued *ex parte* pursuant to Section 766.24(a) of the Regulations and was effective upon issuance.[2] The TDO was subsequently renewed on December 13, 2022[3] and again on June 7, 2023,[4] in accordance with Section 766.24(d) of the Regulations.[5]

On November 13, 2023, BIS, through OEE, submitted a written request for a third renewal of the TDO. The written request was made more than 20 days before the TDO's scheduled expiration and, given the temporary suspension of international mail service to Russia and Belarusia, OEE has attempted to serve a copy of the renewal request on Belavia in accordance with sections 766.5 and 766.24(d) of the Regulations. No opposition to the renewal of the TDO has been received.

II. Renewal of the TDO

A. Legal Standard

Pursuant to section 766.24, BIS may issue an order temporarily denying a respondent's export privileges upon a showing that the order is necessary in the public interest to prevent an ''imminent violation'' of the Regulations, or any order, license or authorization issued thereunder. 15 CFR 766.24(b)(1) and 766.24(d). ''A violation may be 'imminent' either in time or degree of likelihood.'' 15 CFR 766.24(b)(3). BIS may show ''either that a violation is about to occur, or that the general circumstances of the matter under investigation or case under criminal or administrative charges demonstrate a likelihood of future violations.'' *Id.* As to the likelihood of future violations, BIS may show that the violation under investigation or charge ''is significant, deliberate, covert and/or likely to occur again, rather than technical or negligent[.]'' *Id.* A ''lack of information establishing the precise time a violation may occur does not preclude a finding that a violation is imminent, so long as there is sufficient reason to believe the likelihood of a violation.'' *Id.*

If BIS believes that renewal of a denial order is necessary in the public interest to prevent an imminent violation, it may file a written request for renewal, with any modifications if appropriate. 15 CFR 766.24(d)(1). The written request, which must be filed no later than 20 days prior to the TDO's expiration, should set forth the basis for BIS's belief

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[1] On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which includes the Export Control Reform Act of 2018, 50 U.S.C. 4801–4852 (''ECRA''). While section 1766 of ECRA repeals the provisions of the Export Administration Act, 50 U.S.C. app. 2401 *et seq.* (''EAA''), (except for three sections which are inapplicable here), section 1768 of ECRA provides, in pertinent part, that all orders, rules, regulations, and other forms of administrative action that were made or issued under the EAA, including as continued in effect pursuant to the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.* (''IEEPA''), and were in effect as of ECRA's date of enactment (August 13, 2018), shall continue in effect according to their terms until modified, superseded, set aside, or revoked through action undertaken pursuant to the authority provided under ECRA. Moreover, section 1761(a)(5) of ECRA authorizes the issuance of temporary denial orders. 50 U.S.C. 4820(a)(5).

[2] The TDO was published in the **Federal Register** on June 22, 2022 (87 FR 37309).

[3] The December 13, 2022 renewal order was published in the **Federal Register** on December 19, 2022 (87 FR 77550).

[4] The June 7, 2023 renewal order was published in the **Federal Register** on June 13, 2023 (88 FR 38483).

[5] At the time of the renewal, section 766.24(d) provided that BIS may seek renewal of a temporary denial order for additional 180-day renewal periods, if it believes that renewal is necessary in the public interest to prevent an imminent violation.

that renewal is necessary, including any additional or changed circumstances. *Id.* ''In cases demonstrating a pattern of repeated, ongoing and/or continuous apparent violations, BIS may request the renewal of a temporary denial order for an additional period not exceeding one year.'' [6] *Id.*

B. The TDO and BIS's Request for Renewal

The U.S. Commerce Department, through BIS, responded to the Russian Federation's (''Russia's'') further invasion of Ukraine by implementing a sweeping series of stringent export controls that severely restrict Russia's access to technologies and other items that it needs to sustain its aggressive military capabilities. These controls primarily target Russia's defense, aerospace, and maritime sectors and are intended to cut off Russia's access to vital technological inputs, atrophy key sectors of its industrial base, and undercut Russia's strategic ambitions to exert influence on the world stage. Effective February 24, 2022, BIS imposed expansive controls on aviation-related (*e.g.,* Commerce Control List Categories 7 and 9) items to Russia, including a license requirement for the export, reexport or transfer (in-country) to Russia of any aircraft or aircraft parts specified in Export Control Classification Number (''ECCN'') 9A991 (section 746.8(a)(1) of the EAR),[7] BIS will review any export or reexport license applications for such items under a policy of denial. *See* section 746.8(b). Effective March 2, 2022, BIS excluded any aircraft registered in, owned, or controlled by, or under charter or lease by Russia or a national of Russia from being eligible for license exception Aircraft, Vessels, and Spacecraft (''AVS'') (section 740.15 of the EAR), and as part of the same rule, imposed a license requirement for the export, reexport, or transfer (in-country) of all items controlled under CCL Categories 3 through 9 to Belarus.[8] On April 8, 2022, BIS excluded any aircraft registered in, owned, controlled by, or under charter or lease by Belarus or a national of Belarus from eligibility to use license exception AVS for travel to Russia or Belarus.[9] Accordingly, any U.S.-origin aircraft or foreign aircraft that includes more than 25% controlled U.S.-origin content, and that is registered in, owned, or controlled by, or under charter or lease by Belarus or a national of Belarus, is subject to a license requirement before it can travel to Russia or Belarus.

OEE's request for renewal for a period of one year is based upon the facts underlying the issuance of the initial TDO, the renewal orders subsequently issued in this matter, and evidence that continues to develop during this investigation. These facts and evidence demonstrate that Belavia has continued, and continues, to act in blatant disregard for U.S. export controls and the terms of previously issued TDOs. Specifically, the initial TDO, issued on June 16, 2022, was based on evidence that Belavia engaged in conduct prohibited by the Regulations by operating multiple aircraft subject to the EAR and classified under ECCN 9A991.b on flights into Belarus after April 8, 2022, from destinations including, but not limited to, Moscow, Russia; St. Petersburg, Russia; Antalya, Turkey; Istanbul, Turkey, Tbilisi, Georgia; Batumi, Georgia; Sharjah, United Arab Emirates (''UAE''), and Sharm el-Sheikh, Egypt, without the required BIS authorization.[10]

As discussed in the prior renewal orders, BIS presented evidence indicating that, after the initial June 16, 2022 TDO issued, Belavia continued to operate aircraft subject to the EAR and classified under ECCN 9A991.b on flights both into Belarus and/or Russia, in violation of the Regulations and the TDO itself.[11] The December 13, 2022 order detailed Belavia's continued flight operations into Belarus and/or Russia, including flights from St. Petersburg and Moscow, Russia; Istanbul, Turkey; and Sharjah, UAE.[12] The June 7, 2023 renewal order documented a similar pattern of prohibited conduct.[13]

Since that time, Belavia continued to engage in conduct prohibited by the TDO and Regulations. In its November 13, 2023, request for renewal of the TDO, BIS submitted evidence that Belavia continues to operate aircraft subject to the EAR and classified under ECCN 9A991.b, on flights into Belarus and/or Russia, in violation of the June 7, 2023 renewal order and/or the Regulations. Specifically, BIS's evidence and related investigation demonstrates that Belavia continued to operate aircraft subject to the EAR, including, but not limited to, on flights into Belarus and/or Russia from/to Antalya, Turkey, and Sharm el-Sheikh, Egypt. Information about those flights includes, but is not limited to, the following:

Tail No.	Serial No.	Aircraft type	Departure/arrival cities	Dates
EW–455PA	61421	737–8ZM (B738)	Dubai, AE/Minsk, BY	November 27, 2023.
EW–455PA	61421	737–8ZM (B738)	Sharm el-Sheikh, EG/Minsk, BY	November 15, 2023.
EW–455PA	61421	737–8ZM (B738)	Istanbul, TR/Minsk, BY	November 14, 2023.
EW–455PA	61421	737–8ZM (B738)	Minsk, BY/Moscow, RU	November 1, 2023.
EW–455PA	61421	737–8ZM (B738)	Dubai, AE/Minsk, BY	October 29, 2023.
EW–456PA	61422	737–8ZM (B738)	Hurghada, EG/Minsk, BY	November 26, 2023.
EW–456PA	61422	737–8ZM (B738)	Hurghada, EG/Minsk, BY	November 1, 2023.
EW–456PA	61422	737–8ZM (B738)	Sharm el-Sheikh, EG/Minsk, BY	October 31, 2023.
EW–456PA	61422	737–8ZM (B738)	Antalya, TR/Minsk, BY	October 30, 2023.
EW–456PA	61422	737–8ZM (B738)	Minsk, BY/St. Petersburg, RU	October 24, 2023.
EW–457PA	61423	737–8ZM (B738)	Sharm el-Sheikh, EG/Minsk, BY	November 27, 2023.
EW–457PA	61423	737–8ZM (B738)	Antalya, TR/Minsk, BY	November 15, 2023.
EW–457PA	61423	737–8ZM (B738)	Minsk, BY/Moscow, RU	November 14, 2023.

[6] 88 FR 59791 (Aug. 30, 2023).

[7] 87 FR 12226 (Mar. 3, 2022).

[8] 87 FR 13048 (Mar. 8, 2022).

[9] 87 FR 22130 (Apr. 14, 2022). Additionally, this rule also imposed licensing requirements on items controlled on the Commerce Control List (''CCL'') under Categories 0–2 that are destined for Russia or Belarus. Accordingly, now all CCL items require export, reexport, and transfer (in-country) licenses if destined for or within Russia or Belarus.

[10] Publicly available flight tracking information shows that on May 10, 2022, serial number (SN) 61423 flew from Moscow, Russia to Minsk, Belarus. On June 14, 2022, SN 61422 flew from Istanbul, Turkey to Minsk, Belarus and SN 40877 flew from Sharjah, United Arab Emirates to Minsk, Belarus.

[11] Engaging in conduct prohibited by a denial order violates the Regulations. 15 CFR 764.2(a) and (k).

[12] Publicly available flight tracking information shows that on November 15, 2022, serial number (SN) 61421 flew from Moscow, Russia to Minsk, Belarus. On December 9, 2022, SN 61423 flew from St. Petersburg, Russia to Minsk, Belarus and SN 61421 flew from Istanbul, Turkey to Minsk, Belarus. On November 12, 2022, SN 61423 flew from Sharjah, UAE to Minsk, Belarus.

[13] Publicly available flight tracking information shows that SN 61421 flew from Doha, Qatar, to Minsk, Belarus on May 27, 2023. Additionally, SN 61422 flew from Kutaisi, Georgia to Minsk, Belarus on May 25, 2023 and SN 26294 flew from Baku, Azerbaijan to Minsk, Belarus on May 2, 2023.

Tail No.	Serial No.	Aircraft type	Departure/arrival cities	Dates
EW–457PA	61423	737–8ZM (B738)	Istanbul, TR/Minsk, BY	October 31, 2023.
EW–457PA	61423	737–8ZM (B738)	Hurghada, EG/Minsk, BY	October 30, 2023.

III. Findings

Under the applicable standard set forth in Section 766.24 of the Regulations and my review of the entire record, I find that the evidence presented by BIS demonstrates that Belavia has acted in violation of the Regulations and the TDO; that such violations have been significant, deliberate and covert; and that given the foregoing and the nature of the matters under investigation, there is a likelihood of imminent violations. Moreover, I find that renewal for an extended period is appropriate because Belavia has engaged in a pattern of repeated, ongoing and/or continuous apparent violations of the EAR. Therefore, renewal of the TDO for one year is necessary in the public interest to prevent imminent violation of the Regulations and to give notice to companies and individuals in the United States and abroad that they should avoid dealing with Belavia, in connection with export and reexport transactions involving items subject to the Regulations and in connection with any other activity subject to the Regulations.

IV. Order

It is therefore ordered:

First, Belavia Belarusian Airlines, 14A, Nemiga str., Minsk, Belarus, 220004, when acting for or on their behalf, any successors or assigns, agents, or employees may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR including, but not limited to:

A. Applying for, obtaining, or using any license (except directly related to safety of flight), license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the EAR except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations, or engaging in any other activity subject to the EAR except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or from any other activity subject to the EAR except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations.

Second, that no person may, directly or indirectly, do any of the following:

A. Export, reexport, or transfer (in-country) to or on behalf of Belavia any item subject to the EAR except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by Belavia of the ownership, possession, or control of any item subject to the EAR that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby Belavia acquires or attempts to acquire such ownership, possession or control except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from Belavia of any item subject to the EAR that has been exported from the United States except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations;

D. Obtain from Belavia in the United States any item subject to the EAR with knowledge or reason to know that the item will be, or is intended to be, exported from the United States except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations; or

E. Engage in any transaction to service any item subject to the EAR that has been or will be exported from the United States and which is owned, possessed or controlled by Belavia, or service any item, of whatever origin, that is owned, possessed or controlled by Belavia if such service involves the use of any item subject to the EAR that has been or will be exported from the United States except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations. For purposes of this paragraph, servicing means installation, maintenance, repair, modification, or testing.

Third, that, after notice and opportunity for comment as provided in section 766.23 of the EAR, any other person, firm, corporation, or business organization related to Belavia by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order.

In accordance with the provisions of sections 766.24(e) of the EAR, Belavia may, at any time, appeal this Order by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202–4022.

In accordance with the provisions of section 766.24(d) of the EAR, BIS may seek renewal of this Order by filing a written request not later than 20 days before the expiration date. A renewal request may be opposed by Belavia as provided in Section 766.24(d), by filing a written submission with the Assistant Secretary of Commerce for Export Enforcement, which must be received not later than seven days before the expiration date of the Order.

A copy of this Order shall be provided to Belavia and shall be published in the **Federal Register**.

This Order is effective immediately and shall remain in effect for one year.

Matthew S. Axelrod,

Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 2023–26896 Filed 12–6–23; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–867]

Welded Stainless Pressure Pipe From India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily finds that certain producers and/or

exporters subject to this administrative review sold welded stainless pressure pipe (WSPP) from India at less than normal value during the period of review (POR), November 1, 2021, through October 31, 2022. We invite interested parties to comment on these preliminary results.

DATES: Applicable December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Charles Doss or John Conniff, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4474 and (202) 482–1009, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 17, 2016, Commerce published in the **Federal Register** the antidumping order on WSPP from India.[1] On November 1, 2022, Commerce published in the **Federal Register** a notice of opportunity to request an administrative review of the *Order*.[2] On January 3, 2023, based on timely requests for review, in accordance with section 751(a)(1) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.221(c)(1)(i), Commerce initiated an administrative review of the *Order* covering 23 companies.[3] On January 25, 2023, we selected Jindal Saw Limited (JSL) and Ratnamani Metals & Tubes Ltd. (Ratnamani) as the mandatory respondents in this administrative review.[4] Subsequently, on March 23, 2023, JSL timely withdrew its request for review and, consequently, on April 4, 2023, Prakash Steelage Limited (PSL) was selected as a mandatory respondent.[5] Pursuant to section 751(a)(3)(A) of the Act, Commerce extended the deadline for the preliminary results until November 30, 2023.[6]

For a complete description of the events that followed the initiation of the review, *see* the Preliminary Decision Memorandum. A list of topics included in the Preliminary Decision Memorandum is included in the appendix to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order

The merchandise subject to the *Order* is welded stainless pressure pipe from India. For a complete description of the scope, *see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a)(2) of the Act. Export price is calculated in accordance with section 772 of the Act. Normal value is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum.

Partial Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the parties that requested a review withdraw the request within 90 days of the date of publication of the notice of initiation. Both SSPL and JSL timely withdrew the only requests for review for each company. With respect to SSPL, because we later selected PSL as a mandatory respondent and we have preliminarily determined that SSPL is part of a single entity with PSL, SSPL continues to be subject to the instant review. In accordance with 19 CFR 351.213(d)(1), Commerce is rescinding this administrative review with respect to JSL.

Rate for Non-Examined Companies

For the rate for companies not selected for individual examination in an administrative review, generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a less-than-fair-value investigation. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available}.'' In this review, we have preliminarily calculated weighted-average dumping margins of 1.71 percent for Ratnamani and zero percent for PSL/SSPL. Therefore, in accordance with section 735(c)(5)(A) of the Act, we are preliminarily applying Ratnamani's weighted-average dumping margin of 1.71 percent to the non-examined companies because this is the only rate that is not zero, *de minimis,* or based entirely on facts available.

Preliminary Results of Review

We preliminarily determine the following estimated weighted-average dumping margins exist for the period November 1, 2021, through October 31, 2022:

Exporter/producer	Weighted-average dumping margin (percent)
Ratnamani Metals & Tubes Ltd	1.71
Prakash Steelage Ltd/Seth Steelage Pvt. Ltd	0.00
Apex Tubes Private Ltd	1.71
Apurvi Industries	1.71

[1] *See Welded Stainless Pressure Pipe from India: Antidumping and Countervailing Duty Orders,* 81 FR 81062 (November 17, 2016) (*Order*).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review and Join Annual Inquiry Service List,* 87 FR 65750 (November 1, 2022).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 88 FR 50 (January 3, 2023).

[4] *See* Memorandum, ''Respondent Selection,'' dated January 25, 2023, at 1.

[5] *See* JSL's Letter, ''Withdrawal of Request for Antidumping Duty Administrative Review for the Period of November 01, 2021, to October 31, 2022,'' dated March 23, 2023; *see also* Memorandum, ''Selection of Additional Respondent for Individual Examination,'' dated April 4, 2023, at 1. Additionally, Commerce has preliminarily determined that PSL and Seth Steelage Private Limited (SSPL) should be collapsed and treated as a single entity, collectively PSL/SSPL. *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Administrative Review of the Antidumping Duty Order on Welded Stainless Pressure Pipe from India; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum), at the section titled, ''Affiliation and Collapsing.''

[6] *See* Memoranda, ''Extension of Deadline for the Preliminary Results of Antidumping Duty Administrative Review,'' dated July 12, 2023; and ''Second Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated October 25, 2023.

Exporter/producer	Weighted-average dumping margin (percent)
Arihant Tubes	1.71
Divine Tubes Pvt. Ltd	1.71
Heavy Metal & Tubes	1.71
Hindustan Inox. Limited	1.71
J.S.S. Steelitalia Ltd	1.71
Linkwell Seamless Tubes Private Limited	1.71
Maxim Tubes Company Pvt. Ltd	1.71
MBM Tubes Pvt. Ltd	1.71
Mukat Tanks & Vessel Ltd	1.71
Neotiss Ltd	1.71
Quality Stainless Pvt. Ltd	1.71
Raajranta Metal Industries Ltd	1.71
Ratnadeep Metal & Tubes Ltd	1.71
Remi Edelstahl Tubulars	1.71
Shubhlaxmi Metals & Tubes Private Limited	1.71
SLS Tubes Pvt. Ltd	1.71
Steamline Industries Ltd	1.71

Disclosure and Public Comment

We intend to disclose the calculations performed to parties within five days after the date of publication of this notice in the **Federal Register**.[7] Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs to Commerce no later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[8] Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[9]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this review, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[10] Further, we request that interested parties limit their executive summary of each issue to no more than 450 words, not including citations. We intend to use the executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final results in this administrative review. We request that interested parties include footnotes for relevant citations in the executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[11]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. An electronically filed hearing request must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5:00 p.m. Eastern Time within 30 days after the date of publication of this notice.

Final Results of Review

Unless extended, we intend to issue the final results of this administrative review, which will include the results of our analysis of all issues raised in the case and rebuttal briefs, within 120 days of publication of these preliminary results in the **Federal Register**.[12]

Assessment Rates

Upon completion of this administrative review, pursuant to section 751(a)(2)(A) of the Act, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise.

For individually examined respondents whose weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.50 percent), we will calculate importer-specific *ad valorem* antidumping duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1). If the respondent has not reported entered values, we will calculate a per-unit assessment rate for each importer by dividing the total amount of dumping calculated for the examined sales made to that importer by the total quantity associated with those sales. To determine whether an importer-specific, per-unit assessment rate is *de minimis,* in accordance with 19 CFR 351.106(c)(2), we also will calculate an importer-specific *ad valorem* ratio based on estimated entered values. Where either a respondent's weighted average dumping margin is zero or *de minimis,* or an importer-specific *ad valorem* assessment rate is zero or *de minimis,* we intend to instruct CBP to liquidate appropriate entries without regard to antidumping duties.[13]

For entries of subject merchandise during the POR produced by each individually examined respondent for which the producer did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate such entries at the all-others rate (*i.e.,* 8.35 percent) if there is no rate for the intermediate company(ies) involved in the transaction.[14]

[7] *See* 19 CFR 351.224(b).

[8] *See* 19 CFR 351.309(d).

[9] *See* 19 351.309(c)(2) and (d)(2).

[10] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[11] *See Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings; Final Rule,* 88 FR 67069 (September 29, 2023).

[12] *See* section 751(a)(3)(A) of the Act; and 19 CFR 351.213(h).

[13] *See* 19 CFR 351.106(c)(2); *see also Antidumping Proceeding: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification,* 77 FR 8101, 8103 (February 14, 2012).

[14] *See Order,* 81 FR at 81063; *see also Antidumping and Countervailing Duty Proceedings:*

Continued

For those companies which were not individually examined, we will instruct CBP to assess antidumping duties at an *ad valorem* rate equal to the weighted-average dumping margin determined for the non-examined companies in the final results of this review.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for each specific company listed above will be equal to the weighted-average dumping margin established in the final results of this administrative review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rates will be zero; (2) for previously reviewed or investigated companies not participating in this review, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which the producer or exporter participated; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation but the producer is, the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the subject merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be the all-others rate of 8.35 percent.[15] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of doubled antidumping duties, and/or an increase in the amount of antidumping duties by the amount of the countervailing duties.

Notification to Interested Parties

We are issuing and publishing these preliminary results of review in accordance with sections 751(a)(1) and 777(i)(1) of the Act, 19 CFR 351.213(h)(2), and 19 CFR 351.221(b)(4).

Assessment of Antidumping Duties, 68 FR 23954 (May 6, 2003).

[15] *See Order,* 81 FR at 81063.

Dated: November 30, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Partial Rescission of Review
V. Affiliation and Collapsing
VI. Companies Not Selected for Individual Examination
VII. Discussion of the Methodology
VIII. Recommendation

[FR Doc. 2023–26878 Filed 12–6–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–991]

Chlorinated Isocyanurates From the People's Republic of China: Preliminary Results of the Countervailing Duty Administrative Review and Rescission of Review, in Part; 2021

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily finds that countervailable subsidies are being provided to producers and exporters of chlorinated isocyanurates (chlorinated isos) from the People's Republic of China (China) during the period of review (POR), January 1, 2021, through December 31, 2021. Interested parties are invited to comment on these preliminary results.

DATES: Applicable December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Miranda Bourdeau or Eliza DeLong, 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) 482–2021 or (202) 482–3878, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 13, 2014, Commerce published the countervailing duty order on chlorinated isos in the **Federal Register**.[1] On January 3, 2023, Commerce published a notice of initiation of an administrative review of the *Order*.[2] On June 30, 2023, Commerce extended the time period for issuing these preliminary results until November 30, 2023, in accordance with section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act).[3]

For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[4] A list of topics discussed in the Preliminary Decision Memorandum is included at the appendix to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order [5]

The products covered by the *Order* are chlorinated isos. For a complete description of the scope of the *Order, see* the Preliminary Decision Memorandum.

[1] *See Chlorinated Isocyanurates from the People's Republic of China: Countervailing Duty Order,* 79 FR 67424 (November 13, 2014) (*Order*).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 88 FR 50 (January 3, 2023).

[3] *See* Memorandum, ''Extension of Deadline for Preliminary Results of Countervailing Duty Administrative Review,'' dated June 30, 2023.

[4] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Countervailing Duty Administrative Review of Chlorinated Isocyanurates from the People's Republic of China and Rescission of Administrative Review, in Part; 2021,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[5] *See Chlorinated Isocyanurates from the People's Republic of China: Countervailing Duty Order,* 79 FR 67424 (November 13, 2014) (*Order*).

Rescission of Administrative Review, in Part

Pursuant to 19 CFR 351.213(d)(3), Commerce will rescind an administrative review when there are no reviewable suspended entries. Based on our analysis of U.S. Customs and Border Protection (CBP) information, we preliminarily determine that Henan Zerui New Material, Jinchang International Forwarding, Qingdao Fortune Logistics Co., Ltd., Qingdao Kingnod Group Co., Ltd., and Shanghai Sumiso International Logis had no entries of subject merchandise during the POR. On November 16, 2023, we notified parties that we intended to rescind this administrative review with respect to these companies.[6] No parties commented on the notification of intent to rescind the review, in part. We are, therefore, rescinding the administrative review of these companies. For additional information regarding this determination, *see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(A) of the Act. For each of the subsidy programs found countervailable, we preliminarily find that there is a subsidy, *i.e.,* a financial contribution that gives rise to a benefit to the recipient, and that the subsidy is specific.[7]

Commerce notes that, in making these findings, it relied, in part, on facts available and, because it finds that the Government of China did not act to the best of its ability to respond to Commerce's requests for information, it drew an adverse inference where appropriate in selecting from among the facts otherwise available.[8] For further information, *see* the Preliminary Decision Memorandum at the section titled, ''Use of Facts Otherwise Available and Adverse Inferences.''

Company Not Selected for Individual Review

The Act and Commerce's regulations do not directly address the subsidy rate to be applied to companies not selected for individual examination where Commerce limits its examination in an administrative review pursuant to section 777A(e)(2) of the Act. However, Commerce normally determines the rates for non-selected companies in reviews in a manner that is consistent with section 705(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation. Section 777A(e)(2) of the Act provides that ''the individual countervailable subsidy rates determined under subparagraph (A) shall be used to determine the all-others rate under section 705(c)(5) {of the Act}.'' Section 705(c)(5)(A) of the Act states that for companies not investigated, in general, we will determine an all-others rate by weight-averaging the countervailable subsidy rates established for each of the companies individually investigated, excluding zero and *de minimis* rates or any rates based solely on the facts available.

Accordingly, to determine the rate for companies not selected for individual examination, Commerce's practice is to weight average the net subsidy rates for the selected mandatory respondents, excluding rates that are zero, *de minimis,* or based entirely on facts available. We preliminarily determine that Heze Huayi Chemical Co., Ltd. (Heze Huayi) and Juancheng Kangtai Chemical Co., Ltd. (Kangtai) received countervailable subsidies that are above *de minimis* and are not based entirely on facts available. Therefore, we preliminarily determine to apply the weighted average of the net subsidy rates calculated for Heze Huayi and Kangtai using publicly-ranged sales data submitted by those respondents to the non-selected company. The company for which a review was requested, and which was not selected as a mandatory respondents or found to be cross-owned with a mandatory respondent, is Sincere Cooperation Material.

Preliminary Results of Review

For the period January 1, 2021, through December 31, 2021, we preliminarily find that the following net subsidy rates exist:

Company	Subsidy rate (percent *ad valorem*)
Heze Huayi Chemical Co., Ltd	3.98
Juancheng Kangtai Chemical Co., Ltd	3.96
Review-Specific Average Rate Applicable to the Following Company	
Sincere Cooperation Material	3.98

Verification

Commerce received a timely request from Bio-Lab, Inc., Clearon Corp., and Occidental Chemical Corporation (collectively, the petitioners) to verify the information submitted in this administrative review, pursuant to 19 CFR 307(b)(1)(iv).[9] Commerce does not intend to verify the information submitted by the mandatory respondents in the course of this administrative review.

Assessment Rate

Consistent with section 751(a)(2)(C) of the Act, upon issuance of the final results, Commerce shall determine, and CBP shall assess, countervailing duties on all appropriate entries in accordance with the final results of this review. If the assessment rate calculated in the final results is zero or *de minimis,* we will instruct CBP to liquidate all appropriate entries without regard to countervailing duties. For the companies for which this review is rescinded, we will instruct CBP to assess countervailing duties on all appropriate entries at a rate equal to the cash deposit of estimated countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption, during the period January 1, 2021, through December 31, 2021, in accordance with 19 CFR 351.212(c)(l)(i).

For the companies remaining in the review, Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

Pursuant to section 751(a)(2)(C) of the Act, Commerce intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts indicated above, except, where the rate calculated in the final results is zero or *de minimis,* no cash deposit will be required on shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review. For all non-reviewed firms, we will instruct CBP to continue to collect cash deposits of estimated countervailing duties at the most recent company-specific or all-others rate applicable to the company, as appropriate. These cash deposit instructions, when imposed, shall remain in effect until further notice.

[6] *See* Memorandum, ''Notice of Intent to Rescind Review, in Part,'' dated November 16, 2023.

[7] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[8] *See* sections 776(a) and (b) of the Act.

[9] *See* Petitioners' Letter, ''Request for Verification,'' dated April 13, 2023.

Disclosure and Public Comment

We will disclose to parties to this proceeding the calculations performed in reaching the preliminary results within five days of the date of publication of these preliminary results.[10] Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs no later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[11] Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[12]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this review, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[13] Further, we request that interested parties limit their executive summary of each issue to no more than 450 words, not including citations. We intend to use the executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final results in this administrative review. We request that interested parties include footnotes for relevant citations in the executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[14]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce within 30 days after the date of publication of this notice. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs.[15] Parties are reminded that all briefs and hearing requests must be filed electronically using ACCESS and received successfully in their entirety by 5:00 p.m. Eastern Time on the due date.

Final Results of Review

Unless the deadline is extended pursuant to section 751(a)(3)(A) of the Act, Commerce intends to issue the final results of this administrative review, including the results of our analysis of the issues raised by the parties in their comments, within 120 days after publication of these preliminary results.

Notification to Interested Parties

This administrative review and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213.

Dated: November 30, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Rescission of Administrative Review, in Part
V. Rate for Non-Examined Companies
VI. Diversification of China's Economy
VII. Use of Facts Otherwise Available and Adverse Inferences
VIII. Subsidies Valuation
IX. Benchmarks
X. Analysis of Programs
XI. Recommendation

[FR Doc. 2023–26861 Filed 12–6–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–331–806, C–533–921, C–560–843, C–552–838]

Frozen Warmwater Shrimp From Ecuador, India, Indonesia, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Countervailing Duty Investigations

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Zachary Shaykin (Ecuador), Steven Seifert (India), Kelsie Hohenberger (Indonesia), and Adam Simons (the Socialist Republic of Vietnam (Vietnam)), AD/CVD Operations, Offices II, IV, V, and IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2638, (202) 482–3350, (202) 482–2517, and (202) 482–6172, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 14, 2023, the U.S. Department of Commerce (Commerce) initiated countervailing duty investigations of imports of frozen warmwater shrimp from Ecuador, India, Indonesia, and Vietnam.[1] Currently, the preliminary determinations are due no later than January 18, 2024.

Postponement of Preliminary Determinations

Section 703(b)(1) of the Tariff Act of 1930, as amended (the Act), requires Commerce to issue the preliminary determination in a countervailing duty investigation within 65 days after the date on which Commerce initiated the investigation. However, section 703(c)(1) of the Act permits Commerce to postpone the preliminary determination until no later than 130 days after the date on which Commerce initiated the investigation if: (A) the petitioner makes a timely request for a postponement; or (B) Commerce concludes that the parties concerned are cooperating, that the investigation is extraordinarily complicated, and that additional time is necessary to make a preliminary determination. Under 19 CFR 351.205(e), the petitioner must submit a request for postponement 25 days or more before the scheduled date of the preliminary determination and must state the reasons for the request. Commerce will grant the request unless it finds compelling reasons to deny the request.

On November 27, 2023, the petitioner[2] submitted a timely request to postpone the preliminary determinations in these investigations.[3] The petitioner stated that postponement of the preliminary determinations is necessary because the current schedule does not provide adequate time for a

[10] *See* 19 CFR 351.224(b).

[11] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023) (*APO and Final Service Rule*).

[12] *See* 19 351.309(c)(2) and (d)(2).

[13] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[14] *See APO and Final Service Rule.*

[15] *See* 19 CFR 351.310.

[1] *See Frozen Warmwater Shrimp from Ecuador, India, Indonesia, and the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigations,* 88 FR 81053 (November 21, 2023).

[2] The petitioner is the American Shrimp Processors Association.

[3] *See* Petitioner's Letter, ''Request to Extend the Preliminary Determination,'' dated November 27, 2023.

complete analysis given the complexity of the issues in these cases and the number of subsidy programs under investigation in each.[4]

In accordance with 19 CFR 351.205(e), the petitioner has stated the reasons for requesting a postponement of the preliminary determinations, and Commerce finds there are no compelling reasons to deny the request. Therefore, in accordance with section 703(c)(1)(A) of the Act, Commerce is postponing the deadline for the preliminary determinations to no later than 130 days after the day on which these investigations were initiated, *i.e.,* March 25, 2024.[5] Pursuant to section 705(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determinations of these investigations will continue to be 75 days after the date of the preliminary determinations.

This notice is issued and published pursuant to section 703(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: December 1, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–26883 Filed 12–6–23; 8:45 am]

BILLING CODE 3510–DS–P

[4] *Id.*

[5] Postponing the preliminary determination to 130 days after initiation would place the deadline on Saturday, March 23, 2024. Commerce's practice dictates that where a deadline falls on a weekend or a federal holiday, the appropriate deadline is the next business day. *See Notice of Clarification: Application of "Next Business Day" Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–126]

Non-Refillable Steel Cylinders From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2020–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that certain producers and/or exporters made sales of non-refillable steel cylinders (non-refillable cylinders) from the People's Republic of China (China) at less than normal value, and one company had no shipments of subject merchandise during the period of review (POR), October 30, 2020, through April 30, 2022.

DATES: Applicable December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Alex Cipolla, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4956.

SUPPLEMENTARY INFORMATION:

Background

On June 6, 2023, Commerce published the *Preliminary Results.*[1] We invited interested parties to comment on the *Preliminary Results.*[2] For events subsequent to the *Preliminary Results, see* the Issues and Decision Memorandum.[3] On September 22, 2023, in accordance with section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), Commerce extended the deadline for these final results until December 1, 2023.[4]

Scope of the Order[5]

The products covered by this *Order* are certain seamed (welded or brazed), non-refillable steel cylinders meeting the requirements of, or produced to meet the requirements of, U.S. Department of Transportation (USDOT) Specification 39, TransportCanada Specification 39M, or United Nations pressure receptacle standard ISO 11118. A full description of the scope of the *Order* is provided in the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised by interested parties in briefs are addressed in the Issues and Decision Memorandum. A list of the issues addressed in the Issues and Decision Memorandum is provided in the appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on our analysis of the comments received from interested parties regarding our *Preliminary Results,* we made certain changes to the margin calculation for mandatory respondent Wuyi Xilinde Machinery Manufacture Co., Ltd. (Wuyi Xilinde), and consequently, the rate assigned to the non-examined separate rate respondents.[6] For detailed information, *see* the Issues and Decision Memorandum.

Final Determination of No Shipments

In the *Preliminary Results,* we preliminarily determined that Zhejiang Kin-Shine Technology Co., Ltd. (Zhejiang Kin-Shine) had no shipments of subject merchandise to the United States during the POR.[7] No party filed comments with respect to this preliminary determination, and we received no information to contradict it. Therefore, we continue to find that Zhejiang Kin-Shine had no shipments of subject merchandise during the POR and will issue appropriate liquidation instructions that are consistent with our "automatic assessment" instructions for these final results.[8]

Separate Rate Respondents

In our *Preliminary Results,* we determined that Wuyi Xilinde, and two other companies demonstrated their eligibility for separate rates.[9] We received no information or arguments since the issuance of the *Preliminary Results* that provide a basis for reconsideration of these determinations. Therefore, for these final results, we continue to find that the two companies listed in the table in the "Final Results" section of this notice are each eligible for a separate rate, in addition to Wuyi Xilinde.

[1] *See Non-Refillable Steel Cylinders from the People's Republic of China: Preliminary Results and Preliminary Determination of No Shipments of the Antidumping Duty Administrative Review; 2020–2022,* 88 FR 37024 (June 6, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See Preliminary Results,* 88 FR at 37025.

[3] *See* Memorandum, "Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Certain Non-Refillable Steel Cylinders from the People's Republic of China; 2020–2022," dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] *See* Memorandum, "Extension of Deadline for Final Results of Antidumping Duty Administrative Review," dated September 22, 2023.

[5] *See Certain Non-Refillable Steel Cylinders from the People's Republic of China: Amended Final Antidumping Duty Determination and Antidumping Duty and Countervailing Duty Orders,* 86 FR 25839 (May 11, 2021) (*Order*).

[6] *See* Memoranda, "Final Results Analysis Memorandum for Wuyi Xilinde Machinery Manufacture Co., Ltd.," dated concurrently with this notice; and "Surrogate Values for the Final Results," dated concurrently with this notice.

[7] *See Preliminary Results,* 88 FR at 37025.

[8] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011).

[9] *See Preliminary Results,* 88 FR at 37025.

Rate for Non-Examined Separate Rate Respondents

Under section 735(c)(5)(A) of the Act, Commerce's usual practice in determining the rate for separate rate respondents not selected for individual examination is to average the weighted-average dumping margins for the selected companies, excluding rates that are zero, *de minimis,* or based entirely on facts available.[10] In the *Preliminary Results,*[11] consistent with Commerce's practice,[12] we assigned the non-examined, separate rate companies the margin calculated for Wuyi Xilinde, which was not zero, *de minimis,* or based entirely on facts available. No parties commented on the methodology for calculating this separate rate. As such, for these final results, we have assigned the 87.26 percent weighted-average dumping margin calculated for Wuyi Xilinde to the two non-examined respondents which qualify for a separate rate in this review, consistent with Commerce's practice and section 735(c)(5)(A) of the Act.

Final Results of Review

We determine that the following weighted-average dumping margins exist for the period October 30, 2020, through April 30, 2022:

Exporter	Weighted-average dumping margin (percent)
Wuyi Xilinde Machinery Manufacture Co., Ltd	87.26
Ningbo Eagle Machinery & Technology Co., Ltd	87.26
Sanjiang Kai Yuan Co. Ltd	87.26

Disclosure

We intend to disclose to interested parties the calculations and analysis performed for these final results within five days of the date of the publication of this notice in the **Federal Register** in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b), Commerce will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

For Wuyi Xilinde, which has a final weighted-average dumping margin that is not zero or *de minimis* (*i.e.,* less than 0.5 percent), we will calculate importer-specific assessment rates for that respondent, in accordance with 19 CFR 351.212(b)(1). Pursuant to 19 CFR 351.212(b)(1), where the respondent reported the entered value of its U.S. sales, we will calculate importer-specific *ad valorem* assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to the total entered value of the sales for which entered value was reported. Where the respondent did not report entered value, we will calculate importer-specific per-unit duty assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total quantity of those sales. To determine whether an importer-specific per-unit assessment rate is *de minimis* in accordance with 19 CFR 351.106(c)(2), we will also calculate an importer-specific *ad valorem* ratio based on estimated entered values.

For the respondents which were not selected for individual examination in this administrative review, and which qualified for a separate rate, the assessment rate will be equal to the rate assigned to them for these final results (*i.e.,* 87.26 percent).

Pursuant to a refinement in our non-market economy practice, for sales that were not reported in the U.S. sales data submitted by companies individually examined during this review, we will instruction CBP to liquidate entries associated with those sales at the rate for the China-wide entity. Furthermore, where we found that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under that exporter's case number (*i.e.,* at that exporter's cash deposit rate) will be liquidated at the rate for the China-wide entity.

Cash Deposit Requirements

The following cash deposit requirements for estimated antidumping duties will be effective for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for the companies listed above will be equal to each company's weighted-average dumping margin established in the final results of this administrative review; (2) for previously-investigated or reviewed Chinese and non-Chinese exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most-recently completed segment of this proceeding in which they were reviewed; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be equal to the weighted-average dumping margin for the China-wide entity (*i.e.,* 101.67 percent); and (4) for all non-Chinese exporters of subject merchandise which have not received their own separate rate, the cash deposit rate will be the rate applicable to the Chinese exporter(s) that supplied the non-Chinese exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of double antidumping duties, and/or an increase in the amount of antidumping duties by the amount of the countervailing duties.

Administrative Protective Order

This notice also serves as a reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is

[10] *See, e.g., Longkou Haimeng Mach. Co.* v. *United States,* 581 F. Supp. 2d 1344, 1357–60 (CIT 2008) (affirming Commerce's determination to assign a 4.22 percent dumping margin to the separate rate respondents in a segment where the three mandatory respondents received dumping margins of 4.22 percent, 0.03 percent, and zero percent, respectively).

[11] *See Preliminary Results,* 88 FR at 37025.

[12] *See, e.g., Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 74 FR 36656, 36660 (July 24, 2009).

hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing these final results of administrative review in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.221(b)(5).

Dated: November 30, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Changes Since the *Preliminary Results*
V. Discussion of the Issues
Comment 1: Selection of Surrogate Financial Statements
Comment 2: Whether to Include the Surrogate Financial Expense Ratio in Wuyi
Xilinde's Normal Value (NV)
Comment 3: Valuation of Certain Factors of Production (FOP)
Comment 4: Treatment of Carton Inputs as Packing Expense or Packaging Cost
VI. Recommendation

[FR Doc. 2023–26860 Filed 12–6–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–157]

Aluminum Lithographic Printing Plates From the People's Republic of China: Postponement of Preliminary Determination in the Countervailing Duty Investigation

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Terre Keaton Stefanova, AD/CVD Operations Office IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1280.

SUPPLEMENTARY INFORMATION:

Background

On October 18, 2023, the U.S. Department of Commerce (Commerce) initiated a countervailing duty (CVD) investigation of imports of aluminum lithographic printing plates (printing plates) from the People's Republic of China (China).[1] Currently, the preliminary determination is due no later than December 22, 2023.

Postponement of Preliminary Determination

Section 703(b)(1) of the Tariff Act of 1930, as amended (the Act), requires Commerce to issue the preliminary determination in a CVD investigation within 65 days after the date on which Commerce initiated the investigation. However, section 703(c)(1) of the Act permits Commerce to postpone the preliminary determination until no later than 130 days after the date on which Commerce initiated the investigation if: (A) the petitioner makes a timely request for a postponement; or (B) Commerce concludes that the parties concerned are cooperating, that the investigation is extraordinarily complicated, and that additional time is necessary to make a preliminary determination. Under 19 CFR 351.205(e), the petitioner must submit a request for postponement 25 days or more before the scheduled date of the preliminary determination and must state the reasons for the request. Commerce will grant the request unless it finds compelling reasons to deny the request.

On November 27, 2023, Eastman Kodak Company (the petitioner) timely filed a request for Commerce to postpone the preliminary CVD determination.[2] The petitioner requested postponement of the preliminary determination because Commerce needs additional time to collect and analyze questionnaire responses from the Government of China and the mandatory respondents in this investigation, and issue supplemental questionnaires.[3]

In accordance with 19 CFR 351.205(e), the petitioner has stated the reasons for requesting a postponement of the preliminary determination, and Commerce finds no compelling reason to deny the request. Therefore, in accordance with section 703(c)(1)(A) of the Act, Commerce is postponing the deadline for the preliminary determination to no later than 130 days after the date on which this investigation was initiated, *i.e.,* February 26, 2024.[4] Pursuant to section 705(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determination of this investigation will continue to be 75 days after the date of the preliminary determination.

This notice is issued and published pursuant to section 703(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: November 30, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–26876 Filed 12–6–23; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Aluminum Lithographic Printing Plates from the People's Republic of China: Initiation of Countervailing Duty Investigation,* 88 FR 73313 (October 25, 2023).

[2] *See* Petitioner's Letter, ''Petitioner's Request for Postponement of Preliminary Determination,'' dated November 27, 2023.

[3] *Id.*

[4] Postponing the preliminary determination to 130 days after initiation would place the deadline on February 25, 2024, which is a Sunday. Commerce's practice dictates that, when a deadline falls on a weekend or federal holiday, the appropriate deadline is the next business day. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–520–804]

Certain Steel Nails From the United Arab Emirates: Final Results of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that sales of certain steel nails from the United Arab Emirates were made at less than normal value during the period of review (POR) May 1, 2021, through April 30, 2022.

DATES: Applicable December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Kelsie Hohenberger, 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) 482–2517.

SUPPLEMENTARY INFORMATION:

Background

On June 5, 2023, Commerce published the *Preliminary Results* and invited interested parties to comment.[1] This review covers two respondents: Master Nails and Pins Manufacturing, LLC/

[1] *See Certain Steel Nails from the United Arab Emirates: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022,* 88 FR 36536 (June 5, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

Middle East Manufacturing Steel LLC (collectively, Master) and Rich Well Steel Industries LLC (Rich Well).

From June 20 through 23,[2] and July 3 through 7, 2023,[3] Commerce verified Master's sales and cost responses. On August 29, 2023, the petitioner[4] submitted case briefs,[5] and on September 7 and 8, 2023, Rich Well[6] and Master,[7] respectively, submitted rebuttal briefs. On September 21, 2023, we extended the deadline for these final results to December 1, 2023.[8] For a complete description of the events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum.[9]

Commerce conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order[10]

The products covered by this *Order* are certain steel nails from the United Arab Emirates. For a full description of the scope, *see* the Issues and Decision Memorandum.

Analysis of Comments Received

We addressed the issues raised in the case and rebuttal briefs in the Issues and Decision Memorandum. A list of the issues addressed in the Issues and Decision Memorandum is included in the appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on our review of the record, including our verification reports and comments received from interested parties, we have made changes to the *Preliminary Results* margin calculation for Master.[11]

Final Results of Administrative Review

Commerce determines that the following weighted-average dumping margins exist for the period May 1, 2021, through April 30, 2022:

Exporter/producer	Weighted average dumping margin (percent)
Master Nails and Pins Manufacturing LLC/Middle East Manufacturing Steel, LLC	4.58
Rich Well Steel Industries LLC	2.28

Disclosure

Commerce intends to disclose the calculations performed in connection with these final results of review (with respect to Master's revised dumping margin) to interested parties within five days after public announcement of the final results or, if there is no public announcement, within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2) of the Act and 19 CFR 351.212(b)(1), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review.

Because the weighted-average dumping margins for Master and Rich Well are not zero or *de minimis* (*i.e.,* less than 0.5 percent), we calculated importer-specific *ad valorem* assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to the total entered value of the sales. Where an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

Consistent with Commerce's assessment practice, for entries of subject merchandise during the POR produced by Master or Rich Well for which they did not know their merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[12]

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2) of the Act: (1) the cash deposit rates for Master and Rich Well will be the weighted-average dumping margins established in the final results of this administrative review; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding; (3) if the exporter is not a firm covered in this review, a prior review, or the original LTFV investigation, but the producer has been covered in a prior completed segment of this proceeding, the cash deposit rate will be the company-specific rate established for the most recent period for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 4.30 percent.[13] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries

[2] *See* Verification Report, ''Verification of the Sales Response of Master Nails and Pins Manufacturing LLC,'' dated July 21, 2023.

[3] *See* Verification Report, ''Verification of the Cost Response of Master Nails and Pins Manufacturing LLC,'' dated August 15, 2023.

[4] The petitioner is Mid Continent Steel & Wire, Inc.

[5] *See* Petitioner's Letters, ''Case Brief Regarding Master,'' and ''Case Brief Regarding Rich Well,'' both dated August 29, 2023.

[6] *See* Rich Well's Letter, ''Rich Well Steel Industries LLC Rebuttal to the Petitioner's Case Brief,'' dated September 7, 2023.

[7] *See* Master's Letter, ''Rebuttal Brief of Master,'' dated September 8, 2023.

[8] *See* Memorandum, ''Extension of Deadline for Final Results of the 2021–2022 Antidumping Duty Administrative Review,'' dated September 21, 2023.

[9] *See* Memorandum, ''Certain Steel Nails from the United Arab Emirates: Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[10] *See Certain Steel Nails from the United Arab Emirates: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order,* 77 FR 27421 (May 10, 2012) (*Order*).

[11] *See* Issues and Decision Memorandum at Comments 1 and 2.

[12] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[13] *See Order,* 77 FR at 27422.

during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties has occurred and the subsequent assessment of double antidumping duties.

Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5).

Dated: December 1, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Changes Since the Preliminary Results
V. Discussion of the Issues
Comment 1: Whether Master Nails and Pins Manufacturing, LLC/Middle East Manufacturing Steel, LLC (Master) Failed to Report Reliable/Verifiable Sales Data
Comment 2: Whether Commerce Should Make Adjustments to Master's Data
Comment 3: Whether Rich Well Steel Industries LLC (Rich Well) Failed to Provide an Accurate and Reliable Cost Database
Comment 4: Whether Commerce Should Adjust Rich Well's General and Administrative (G&A) Expenses
VI. Recommendation

[FR Doc. 2023–26892 Filed 12–6–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–067]

Forged Steel Fittings From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Determination of No Shipments; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that Qingdao Bestflow Industrial Co., Ltd. (Bestflow), the sole participating mandatory respondent in this review and an exporter of forged steel fittings from the People's Republic of China (China), as well as Both-Well Taizhou Steel Fittings Co., Ltd. (Both-Well), a non-individually-examined exporter of forged steel fittings from China, sold subject merchandise in the United States at prices below normal value (NV) during the period of review (POR) November 1, 2021, through October 31, 2022. Further, Commerce preliminarily determines that Xin Yi International Trade Co., Limited (Xin Yi) had no shipments of subject merchandise during the POR. Lastly, Commerce preliminarily determines that Lianfa Stainless Steel Pipes & Valves (Qingyun) Co., Ltd. (Lianfa), Yingkou Guangming Pipeline Industry Co., Ltd. (Yingkou Guangming), Jiangsu Forged Pipe Fittings Co., Ltd. (Jiangsu), and 20 other companies for which this review was initiated are not eligible for a separate rate and, are thus, part of the China-wide entity. Interested parties are invited to comment on these preliminary results.

DATES: Applicable December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Jinny Ahn, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0339.

SUPPLEMENTARY INFORMATION:

Background

This administrative review is being conducted in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act). On January 3, 2023, Commerce published the notice of initiation of this administrative review, covering 26 companies.[1] On March 23, 2023, Commerce selected as the mandatory respondents, Lianfa Stainless Steel Pipes & Valves (Qingyun) Co., Ltd. (Lianfa) and Bestflow, the companies accounting for the largest volume of suspended U.S. entries of subject merchandise into the United States as reported by U.S. Customs and Border Protection (CBP).[2] On March 23, 2023, Commerce also issued its initial non-market economy (NME) antidumping duty questionnaire to Bestflow and Lianfa. On April 14, 2023, Lianfa notified Commerce that it intended not to participate in this review.[3] On June 29, 2023, Commerce selected Yingkou Guangming as an additional mandatory respondent based on the volume of suspended entries of subject merchandise, entered for consumption into the United States during the POR, and issued its initial questionnaire to Yingkou Guangming.[4] On July 14, 2023, Yingkou Guangming notified Commerce that it intended not to participate in this review.[5] On July 25, 2023, Commerce selected Jiangsu as a second additional mandatory respondent based on the volume of suspended entries of subject merchandise entered for consumption into the United States during the POR, and issued its initial questionnaire to Jiangsu.[6] On August 8, 2023, Jiangsu notified Commerce that it intended not to participate in this review.[7] On July 11, 2023, Commerce extended the preliminary results deadline by 120 days.[8]

For a complete description of the events that followed the initiation of this administrative review, *see* the Preliminary Decision Memorandum.[9] A list of the topics included in the Preliminary Decision Memorandum is included in Appendix I to this notice. The Preliminary Decision Memorandum is a public document and is made available to the public via Enforcement

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 88 FR 50 (January 3, 2023).

[2] *See* Memorandum, ''Respondent Selection,'' dated March 23, 2023.

[3] *See* Lianfa's Letter, ''Lianfa Notice of Intent Not to Participate,'' dated April 14, 2023.

[4] *See* Memorandum, ''Selection of an Additional Mandatory Respondent,'' dated June 29, 2023.

[5] *See* Yingkou Guangming's Letter, ''Yingkou Notice of Intent Not to Participate,'' dated July 14, 2023.

[6] *See* Memorandum, ''Selection of a Second Additional Mandatory Respondent,'' dated July 25, 2023.

[7] *See* Jiangsu's Letter, ''Notice of Intent Not to Participate,'' dated August 8, 2023.

[8] *See* Memorandum, ''Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated July 11, 2023.

[9] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the 2021–2022 Antidumping Duty Administrative Review: Forged Steel Fittings from the People's Republic of China,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order [10]

The merchandise covered by the *Order* is carbon and alloy forged steel fittings, whether unfinished (commonly known as blanks or rough forgings) or finished. Subject carbon and alloy forged steel fittings are normally entered under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7307.99.1000, 7307.99.3000, 7307.99.5045, and 7307.99.5060. They also may be entered under HTSUS subheadings 7307.92.3010, 7307.92.3030, 7307.92.9000, and 7326.19.0010. The HTSUS subheadings and specifications are provided for convenience and customs purposes; the written description of the scope is dispositive. For a complete description of the scope of the *Order, see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Act and 19 CFR 351.213. We calculated export prices in accordance with section 772 of the Act. Because China is an NME country within the meaning of section 771(18) of the Act, NV has been calculated in accordance with section 773(c) of the Act. For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum.

Continuation of Administrative Review for Various Companies

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if a party who requested the review withdraws the request within 90 days of the date of publication of the notice of initiation of the requested review. On March 30, 2023, Jiangsu, Lianfa, Xin Yi, and Yingkou Guangming timely withdrew their requests for review.[11] On April 2, 2023, Both-Well timely withdrew its request for review.[12] However, as Bonney Forge Corporation (Bonney Forge), a domestic producer and interested party, also requested review of these five companies and Bonney Forge's request has not been withdrawn,[13] we are not rescinding this review with respect to these five companies, pursuant to 19 CFR 351.213(d)(1).

Preliminary Determination of No Shipments

Xin Yi reported that it made no shipments of subject merchandise to the United States during the POR.[14] Subsequently, Commerce requested that CBP provide any information which may contradict Xin Yi's claim; CBP reported no such contradictory information. Because Xin Yi certified that it made no shipments of subject merchandise, and there is no information on the record which contradicts its claim, Commerce preliminarily determines that Xin Yi did not have shipments of subject merchandise to the United States during the POR. Consistent with Commerce's practice, Commerce will not rescind the review with respect to this company, but instead, will complete the review and issue assessment instructions to CBP based on the final results.[15]

Separate Rates

Commerce preliminarily finds that 23 companies for which a review was initiated did not establish their eligibility for a separate rate because they failed to provide a separate rate application, a separate rate certification, or a no-shipment certification if they were already eligible for a separate rate, or did not cooperate to the best of their ability and refused to provide Commerce with a complete response to its questionnaire.[16] As such, we preliminarily determine these 23 companies are part of the China-wide entity.

Additionally, Commerce preliminarily finds that the information placed on the record by Bestflow and Both-Well demonstrates that these companies are eligible for a separate rate. For additional information, *see* the Preliminary Decision Memorandum.

Weighted-Average Dumping Margin for Non-Examined Companies Granted a Separate Rate

In these preliminary results, the sole individually examined mandatory respondent (*i.e.,* Bestflow) received a weighted-average dumping margin that is not zero, *de minimis,* or based entirely on facts available. Therefore, consistent with section 735(c)(5)(A) of the Act, we find it appropriate to assign the calculated weighted-average dumping margin for Bestflow (*i.e.,* 496.77 percent) as the weighted-average dumping margin for the non-examined, separate rate company Both-Well. For additional information, *see* the Preliminary Decision Memorandum.

The China-Wide Entity

Commerce's policy regarding conditional review of the China-wide entity applies to this administrative review.[17] Under this policy, the China-wide entity will not be under review unless a party specifically requests and Commerce initiates, or Commerce self-initiates, a review of the China-wide entity.[18] Because no party requested a review of the China-wide entity and no review was initiated for this POR, the China-wide entity is not under review and the China-wide entity's rate (*i.e.,* 142.72 percent) is not subject to change.[19] For additional information, *see* the Preliminary Decision Memorandum.

Preliminary Results of Review

Commerce preliminarily determines that the following weighted-average dumping margins exist for the POR:

[10] *See Forged Steel Fittings from Italy and the People's Republic of China: Antidumping Duty Orders,* 83 FR 60397 (November 26, 2018) (*Order*).

[11] *See* Jiangsu, Lianfa, Yingkou Guangming, and XinYi's Letter, ''Withdrawal of Requests for Administrative Review,'' dated March 30, 2023.

[12] *See* Both-Well's Letter, ''Withdrawal of Requests for Administrative Review,'' dated April 2, 2023.

[13] *See* Bonney Forge's Letter, ''Request for Administrative Review,'' dated November 30, 2022.

[14] *See* Xin Yi's Letter, ''No Sales Certification,'' dated February 1, 2023.

[15] *See, e.g., Certain Frozen Warmwater Shrimp from Thailand; Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Review, Preliminary Determination of No Shipments; 2012–2013,* 79 FR 15951, 15952 (March 24, 2014), unchanged in *Certain Frozen Warmwater Shrimp from Thailand: Final Results of Antidumping Duty Administrative Review, Final Determination of No Shipments, and Partial Rescission of Review; 2012–2013,* 79 FR at 51306 (August 28, 2014).

[16] *See* Appendix II of this notice which identifies these 23 companies.

[17] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

[18] *Id.*

[19] *See Order,* 83 FR at 60397.

Exporter	Weighted-average dumping margin (percent)
Qingdao Bestflow Industrial Co., Ltd	496.77
Review-Specific Average Rate Applicable to the Following Company	
Both-Well (Taizhou) Steel Fittings Co., Ltd	496.77

Disclosure and Public Comment

We intend to disclose the calculations performed for these preliminary results to interested parties subject to an administrative protective order within five days after the date of publication of this notice.[20] Pursuant to 19 CFR 351.309(c)(ii), interested parties may each submit a case brief no later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[21] Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[22]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this review, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[23] Further, we request that interested parties limit their executive summary of each issue to no more than 450 words, not including citations. We intend to use the executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final results in this administrative review. We request that interested parties include footnotes for relevant citations in the executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[24]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. An electronically filed hearing request must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5 p.m. Eastern Time within 30 days after the date of publication of this notice.

Final Results of Review

Unless the deadline is extended, Commerce intends to issue the final results of this administrative review, which will include the results of its analysis of issues raised in any briefs, within 120 days of publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

In accordance with section 751(a)(2)(C) of the Act, the final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by this review. Upon issuance of the final results, Commerce will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[25] Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review, when the company-specific weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.50 percent), or when the importer-specific assessment rate calculated in the final results of this review is not zero or *de minimis.*[26] Where either a company's weighted-average dumping margin is zero or *de minimis,* or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

If Bestflow's weighted-average dumping margin is not zero or *de minimis* in the final results of this review, Commerce will instruct CBP to assess antidumping duties at the time of liquidation, in accordance with 19 CFR 351.212(b)(1).[27] Because Bestflow did not report entered value for its U.S. sales, we intend to calculate customer-specific per-unit assessment rates by dividing the total amount of dumping calculated for all reviewed sales to the customer by the total quantity of the sales to the customer. Commerce will also calculate (estimated) *ad valorem* customer-specific assessment rates with which to assess whether the per-unit assessment rates are *de minimis.* We intend to calculate estimated customer-specific *ad valorem* assessment rates by dividing the total amount of dumping calculated for all reviewed U.S. sales to the customer by the total estimated entered value of the merchandise sold to the customer by Bestflow.[28]

For the respondent that was not selected for individual examination in this administrative review but qualified for a separate rate (*i.e.,* Both-Well), the assessment rate will be equal to the weighted-average dumping margin determined in the final results of this review.

For the final results, if we continue to find that the 23 companies, identified in Appendix II, are ineligible for a separate rate and are, therefore, considered part of the China-wide entity, we will

[20] *See* 19 CFR 351.224(b).

[21] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023) (*APO and Final Service Rule*).

[22] *See* 19 351.309(c)(2) and (d)(2).

[23] We use the term "issue" here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[24] *See APO and Final Service Rule.*

[25] *See* 19 CFR 351.212(b)(1).

[26] *See* 19 CFR 351.106(c)(2).

[27] Commerce will apply the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012).

[28] *See* 19 CFR 351.212 (b)(1).

instruct CBP to apply an antidumping duty assessment rate of 142.72 percent (*i.e.,* the rate for the China-wide entity) to all entries of subject merchandise during the POR which were exported by those companies.

For entries that were not reported in the U.S. sales data submitted by Bestflow during this review, Commerce will instruct CBP to liquidate such entries at the antidumping duty assessment rate for the China-wide entity.[29] Additionally, if Commerce determines in the final results that Xin Yi had no shipments of the subject merchandise, any suspended entries that entered under Xin Yi's case number (*i.e.,* at Xin Yi's cash deposit rate) will be liquidated at the antidumping duty assessment rate for the China-wide entity.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) for companies listed above that have a separate rate, the cash deposit rate will be equal to the weighted-average dumping margin established in the final results of this review (except, if the rate is *de minimis,* then the cash deposit rate will be zero); (2) for previously examined Chinese and non-Chinese exporters not listed above that received a separate rate in the most recently completed segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific cash deposit rate; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the rate for the China-wide entity (*i.e.,* 142.72 percent); and (4) for all non-Chinese exporters of subject merchandise which have not received their own separate rate, the cash deposit rate will be the rate applicable to the Chinese exporter that supplied that non-Chinese exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of double antidumping duties, and/or an increase in the amount of antidumping duties by the amount of the countervailing duties.

Notification to Interested Parties

This administrative review and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, 19 CFR 351.213, and 19 CFR 351.221(b)(4).

Dated: November 30, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Discussion of the Methodology
V. Recommendation

Appendix II

Companies Preliminarily Not Eligible for a Separate Rate and Treated as Part of the China-Wide Entity

1. Cixi Baicheng Hardware Tools, Ltd.
2. Dalian Guangming Pipe Fittings Co., Ltd.
3. Eaton Hydraulics (Luzhou) Co., Ltd.
4. Eaton Hydraulics (Ningbo) Co., Ltd.
5. Jiangsu Forged Pipe Fittings Co., Ltd.
6. Jiangsu Haida Pipe Fittings Group Co.
7. Jinan Mech Piping Technology Co., Ltd.
8. Jining Dingguan Precision Parts Manufacturing Co., Ltd.
9. Lianfa Stainless Steel Pipes & Valves (Qingyun) Co., Ltd.
10. Luzhou City Chengrun Mechanics Co., Ltd.
11. Ningbo HongTe Industrial Co., Ltd.
12. Ningbo Long Teng Metal Manufacturing Co., Ltd.
13. Ningbo Save Technology Co., Ltd.
14. Ningbo Zhongan Forging Co., Ltd.
15. Q.C. Witness International Co., Ltd.
16. Shanghai Lon Au Stainless Steel Materials Co., Ltd.
17. Witness International Co., Ltd.
18. Yancheng Boyue Tube Co., Ltd.
19. Yancheng Haohui Pipe Fittings Co., Ltd.
20. Yancheng Jiuwei Pipe Fittings Co., Ltd.
21. Yancheng Manda Pipe Industry Co., Ltd.
22. Yingkou Guangming Pipeline Industry Co., Ltd.
23. Yuyao Wanlei Pipe Fitting Manufacturing Co., Ltd.

[FR Doc. 2023–26879 Filed 12–6–23; 8:45 am]

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[29] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694, 65695 (October 24, 2011), for a full discussion of this practice.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–841]

Mattresses From Thailand: Final Results and Rescission of the Antidumping Duty Administrative Review; 2020–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that Saffron Living Co., Ltd. (Saffron) did not have a *bona fide* sale during the period of review (POR) November 3, 2020, through April 30, 2022. Therefore, we are rescinding this administrative review.

DATES: Applicable December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Paola Aleman Ordaz, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4031.

SUPPLEMENTARY INFORMATION:

Background

On June 6, 2023, Commerce published its preliminary results in the first administrative review of the antidumping duty order on mattresses from Thailand [1] in the **Federal Register** and invited interested parties to comment.[2] For a summary of the events that occurred since the publication of the *Preliminary Results, see* the Issues and Decision Memorandum.[3] Commerce conducted this administrative review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The merchandise subject to the *Order* are mattresses from Thailand. The products subject to this Order are currently properly classifiable under

[1] *See Mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey, and the Socialist Republic of Vietnam: Antidumping Duty Orders and Amended Final Affirmative Antidumping Determination for Cambodia,* 86 FR 26460 (May 14, 2021) (*Order*).

[2] *See Mattresses from Thailand: Preliminary Results, Preliminary Intent To Rescind, in Part, and Partial Rescission of Antidumping Duty Administrative Review; 2020–2022,* 88 FR 37009 (June 6, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[3] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Mattresses from Thailand; 2020–2022,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

HTSUS subheadings: 9404.21.0010, 9404.21.0013, 9404.29.1005, 9404.29.1013, 9404.29.9085, and 9404.29.9087. Products subject to this Order may also enter under HTSUS subheadings: 9404.21.0095, 9404.29.1095, 9404.29.9095, 9401.41.0000, 9401.49.0000, and 9401.99.9081. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to this Order is dispositive. For a complete description of the scope of the *Order, see* the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised by the parties in their case and rebuttal briefs, to which we responded in the Issues and Decision Memorandum, are listed in the appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Bona Fide Sales Analysis

In the *Preliminary Results,* Commerce found that the sole mandatory respondent Saffron did not have a *bona fide* sale of a mattress during the POR.[4] Based on an analysis of the information on the administrative record, Commerce continues to find that Saffron did not have a *bona fide* sale during the POR. Commerce reached this conclusion based on its consideration of the totality of circumstances, including, but not limited to: (a) the atypical nature of both the price and quantity of the sale; (b) the expenses incurred arising from the transaction; (c) the profitability of the resold subject merchandise; and (d) the likelihood that the sale is atypical due to the business nature of the U.S. customer. Consequently, we are rescinding this administrative review.

Assessment Rates

Because Commerce is rescinding this administrative review, we have not calculated a dumping margin for Saffron. Saffron's entries will be liquidated at 37.48 percent, the company-specific rate established in the less than fair value (LTFV) investigation.[5]

Cash Deposit Requirements

Because we are rescinding this administrative review, Saffron remains subject to the antidumping duty rate for its merchandise entered (*i.e.* 37.48 percent), which is the company-specific rate established in the LTFV investigation.[6] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties has occurred and the subsequent assessment of double antidumping duties.

Administrative Protective Order

This notice also serves as a final reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(3).

Dated: December 1, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Discussion of the Issues
Comment 1: Whether Saffron Had a *Bona Fide* Sale During the POR
Comment 2: Whether Commerce Must Conduct Verification if it Reverses its Decision to Rescind the Administrative Review
Comment 3: Whether Commerce Should Apply Facts Available to Calculate Saffron's Dumping Margin if It Reverses Its Decision to Rescind the Administrative Review
Comment 4: Whether Commerce Should Apply the Transactions Disregarded and Major Input Rules if It Reverses Its Decision to Rescind the Administrative Review
V. Recommendation

[4] *See Preliminary Results,* 88 FR at 37010.

[5] *See Mattresses from Thailand: Final Affirmative Determination of Sales at Less Than Fair Value,* 86 FR 15928, 15929 (March 25, 2021); and *Order,* 86 FR at 26462.

[6] *Id.*

[FR Doc. 2023–26897 Filed 12–6–23; 8:45 am]
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DEPARTMENT OF COMMERCE

International Trade Administration

[C–122–858]

Certain Softwood Lumber Products From Canada: Notice of Reinstatement of Exclusion From the Countervailing Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On November 20, 2023, the U.S. Court of International Trade (CIT) issued an order in *Committee Overseeing Action for Lumber International Trade Investigations or Negotiations* v. *United States, et. al.,* Consol. Ct. No. 19–00122 (Slip Op. 23–163), reinstating the exclusion of Les Produits Forestiers D&G Ltée (D&G), Marcel Lauzon Inc. (MLI), North American Forest Products Ltd. (NAFP) (located in New Brunswick), and Scierie Alexandre Lemay & Fils Inc. (Lemay), and their cross-owned companies, from the countervailing duty (CVD) order on certain softwood lumber products (softwood lumber) from Canada. In accordance with the CIT's order, Commerce is issuing this notice excluding from the CVD order D&G, MLI, NAFP, and Lemay, and their cross-owned companies. Commerce will also direct U.S. Customs and Border Protection (CBP) to discontinue suspension of liquidation and the collection of cash deposits for all shipments of softwood lumber produced and exported by D&G, Lemay, MLI, and NAFP, entered, or withdrawn from warehouse, for consumption on or after August 28, 2021, to liquidate all suspended entries of shipments of softwood lumber produced and exported by D&G, Lemay, MLI, and NAFP without regard to countervailing duties; and to refund all cash deposits

of estimated countervailing duties collected on all such shipments.

DATES: Applicable August 28, 2021.

FOR FURTHER INFORMATION CONTACT: Kristen Johnson, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482- 4793.

SUPPLEMENTARY INFORMATION:

Background

On January 3, 2018, Commerce published the CVD order on softwood lumber from Canada.[1] On July 5, 2019, Commerce published its *Final Results of Expedited Review* for the *Order.*[2] In the *Final Results of Expedited Review,* Commerce found that five companies subject to the review had *de minimis* subsidy rates, and therefore, were excluded from the *Order.*[3] The five companies are D&G, Lemay, MLI, NAFP, and Roland Boulanger & Cie Ltée (Roland).[4]

The Committee Overseeing Action for Lumber International Trade Investigations or Negotiations appealed Commerce's *Final Results of Expedited Review.* On November 19, 2020, the CIT remanded the *Final Results of Expedited Review* to Commerce for reconsideration of the statutory basis upon which Commerce promulgated its CVD expedited review regulations at 19 CFR 351.214(k) to determine individual subsidy rates for companies not individually examined in an investigation.[5]

In its *Final Remand,* issued in February 2021, Commerce determined that section 103(a) of the Uruguay Round of Agreements Act, as well as the other legal authorities presented to the CIT, cannot be the basis for the promulgation of the CVD expedited review regulations under 19 CFR 351.214(k) and, thus, Commerce lacks the statutory authority to conduct CVD expedited reviews.[6] The CIT sustained Commerce's *Final Remand.*[7] Consequently, Commerce reinstated the excluded companies in the *Order* prospectively, effective August 28, 2021, and imposed a 14.19 percent *ad valorem* cash deposit requirement based on the all-others rate from the investigation.[8] The Canadian parties appealed the CIT's decision.[9]

On April 25, 2023, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) reversed the CIT's August 18, 2021 decision and held that Commerce has the statutory authority to adopt the CVD expedited review process, and remanded for further proceedings necessitated by its holding that such statutory authority exists.[10]

On October 6, 2023, D&G, Lemay, MLI, and NAFP filed a motion with the CIT requesting reinstatement of their exclusion from the *Order* during the pendency of this litigation.[11] On November 20, 2023, the CIT granted the motion, finding that there was an equitable basis for reversing the actions of its August 18, 2021 decision, and ordered the reinstatement of exclusion from the *Order,* effective August 28, 2021, for D&G, Lemay, MLI, and NAFP.[12] The CIT also ordered Commerce to instruct CBP to discontinue the suspension of liquidation and the collection of cash deposits of estimated countervailing duties on all shipments of softwood lumber produced and exported by D&G, Lemay, MLI, and NAFP, entered or withdrawn from warehouse, for consumption on or after August 28, 2021, and to instruct CBP to liquidate, without regard to countervailing duties, all suspended entries of shipments of softwood lumber produced and exported by D&G, Lemay, MLI, and NAFP.[13]

Reinstatement of Exclusion From the Order

Because of the CIT's order, Commerce is reinstating the exclusion from the *Order* of D&G, Lemay, MLI, and NAFP, effective August 28, 2021. Commerce's practice with respect to the exclusion of companies from a CVD order is to exclude the subject merchandise both produced and exported by those companies.[14] As a result, we will instruct CBP to discontinue the suspension of liquidation and the collection of cash deposits of estimated countervailing duties on all shipments of softwood lumber produced and exported by D&G, Lemay, MLI, and NAFP, entered, or withdrawn from warehouse, for consumption on or after August 28, 2021. In addition, we will instruct CBP to liquidate, without regard to countervailing duties, all suspended entries of shipments of softwood lumber produced and exported by D&G, Lemay, MLI, and NAFP, and to refund all cash deposits of estimated countervailing duties collected on all such shipments. Subject merchandise that D&G, Lemay, MLI, and NAFP export but do not produce, as well as merchandise D&G, Lemay, MLI, and NAFP produce but is exported by another company remain subject to the *Order.*

Notification to Interested Parties

This notice is issued and published in accordance with section 516A(c) of the Tariff Act of 1930, as amended.

Dated: November 30, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–26857 Filed 12–6–23; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Certain Softwood Lumber Products from Canada: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 83 FR 347 (January 3, 2018) (*Order*).

[2] *See Certain Softwood Lumber Products from Canada: Final Results of Countervailing Duty Expedited Review,* 84 FR 32121 (July 5, 2019) (*Final Results of Expedited Review*), and accompanying Issues and Decision Memorandum.

[3] *Id.,* 84 FR at 32122.

[4] *Id.* While Commerce calculated a *de minimis* rate for Roland and its cross-owned affiliates, those companies are not a party to the litigation nor to the Court's order ordering this notice.

[5] *See Committee Overseeing Action for Lumber International Trade Investigations or Negotiations, et al.* v. *United States, et al.,* Court No. 19–00122, Slip Op. 20–167 (CIT 2020).

[6] *See Final Results of Redetermination Pursuant to Court Remand, Committee Overseeing Action for Lumber International Trade Investigations or Negotiations, et al.* v. *United States, et al.,* Court No. 19–00122, Slip Op. 20–167 (CIT 2020), dated February 17, 2021 (*Final Remand*), available at *https://access.trade.gov/resources/remands/20-167.pdf.*

[7] *See Committee Overseeing Action for Lumber International Trade Investigations or Negotiations, et al.* v. *United States, et al.,* Court No. 19–00122, Slip Op. 21–104 (CIT 2021).

[8] *See Certain Softwood Lumber Products from Canada: Notice of Court Decision Not in Harmony with the Results of Countervailing Duty Expedited Review; Notice of Amended Final Results,* 86 FR 48396 (August 30, 2021) (*Amended Final Results of Expedited Review*).

[9] The Canadian parties are D&G, Lemay, MLI, NAFP, Fontaine Inc., Mobilier Rustique (Beauce) Inc., Government of Canada, Government of New Brunswick, and Government of Québec.

[10] *See Committee Overseeing Action for Lumber International Trade Investigations or Negotiations* v. *United States,* 66 F.4th 968 (Fed. Cir. 2023).

[11] *See Committee Overseeing Action for Lumber International Trade Investigations or Negotiations* v. *United States,* Consol. Ct. No. 19–00122 (Slip Op. 23–163) (CIT Nov. 20, 2023), citing motion filed by D&G, Lemay, MLI, and NAFP.

[12] *Id.*

[13] *Id.*

[14] *See, e.g., Certain Corrosion-Resistant Steel Products from India, Italy, Republic of Korea and the People's Republic of China: Countervailing Duty Order,* 81 FR 48387 (July 25, 2016).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–475–834]

Certain Carbon and Alloy Steel Cut-To-Length Plate From Italy: Final Results of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that NLMK Verona S.p.A. (NVR) made sales of subject merchandise at less than normal value during the period of review (POR), May 1, 2021, through April 30, 2022.

DATES: Applicable December 7, 2023.

FOR FURTHER INFORMATION CONTACT: David Crespo, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3693.

SUPPLEMENTARY INFORMATION:

Background

On June 5, 2023, Commerce published in the **Federal Register** the *Preliminary Results* of the 2021–2022 administrative review of the antidumping duty order on certain carbon and alloy steel cut-to-length plate from Italy and invited interested parties to comment on those results.[1] In July 2023, the petitioner (*i.e.,* Nucor Corporation) and NVR submitted a case and rebuttal brief, respectively. On September 1, 2023, we extended the deadline for the final results until December 1, 2023.[2] For a complete description of the events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum.[3] Commerce conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order[4]

The merchandise subject to the *Order* is certain carbon and alloy steel cut-to-length plate from Italy. A complete description of the scope of the *Order* is contained in the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs filed by parties in this administrative review are addressed in the Issues and Decision Memorandum and are listed in the appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding the *Preliminary Results,* and for the reasons explained in the Issues and Decision Memorandum, Commerce made certain changes to the preliminary weighted-average dumping margin calculation for NVR for the final results of review.[5]

Final Results of Administrative Review

As a result of this review, we determine that the following weighted-average dumping margin exists for the period May 1, 2021, through April 30, 2022:

Producer/exporter	Weighted-average dumping margin (percent)
NLMK Verona S.p.A	18.65

Disclosure

Commerce intends to disclose the calculations performed in connection with these final results of review to interested parties within five days after public announcement of the final results or, if there is no public announcement, within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Assessment Rate

Pursuant to section 751(a)(2)(C) of the Act, and 19 CFR 351.212(b)(1), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review.

Pursuant to 19 CFR 351.212(b)(1), we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for each importer's examined sales and the total entered value of those sales. Where either the respondent's weighted-average dumping margin is zero or *de minimis,* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. For entries of subject merchandise during the POR produced by NVR for which it did not know that its merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate established in the less-than-fair-value (LTFV) of 6.08 percent *ad valorem,*[6] if there is no rate for the intermediate company(ies) involved in the transaction.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

Upon publication of this notice in the **Federal Register**, the following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for the company subject to this review will be equal to the weighted-average dumping margin established in the final results of this review; (2) for merchandise exported by producers or exporters not covered in this review but covered in a prior completed segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published in the completed segment for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original LTFV investigation, but the producer has been covered in a prior completed segment of this proceeding, then the cash deposit rate will be the rate

[1] *See Certain Carbon and Alloy Steel Cut-To-Length Plate from Italy: Preliminary Results of Antidumping Duty Administrative Review and Rescission in Part; 2021–2022,* 88 FR 36534 (June 5, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Extension of Deadline for Final Results of Antidumping Duty Administrative Review,'' dated September 1, 2023.

[3] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the 2021–2022 Administrative Review of the Antidumping Duty Order on Certain Carbon and Alloy Steel Cut-To-Length Plate from Italy,'' dated concurrently with, and hereby adopted by, these results (Issues and Decision Memorandum).

[4] *See Certain Carbon and Alloy Steel Cut-To-Length Plate from Austria, Belgium, France, the Federal Republic of Germany, Italy, Japan, the Republic of Korea, and Taiwan: Amended Final Affirmative Antidumping Determinations for France, the Federal Republic of Germany, the Republic of Korea and Taiwan, and Antidumping Duty Orders,* 82 FR 24096, 24098 (May 25, 2017) (*Order*).

[5] *See* Issues and Decision Memorandum; and Memorandum, ''Cost Calculations for NLMK Verona SpA (NVR) for the Final Results,'' dated concurrently with this notice.

[6] *See Order.*

established in the completed segment for the most recent period for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 6.08 percent, the all-others rate established in the LTFV investigation for this proceeding.[7] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Administrative Protective Order

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation subject to sanction.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.221(b)(5).

Dated: November 30, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Changes Since the *Preliminary Results*
V. Discussion of the Issues
Comment 1: Treatment of NVR's Home Market Overrun Sales
Comment 2: Whether Commerce Should Revise NVR's Reported Sales and Cost Data to be Based on Theoretical Weight
Comment 3: Whether Commerce Should Apply the Major Input Rule to Value NVR's Affiliate-Supplied Slab
Comment 4: Whether Commerce Should Allocate NVR's Unreconciled Costs to Subject Merchandise
VI. Recommendation

[7] *See Order.*

[FR Doc. 2023–26882 Filed 12–6–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–489–845]

Certain Aluminum Foil From Turkey: Preliminary Results of Countervailing Duty Administrative Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that countervailable subsidies were provided to producers and exporters of certain aluminum foil (aluminum foil) from the Republic of Turkey (Turkey) during the period of review (POR), March 5, 2021, through December 31, 2021. Interested parties are invited to comment on these preliminary results.

DATES: Applicable December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Adam Simons, AD/CVD Operations, Office IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–6172.

SUPPLEMENTARY INFORMATION:

Background

On November 12, 2021, Commerce published in the **Federal Register** a countervailing duty order on aluminum foil from Turkey.[1] On November 1, 2022, Commerce published the notice of the opportunity to request a review of the *Order.*[2] On January 3, 2023, Commerce published the notice of the initiation of this administrative review in the **Federal Register**.[3] For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[4] A list of topics included in the Preliminary Decision Memorandum is provided as the appendix to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order

The product covered by the *Order* is aluminum foil from Turkey. For a complete description of the scope of the *Order, see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this administrative review in accordance with section 701 of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, Commerce preliminarily determines that there is a subsidy, *i.e.,* a financial contribution by an ''authority'' that gives rise to a benefit to the recipient, and that the subsidy is specific.[5]

Companies Not Selected for Individual Examination

The Act and Commerce's regulations do not directly address the subsidy rate to be applied to companies not selected for individual examination where Commerce limits its examination in an administrative review pursuant to section 777A(e)(2) of the Act. However, Commerce normally determines the rates for non-selected companies in reviews in a manner that is consistent with section 705(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation. Section 777A(e)(2) of the Act provides that ''the individual countervailable subsidy rates determined under subparagraph (A) shall be used to determine the all-others rate under section 705(c)(5) {of the Act}.'' Section 705(c)(5)(A) of the Act states that for companies not investigated, in general,

[1] *See Certain Aluminum Foil from the Sultanate of Oman and the Republic of Turkey: Countervailing Duty Orders,* 86 FR 62782 (November 12, 2021) (*Order*).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review and Join Annual Inquiry Service List,* 87 FR 65750 (November 1, 2022).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 88 FR 50 (January 3, 2023).

[4] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the 2021 Countervailing Duty Administrative Review of Certain Aluminum Foil from Turkey,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[5] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

we will determine an all-others rate by weight averaging the countervailable subsidy rates established for each of the companies individually investigated, excluding zero and *de minimis* rates or any rates based solely on the facts available.

Accordingly, to determine the rate for companies not selected for individual examination, Commerce's practice is to weight average the net subsidy rates for the selected mandatory respondents, excluding rates that are zero, *de minimis,* or based entirely on facts available.[6] We selected ASAS Aluminyum Sanayi ve Ticaret A.S. for review as a mandatory respondent and preliminary determine that it received countervailable subsidies at a *de minimis* rate. Therefore, we preliminarily determine that the other selected mandatory respondent, Assan Aluminyum Sanayi ve Ticaret A.S. (Assan), is the sole mandatory respondent which received countervailable subsidies that are above *de minimis* and are not based entirely on facts available. Therefore, we are preliminarily applying the net subsidy rate calculated for Assan to the non-selected companies.

Preliminary Results of Review

Commerce preliminarily determines the following net countervailable subsidy rates for the POR:

Company	Subsidy rate (percent *ad valorem*)
ASAS Aluminyum Sanayi ve Ticaret A.S	0.32
Assan Aluminyum Sanayi ve Ticaret A.S [7]	1.15
Ilda Pack Ambalaj	1.15
John Good Denizcilik Tas.Ve	1.15
Panda Aluminyum	1.15
Seherli Danismanlik A.S	1.15

Disclosure and Public Comment

We intend to disclose the calculations performed for these preliminary results to interested parties within five days after the date of publication of this notice.[8] Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs to Commerce no later than seven days after the date of the last verification report issued in this administrative review. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[9] Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[10] All briefs must be filed electronically using ACCESS. An electronically filed document must be received successfully in its entirety in ACCESS by 5:00 p.m. Eastern Time on the established deadline. As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this review, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.'' [11] Further, we request that interested parties limit their executive summary of each issue to no more than 450 words, not including citations. We intend to use the executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final results in this administrative review. We request that interested parties include footnotes for relevant citations in the executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[12]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. If a request for a hearing is made, Commerce will inform parties of the scheduled date for the hearing. An electronically filed hearing request must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5:00 p.m. Eastern Time within 30 days after the date of publication of this notice.

Assessment Rates

Consistent with section 751(a)(1) of the Act and 19 CFR 351.212(b)(2), upon issuance of the final results, Commerce will determine, and U.S. Customs and Border Protection (CBP) shall assess, countervailing duties on all appropriate entries covered by this review. We intend to issue instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

In accordance with section 751(a)(2)(C) of the Act, Commerce also intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown for each of the companies listed above with regard to shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review. For all non-reviewed firms, CBP will continue to collect cash deposits of estimated countervailing duties at the all-others rate or the most recent company-specific rate applicable to the company, as appropriate. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Verification

On April 13, 2023, the Aluminum Association Trade Enforcement Working Group and its individual members requested that Commerce conduct verification of the factual information submitted by the respondents in this administrative review. Accordingly, as provided in section 782(i)(3) of the Act, Commerce intends to verify certain of the information relied upon for its final results.

Notification to Interested Parties

We are issuing and publishing these preliminary results in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(4).

[6] *See, e.g., Certain Pasta from Italy: Final Results of the 13th (2008) Countervailing Duty Administrative Review,* 75 FR 37386, 37387 (June 29, 2010).

[7] As discussed in the Preliminary Decision Memorandum, Commerce has found the following companies to be cross-owned with Assan: Kibar Dış Ticaret A.S.; Kibar Holding A.S.; and Ispak Esnek Ambalaj Sanayi A.S.

[8] *See* 19 CFR 351.224(b).

[9] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023).

[10] *See* 19 351.309(c)(2) and (d)(2).

[11] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[12] *See Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings; Final Rule,* 88 FR 67069 (September 29, 2023).

Dated: November 30, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Review
IV. Scope of the *Order*
V. Subsidies Valuation
VI. Benchmarks and Interest Rates
VII. Analysis of Programs
VIII. Recommendation

[FR Doc. 2023–26877 Filed 12–6–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–093]

Refillable Stainless Steel Kegs From the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that certain producers and/or exporters made sales of refillable stainless steel kegs (kegs) at less than normal value during the period of review (POR) April 1, 2021, through March 31, 2022. Interested parties are invited to comment on the preliminary results of this review.

DATES: Applicable December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Aleksandras Nakutis and Jacob Keller, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3147 and (202) 482–4849, respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 16, 2019, Commerce published in the **Federal Register** the AD order on kegs from China.[1] On December 1, 2022, Commerce published a notice of opportunity to request an administrative review of the *Order,* covering the POR, pursuant to section 751(a)(1) of the Tariff Act of 1930, as amended (the Act).[2] On February 2, 2023, based on timely requests for review, Commerce initiated an administrative review of the *Order* covering the POR.[3] On March 6, 2023, Guangzhou Ulix Industrial & Trading Co., Ltd., (Ulix) and Guangzhou Jingye Machinery Co., Ltd., (Jingye) each timely filed a no-shipment certification (NSC) and a separate rate certification.[4] This administrative review covers 41 companies.[5]

Scope of the Order

The merchandise covered by this *Order* are kegs, vessels, or containers with bodies that are approximately cylindrical in shape, made from stainless steel (*i.e.,* steel containing at least 10.5 percent chromium by weight and less than 1.2 percent carbon by weight, with or without other elements), and that are compatible with a ''D Sankey'' extractor (refillable stainless steel kegs) with a nominal liquid volume capacity of 10 liters or more, regardless of the type of finish, gauge, thickness, or grade of stainless steel, and whether or not covered by or encased in other materials. The merchandise covered by the orders are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 7310.10.0010, 7310.10.0050, 7310.29.0025, and 7310.29.0050. These HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of the orders is dispositive. A full description of the scope of the *Order* is provided in the Preliminary Decision Memorandum.[6]

Preliminary Results and Referral to U.S. Customs and Border Protection

Based on record information, Commerce preliminarily determine that all 41 companies subject to this administrative review are a part of the China-wide entity.[7] Regarding Jingye and Ulix's NSCs, we preliminarily determine these responses to be unreliable and that use of facts otherwise available with an adverse inference is warranted, pursuant to sections 776(a)–(b) of the Act, to determine that Jingye and Ulix have not substantiated their NSCs. Moreover, for reasons discussed in the Preliminary Decision Memorandum, Commerce is preliminarily treating Jingye and Ulix as part of the China-wide entity and Commerce is referring its preliminary findings to U.S. Customs and Border Protection (CBP) to investigate evasion of the *Order.*

China-Wide Entity

Under Commerce's policy regarding the conditional review of the China-wide entity,[8] the China-wide entity will not be under review unless a party specifically requests, or Commerce self-initiates, a review of the entity. Because no party requested a review of the China-wide entity in this review, the entity is not under review, and the entity's rate (*i.e.,* 77.13 percent) is not subject to change.[9] Commerce considers the 41 companies for which a review was requested (which did not file a separate rate application or did not demonstrate separate rate eligibility) listed in Appendix II to this notice, to be part of the China-wide entity.[10]

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Act. For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. A list of topics discussed in the Preliminary Decision Memorandum is included as Appendix I to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete

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[1] *See Refillable Stainless Steel Kegs from the Federal Republic of Germany and the People's Republic of China: Antidumping Duty Orders,* 84 FR 68405 (December 16, 2019) (*Order*).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review and Join Annual Inquiry Service List,* 87 FR 73752 (December 1, 2022).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 88 FR 7060 (February 2, 2023) (*Initiation Notice*).

[4] *See* Ulix's Letter, ''Separate Rate Certification,'' dated March 6, 2023; *see also* Jingye's Letter, ''No Sales & Separate Rate Certification,'' dated March 6, 2023.

[5] *See* Memorandum, ''Respondent Selection,'' dated September 14, 2022.

[6] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review of Refillable Stainless Steel Kegs from the People's Republic of China; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[7] *See* Appendix II.

[8] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

[9] *See Order.*

[10] *See Initiation Notice* (''All firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate rate application or certification, as described below.''); *see also* Appendix II for the list of companies that are subject to this administrative review that are considered to be part of the China-wide entity.

version of the Preliminary Decision Memorandum can be found at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Public Comment

Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs no later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[11] Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[12]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this review, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[13] Further, we request that interested parties limit their executive summary of each issue to no more than 450 words, not including citations. We intend to use the executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final determination in this review. We request that interested parties include footnotes for relevant citations in the executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[14]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the publication of this notice. Requests should contain the party's name, address, telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Unless the deadline is extended, Commerce intends to issue the final results of this review, including the results of its analysis of the issues raised in any written briefs, no later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h).

Assessment Rates

Upon issuing the final results, Commerce will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[15] If the preliminary results are unchanged for the final results, we will instruct CBP to apply an *ad valorem* assessment rate of 77.13 percent to all entries of subject merchandise during the POR which were exported by the companies considered to be a part of the China-wide entity listed in Appendix II of this notice.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this review for shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be that for the China-wide entity; and (2) for all non-Chinese exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the Chinese exporter that supplied that non-Chinese exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during the POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of double antidumping duties, and/or an increase in the amount of antidumping duties by the amount of the countervailing duties.

Notification to Interested Parties

Commerce is issuing and publishing the preliminary results of this review in accordance with sections 751(a)(1)(B), 751(a)(3) and 777(i) of the Act, and 19 CFR 351.213(d)(4) and 351.221(b)(4).

Dated: November 30, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. No-Shipment Certifications and Referral to CBP of Evasion
V. Discussion of the Methodology
VI. Recommendation

Appendix II

Companies Considered To Be Part of the China-Wide Entity

1. Dalian Yonghsheng Metal Structure Co., Ltd. d/b/a DYM Brewing Solutions
2. Equipmentimes (Dalian) E-Commerce Co., Ltd.
3. Guangzhou Jingye Machinery Co., Ltd.
4. Guangzhou Ulix Industrial & Trading Co., Ltd.
5. Jinan Chenji International Trade Co., Ltd.
6. Jinan Chenji Machinery Equipment Co., Ltd.
7. Jinan HaoLu Machinery Equipment Co., Ltd.
8. Jinjiang Jiaxing Import and Export Co., Ltd.
9. NDL Keg Qingdao Inc.
10. Ningbo All In Brew Technology Co.
11. Ningbo BestFriends Beverage Containers Industry Co., Ltd.
12. Ningbo Chance International Trade Co., Ltd.
13. Ningbo Direct Import & Export Co., Ltd.
14. Ningbo Haishu Direct Import and Export Trade Co., Ltd.
15. Ningbo Haishu Xiangsheng Metal Factory
16. Ningbo Hefeng Container Manufacturer Co., Ltd.
17. Ningbo Hefeng Kitchen Utensils Manufacture Co., Ltd.
18. Ningbo HGM Food Machinery Co., Ltd.
19. Ningbo Jiangbei Bei Fu Industry and Trade Co., Ltd.
20. Ningbo Kegco International Trade Co., Ltd.

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[11] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Final Rule*).

[12] *See* 19 351.309(c)(2) and (d)(2).

[13] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[14] *See APO and Service Final Rule.*

[15] *See* 19 CFR 351.212(b)(1).

21. Ningbo Kegstorm Stainless Steel Co., Ltd.
22. Ningbo Minke Import & Export Co., Ltd.
23. Ningbo Sanfino Import & Export Co., Ltd.
24. Ningbo Shimaotong International Co., Ltd.
25. Ningbo Sunburst International Trading Co., Ltd.
26. Orient Equipment (Taizhou) Co., Ltd.
27. Penglai Jinfu Stainless Steel Products.
28. Pera Industry Shanghai Co., Ltd.
29. Qingdao Henka Precision Technology Co., Ltd.
30. Qingdao Xinhe Precision Manufacturing Co., Ltd.
31. Rain Star International Trading Dalian Co., Ltd.
32. Shandong Meto Beer Equipment Co., Ltd.
33. Shandong Tiantai Beer Equipment Co., Ltd.
34. Shandong Tonsen Equipment Co., Ltd.
35. Shandong Yuesheng Beer Equipment Co., Ltd.
36. Shenzhen Wellbom Technology Co., Ltd.
37. Sino Dragon Group, Ltd.
38. Wenzhou Deli Machinery Equipment Co.
39. Wuxi Taihu Lamps and Lanterns Co., Ltd.
40. Yantai Toptech Ltd.
41. Yantai Trano New Material Co., Ltd., d/b/a Trano Keg, d/b/a SS Keg.

[FR Doc. 2023–26858 Filed 12–6–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–845, A–580–834, A–583–831, C–580–835]

Stainless Steel Sheet and Strip in Coils From Japan, the Republic of Korea, and Taiwan: Continuation of Antidumping Duty Orders and Countervailing 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) orders on stainless steel sheet and strip in coils (SSSSC) from Japan, the Republic of Korea (Korea), and Taiwan and the countervailing duty (CVD) order on SSSSC from Korea would likely lead to the 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 these AD and CVD orders.

DATES: Applicable October 24, 2023.

FOR FURTHER INFORMATION CONTACT: Andrew Hart, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1058.

SUPPLEMENTARY INFORMATION:

Background

On July 27, 1999, Commerce published in the **Federal Register** the AD orders on SSSSC from Japan, Korea, and Taiwan, and, on August 6, 1999, Commerce published the CVD order on SSSSC from Korea.[1] On September 1, 2022, the ITC instituted,[2] and Commerce initiated,[3] the fourth sunset review of the *Orders,* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). As a result of its reviews, Commerce determined that revocation of the *Orders* would likely lead to the continuation or recurrence of dumping and countervailable subsidies and, therefore, notified the ITC of the magnitude of the margins of dumping and subsidy rates likely to prevail should the *Orders* be revoked.[4]

On October 24, 2023, the ITC published its determination, pursuant to sections 751(c) and 752(a) of the Act, that revocation of the *Orders* would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[5]

Scope of the Orders

The merchandise under review is certain stainless steel sheet and strip in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject sheet and strip is a flat-rolled product in coils that is greater than 9.5 mm in width and less than 4.75 mm in thickness, and that is annealed or otherwise heat treated and pickled or otherwise descaled. The subject sheet and strip may also be further processed (*e.g.,* cold-rolled, polished, aluminized, coated, *etc.*) provided that it maintains the specific dimensions of sheet and strip following such processing.

The merchandise subject to this review is classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings: 7219.13.00.31, 7219.13.00.51, 7219.13.00.71, 7219.13.00.81, 7219.14.00.30, 7219.14.00.65, 7219.14.00.90, 7219.32.00.05, 7219.32.00.20, 7219.32.00.25, 7219.32.00.35, 7219.32.00.36, 7219.32.00.38, 7219.32.00.42, 7219.32.00.44, 7219.33.00.05, 7219.33.00.20, 7219.33.00.25, 7219.33.00.35, 7219.33.00.36, 7219.33.00.38, 7219.33.00.42, 7219.33.00.44, 7219.34.00.05, 7219.34.00.20, 7219.34.00.25, 7219.34.00.30, 7219.34.00.35, 7219.35.00.05, 7219.35.00.15, 7219.35.00.30, 7219.35.00.35, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.12.10.00, 7220.12.50.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.20.70.05, 7220.20.70.10, 7220.20.70.15, 7220.20.70.60, 7220.20.70.80, 7220.20.80.00, 7220.20.90.30, 7220.20.90.60, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80. Although the HTSUS subheadings are provided for convenience and Customs purposes, Commerce's written description of the merchandise under review is dispositive.

Excluded from the scope of this review are the following: (1) sheet and strip that is not annealed or otherwise heat treated and pickled or otherwise descaled, (2) sheet and strip that is cut to length, (3) plate (*i.e.,* flat-rolled stainless steel products of a thickness of 4.75 mm or more), (4) flat wire (*i.e.,* cold-rolled sections, with a prepared edge, rectangular in shape, of a width of not more than 9.5 mm), and (5) razor blade steel. Razor blade steel is a flat-rolled product of stainless steel, not further worked than cold-rolled (cold-reduced), in coils, of a width of not more than 23 mm and a thickness of 0.266 mm or less, containing, by weight, 12.5 to 14.5 percent chromium, and certified at the time of entry to be used in the manufacture of razor blades. *See* Chapter 72 of the HTSUS, ''Additional U.S. Note'' 1(d).

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[1] *See Notice of Antidumping Duty Order: Stainless Steel Sheet and Strip in Coils from United Kingdom, Taiwan, and South Korea,* 64 FR 40555 (July 27, 1999); *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Stainless Steel Sheet and Strip in Coils from Japan,* 64 FR 40565 (July 27, 1999); and *Amended Final Determination: Stainless Steel Sheet and Strip in Coils from the Republic of Korea; and Notice of Countervailing Duty Orders: Stainless Steel Sheet and Strip in Coils from France, Italy, and the Republic of Korea,* 64 FR 42923 (August 6, 1999) (collectively, *Orders*).

[2] *See Stainless Steel Sheet and Strip from Japan, Korea, and Taiwan; Institution of Five-Year Review,* 87 FR 53780 (September 1, 2022).

[3] *See Initiation of Five-Year (''Sunset'') Review,* 87 FR 53727 (September 1, 2022).

[4] *See Stainless Steel Sheet and Strip in Coils from Japan, the Republic of Korea, and Taiwan: Final Results of the Expedited Fourth Sunset Review of the Antidumping Duty Orders,* 87 FR 74133 (December 2, 2022), and accompanying Issues and Decision Memorandum (IDM); and *Stainless Steel Sheet and Strip in Coils from the Republic of Korea: Final Results of Expedited Sunset Review of the Countervailing Duty Order,* 87 FR 74130 (December 2, 2022), and accompanying IDM.

[5] *See Stainless Steel Sheet and Strip from Japan, South Korea, and Taiwan Determinations,* 88 FR 73043 (October 24, 2023) (*ITC Final Determination*).

Flapper valve steel is also excluded from the scope of the review. This product is defined as stainless steel strip in coils containing, by weight, between 0.37 and 0.43 percent carbon, between 1.15 and 1.35 percent molybdenum, and between 0.20 and 0.80 percent manganese. This steel also contains, by weight, phosphorus of 0.025 percent or less, silicon of between 0.20 and 0.50 percent, and sulfur of 0.020 percent or less. The product is manufactured by means of vacuum arc remelting, with inclusion controls for sulphide of no more than 0.04 percent and for oxide of no more than 0.05 percent. Flapper valve steel has a tensile strength of between 210 and 300 ksi, yield strength of between 170 and 270 ksi, plus or minus 8 ksi, and a hardness (Hv) of between 460 and 590. Flapper valve steel is most commonly used to produce specialty flapper valves in compressors.

Also excluded is a product referred to as suspension foil, a specialty steel product used in the manufacture of suspension assemblies for computer disk drives. Suspension foil is described as 302/304 grade or 202 grade stainless steel of a thickness between 14 and 127 microns, with a thickness tolerance of plus-or-minus 2.01 microns, and surface glossiness of 200 to 700 percent Gs. Suspension foil must be supplied in coil widths of not more than 407 mm, and with a mass of 225 kg or less. Roll marks may only be visible on one side, with no scratches of measurable depth. The material must exhibit residual stresses of 2 mm maximum deflection, and flatness of 1.6 mm over 685 mm length.

Certain stainless steel foil for automotive catalytic converters is also excluded from the scope of these *Orders.* This stainless steel strip in coils is a specialty foil with a thickness of between 20 and 110 microns used to produce a metallic substrate with a honeycomb structure for use in automotive catalytic converters. The steel contains, by weight, carbon of no more than 0.030 percent, silicon of no more than 1.0 percent, manganese of no more than 1.0 percent, chromium of between 19 and 22 percent, aluminum of no less than 5.0 percent, phosphorus of no more than 0.045 percent, sulfur of no more than 0.03 percent, lanthanum of less than 0.002 or greater than 0.05 percent, and total rare earth elements of more than 0.06 percent, with the balance iron.

Permanent magnet iron-chromium-cobalt alloy stainless strip is also excluded from the scope of this order. This ductile stainless steel strip contains, by weight, 26 to 30 percent chromium, and 7 to 10 percent cobalt, with the remainder of iron, in widths 228.6 mm or less, and a thickness between 0.127 and 1.270 mm. It exhibits magnetic remanence between 9,000 and 12,000 gauss, and a coercivity of between 50 and 300 oersteds. This product is most commonly used in electronic sensors and is currently available under proprietary trade names such as ''Arnokrome III.'' [6]

Certain electrical resistance alloy steel is also excluded from the scope of these *Orders.* This product is defined as a non-magnetic stainless steel manufactured to American Society of Testing and Materials (ASTM) specification B344 and containing, by weight, 36 percent nickel, 18 percent chromium, and 46 percent iron, and is most notable for its resistance to high temperature corrosion. It has a melting point of 1390 degrees Celsius and displays a creep rupture limit of 4 kilograms per square millimeter at 1000 degrees Celsius. This steel is most commonly used in the production of heating ribbons for circuit breakers and industrial furnaces, and in rheostats for railway locomotives. The product is currently available under proprietary trade names such as ''Gilphy 36.'' [7]

Certain martensitic precipitation-hardenable stainless steel is also excluded from the scope of these *Orders.* This high-strength, ductile stainless steel product is designated under the Unified Numbering System (UNS) as S45500-grade steel, and contains, by weight, 11 to 13 percent chromium, and 7 to 10 percent nickel. Carbon, manganese, silicon and molybdenum each comprise, by weight, 0.05 percent or less, with phosphorus and sulfur each comprising, by weight, 0.03 percent or less. This steel has copper, niobium, and titanium added to achieve aging, and will exhibit yield strengths as high as 1700 Mpa and ultimate tensile strengths as high as 1750 Mpa after aging, with elongation percentages of 3 percent or less in 50 mm. It is generally provided in thicknesses between 0.635 and 0.787 mm, and in widths of 25.4 mm. This product is most commonly used in the manufacture of television tubes and is currently available under proprietary trade names such as ''Durphynox 17.'' [8]

Finally, three specialty stainless steels typically used in certain industrial blades and surgical and medical instruments are also excluded from the scope of these *Orders.* These include stainless steel strip in coils used in the production of textile cutting tools (*e.g.,* carpet knives).[9] This steel is similar to AISI grade 420 but containing, by weight, 0.5 to 0.7 percent of molybdenum. The steel also contains, by weight, carbon of between 1.0 and 1.1 percent, sulfur of 0.020 percent or less, and includes between 0.20 and 0.30 percent copper and between 0.20 and 0.50 percent cobalt. This steel is sold under proprietary names such as ''GIN4 Mo.'' The second excluded stainless steel strip in coils is similar to AISI 420–J2 and contains, by weight, carbon of between 0.62 and 0.70 percent, silicon of between 0.20 and 0.50 percent, manganese of between 0.45 and 0.80 percent, phosphorus of no more than 0.025 percent and sulfur of no more than 0.020 percent. This steel has a carbide density on average of 100 carbide particles per 100 square microns. An example of this product is ''GIN5'' steel. The third specialty steel has a chemical composition similar to AISI 420 F, with carbon of between 0.37 and 0.43 percent, molybdenum of between 1.15 and 1.35 percent, but lower manganese of between 0.20 and 0.80 percent, phosphorus of no more than 0.025 percent, silicon of between 0.20 and 0.50 percent, and sulfur of no more than 0.020 percent. This product is supplied with a hardness of more than Hv 500 guaranteed after customer processing, and is supplied as, for example, ''GIN6.'' [10]

Continuation of the Orders

As a result of the determinations by Commerce and the ITC that revocation of the *Orders* would likely lead to continuation or recurrence of dumping, countervailable subsidies, and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, Commerce hereby orders the continuation of the *Orders.* U.S. Customs and Border Protection will continue to collect AD and CVD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of the continuation of the *Orders* will be October 24, 2023.[11] Pursuant to section 751(c)(2) of the Act and 19 CFR 351.218(c)(2), Commerce intends to initiate the next five-year reviews of the *Orders* not later than 30 days prior to fifth anniversary of the date of the last determination by the ITC.

[6] ''Arnokrome III'' is a trademark of the Arnold Engineering Company.

[7] ''Gilphy 36'' is a trademark of Imphy, S.A.

[8] ''Durphynox 17'' is a trademark of Imphy, S.A.

[9] This list of uses is illustrative and provided for descriptive purposes only.

[10] ''GIN4 Mo,'' ''GIN5'' and ''GIN6'' are the proprietary grades of Hitachi Metals America, Ltd.

[11] *See ITC Final Determination.*

Administrative Protective Order (APO)

This notice also serves as a final reminder to parties subject to an APO of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceedings. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

These five-year (sunset) reviews and this notice are in accordance with sections 751(c) and 751(d)(2) of the Act and published in accordance with section 777(i) of the Act and 19 CFR 351.218(f)(4).

Dated: December 1, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–26884 Filed 12–6–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–489–819]

Steel Concrete Reinforcing Bar From the Republic of Turkey: Preliminary Results of Countervailing Duty Administrative Review and Rescission of Administrative Review, in Part; 2021

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that countervailable subsidies are being provided to producers and exporters of steel concrete reinforcing bar (rebar) from the Republic of Turkey (Turkey) during the period of review (POR) January 1, 2021, through December 31, 2021. In addition, we are rescinding the review with respect to 15 companies and announcing our preliminary intent to rescind this review with respect to four companies. Interested parties are invited to comment on these preliminary results.

DATES: Applicable December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Nicholas Czajkowski or Stefan Smith, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1395 or (202) 482–3464, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 6, 2014, Commerce published in the **Federal Register** the countervailing duty order on rebar from Turkey.[1] On November 1, 2022, Commerce published the notice of opportunity to request an administrative review of the *Order.*[2] On January 3, 2023, based on timely requests for an administrative review, Commerce published the notice of initiation of an administrative review of the *Order.*[3] On March 28, 2023, Commerce selected Colakoglu Metalurji A.S. (Colakoglu) and Kaptan Demir Celik Endustrisi ve Ticaret A.S. (Kaptan) as the mandatory respondents in this review.[4] On July 17, 2023, Commerce extended the deadline for the preliminary results of this administrative review until November 30, 2023.[5]

For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[6] A list of topics discussed in the Preliminary Decision Memorandum is included in the appendix to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order

The product covered by the *Order* is rebar from Turkey. For a complete description of the scope of the *Order, see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this countervailing duty administrative review in accordance with section 751(a)(1) of the Tariff Act of 1930, as amended (the Act). For each subsidy program found countervailable, Commerce preliminarily determines that there is a subsidy, *i.e.,* a financial contribution by an ''authority'' that gives rise to a benefit to the recipient, and that the subsidy is specific.[7] For a full description of the methodology underlying our conclusions, including our reliance, in part, on facts otherwise available pursuant to sections 776(a) and (b) of the Act, *see* the Preliminary Decision Memorandum.

Rescission of Administrative Review, In Part

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the parties that requested a review withdraw the request within 90 days of the date of publication of the notice of initiation. On April 3, 2022, the Rebar Trade Coalition (the petitioner) timely withdrew its requests for an administrative review of Icdas and its cross-owned affiliates (*i.e.,* Mardas Marmara Deniz Isletmeciligi A.S.; Artmak Denizcilik Ticaret ve Sanayi A.S.; Oraysan Insaat Sanayi ve Ticaret A.S.; Artim Demir Insaat Turizm Sanayi Ticaret Ltd. Sti.; Anka Entansif Hayvancilik Gida Tarim Sanayi ve Ticaret A.S.; Eras Tasimacilik Taahhut Insaat ve Ticaret A.S.; and Karsan Gemi Insaa Sanayi Ticaret A.S.).[8] Because the withdrawal request from the petitioner was timely filed, and no other party requested a review of these companies, in accordance with 19 CFR 351.213(d)(1), Commerce is rescinding this review of the *Order* with respect to the Icdas and its cross-owned affiliates

Based on our analysis of U.S. Customs and Border Protection (CBP) data, we determine that the following companies had no entries of subject merchandise during the POR: Ans Kargo Lojistik Tas

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[1] *See Steel Concrete Reinforcing Bar from the Republic of Turkey: Countervailing Duty Order,* 79 FR 65926 (November 6, 2014) (*Order*).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review and Join Annual Inquiry Service List,* 87 FR 65750 (November 1, 2022).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 88 FR 50, (January 3, 2023); *see also Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 88 FR 15642, (March 14, 2023).

[4] *See* Memorandum, ''Respondent Selection Memorandum,'' dated March 28, 2023.

[5] *See* Memorandum, ''Extension of Deadline for Preliminary Results of Countervailing Duty Administrative Review,'' dated July 17, 2023.

[6] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination of the 2021 Countervailing Duty Administrative Review and Rescission of Review in Part: Steel Concrete Reinforcing Bar from the Republic of Turkey,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[7] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[8] *See* Petitioner's, ''Partial Withdrawal of Request for Administrative Review,'' dated April 1, 2023

ve Tic; Baykan Dis Ticaret; Kibar dis Ticaret A.S.; Meral Makina Iml Ith Ihr Gida; Sami Soybas Demir Sanayi ve Ticaret; and Yucel Boru Ihracat Ithalat ve Pazarlama. On April 17, 2023, we notified parties of our intent to rescind the administrative review with respect to the four companies because there are no reviewable suspended entries.[9] No parties commented on the notification of intent to rescind the review, in part. Pursuant to 19 CFR 351.213(d)(3), we are rescinding the administrative review of these companies. For additional information regarding this determination, *see* the Preliminary Decision Memorandum.

Preliminary Results of Review

We preliminary find that the net countervailable subsidy rates exist for the period January 1, 2021, through December 31, 2021:

Company	Subsidy rate (percent *ad valorem*)
Kaptan Demir Celik Endustrisi ve Ticaret A.S., Kaptan Metal Dis Ticaret ve Nakliyat A.S., and their cross-owned affiliates[10]	5.54
Colakoglu Metalurji A.S	0.03 (*de minimis*)

Cash Deposit Requirements

In accordance with section 751(a)(2)(C) of the Act, Commerce also intends upon publication of the final results, to instruct CBP to collect cash deposits of the estimated countervailing duties in the amounts calculated in the final results of this review for the respective companies listed above with regard to shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review. If the rate calculated in the final results is zero or *de minimis,* no cash deposit will be required on shipments of the subject merchandise entered or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review.

For all non-reviewed firms, CBP will continue to collect cash deposits of estimated countervailing duties at the all-others rate or the most recent company-specific rate applicable to the company, as appropriate. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Assessment Rates

In accordance with section 751(a)(2)(C) of the Act and 19 CFR 351.221(b)(4)(i), we preliminarily determined subsidy rates in the amounts shown above for the producer/exporters shown above. Upon issuance of the final results of the administrative review, consistent with section 751(a)(1) of the Act and 19 CFR 351.212(b)(2), Commerce shall determine, and CBP shall assess, countervailing duties on all appropriate entries covered by this review.

For the companies for which this review is rescinded with these preliminary results, we will instruct CBP to assess countervailing duties on all appropriate entries at a rate equal to the cash deposit of estimated countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption, during the period January 1, 2021, through December 31, 2021, in accordance with 19 CFR 351.212(c)(l)(i). For the companies remaining in the review, we intend to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**.

If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Disclosure and Public Comment

We intend to disclose the calculations performed for these preliminary results to interested parties within five days after the date of publication of this notice.[11] Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs to Commerce no later than 30 days after the date of publication of these preliminary results of review. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[12] Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[13]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this review, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[14] Further, we request that interested parties limit their executive summary of each issue to no more than 450 words, not including citations. We intend to use the executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final results in this administrative review. We request that interested parties include footnotes for relevant citations in the executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[15]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. An electronically filed hearing request must be received successfully in its entirety by Commerce's electronic records system,

[9] *See* Memorandum, ''Notice of Intent to Rescind Review, in Part,'' dated April 17, 2023.

[10] Commerce preliminarily finds the following companies to be cross-owned with Kaptan: Martas Marmara Ereglisi Liman Tesisleri A.S.; Aset Madencilik A.S.; Kaptan Is Makinalari Hurda Alim Satim Ltd. Sti.; Efesan Demir San. Ve Tic. A.S.; and Nur Gemicilik ve Tic. A.S.

[11] *See* 19 CFR 351.224(b).

[12] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023) (*APO and Final Service Rule*).

[13] *See* 19 351.309(c)(2) and (d)(2)

[14] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[15] *See APO and Final Service Rule.*

ACCESS, by 5 p.m. Eastern Time within 30 days after the date of publication of this notice.

Unless extended, we intend to issue the final results of this administrative review, which will include the results of our analysis of the issues raised in the case briefs, within 120 days of publication of these preliminary results in the **Federal Register**, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(1).

Notification to Interested Parties

These preliminary results of review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213 and 351.221(b)(4).

Dated: November 30, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Rescission of Administrative Review, in Part
V. Use of Facts Otherwise Available and Application of Adverse Inferences
VI. Subsidies Valuation Information
VII. Analysis of Programs
VIII. Recommendation

[FR Doc. 2023–26881 Filed 12–6–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–580–898]

Large Diameter Welded Pipe From the Republic of Korea: Final Results of Countervailing Duty Administrative Review; 2021

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that producers and/or exporters of large diameter welded pipe (welded pipe) from the Republic of Korea (Korea) received countervailable subsidies during the period of review (POR), January 1, 2021, through December 31, 2021.

DATES: Applicable December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Jonathan Schueler or Faris Montgomery, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–9175 or (202) 482–1537, respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 7, 2023, Commerce published the *Preliminary Results* of this administrative review in the **Federal Register**,[1] and invited interested parties to comment. For a complete description of the events that followed the *Preliminary Results, see* the Issues and Decision Memorandum.[2] Commerce postponed these final results until December 1, 2023.[3]

Scope of the Order [4]

The merchandise covered by the *Order* is welded pipe. For a complete description of the scope of the *Order, see* the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in interested parties' briefs are addressed in the Issues and Decision Memorandum. A list of the issues addressed is attached to this notice as an appendix. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on our analysis of the case and rebuttal briefs and the evidence on the record, we made certain changes from the *Preliminary Results* related to the benefit calculations of certain programs due to data corrections based on verification findings. These changes are explained in the Issues and Decision Memorandum.

Methodology

Commerce conducted this review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, we find that there is a subsidy, *i.e.,* a government-provided financial contribution that gives rise to a benefit to the recipient, and that the subsidy is specific.[5] For a description of the methodology underlying Commerce's conclusions, *see* the Issues and Decision Memorandum.

Verification

As provided in section 782(i) of the Act, in August and September 2023, Commerce conducted on-site verification of the subsidy information reported by Hyundai RB Co., Ltd (Hyundai RB), SeAH Steel Corporation (SeAH Steel), and the Government of Korea. We used standard on-site verification procedures, including an examination of relevant accounting records and original source documents provided by the respondents.

Rate for Non-Selected Companies

Generally, Commerce looks to section 705(c)(5) of the Act for guidance for calculating the rate for companies that were not selected for individual examination in an administrative review. Section 705(c)(5)(A) of the Act states that for companies not investigated, in general, we will determine an all-others rate by weight averaging the countervailable subsidy rates established for each of the companies individually investigated, excluding zero and *de minimis* rates or any rates based solely on facts otherwise available. Here, the only rate that is not zero, *de minimis,* or based entirely on facts otherwise available is the rate calculated for Hyundai RB. Consequently, we are assigning this rate to HiSteel Co., Ltd., the only company not selected for individual examination.

Final Results of Review

In accordance with 19 CFR 351.221(b)(5), we determine the following net countervailable subsidy rates exist for the POR January 1, 2021, through December 31, 2021:

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[1] *See Large Diameter Welded Pipe from the Republic of Korea: Preliminary Results and Partial Rescission of the Countervailing Duty Administrative Review; 2021,* 88 FR 37200 (June 7, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review of Large Diameter Welded Pipe from the Republic of Korea; 2021,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Memoranda, ''Extension of Deadline for Final Results of Countervailing Duty Administrative Review; 2021,'' dated September 27, 2023; and ''Second Extension of Deadline for Final Results of Countervailing Duty Administrative Review; 2021,'' dated November 8, 2023.

[4] *See Large Diameter Welded Pipe from the Republic of Korea: Countervailing Duty Order,* 84 FR 18773 (May 2, 2019) (*Order*).

[5] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

Company	Subsidy rate (percent *ad valorem*)
Hyundai RB Co., Ltd. and its cross-owned affiliates [6]	1.54
SeAH Steel Corporation and its cross-owned affiliates [7]	* 0.19
HiSteel Co., Ltd	1.54

* (*de minimis*).

Disclosure

Commerce intends to disclose to parties in this proceeding the calculations performed for these final results of review within five days of the date of publication of this notice in the **Federal Register**.[8]

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b)(2), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, countervailing duties on all appropriate entries of subject merchandise in accordance with the final results of this review, for the above-listed companies at the applicable *ad valorem* assessment rates listed. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Instructions

In accordance with section 751(a)(1) of the Act, Commerce intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown for each of the companies listed above based on shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.[9] For all non-reviewed firms subject to the *Order,* we will instruct CBP to continue to collect cash deposits of estimated countervailing duties at the most recent company-specific rate or the all-others rate (*i.e.,* 9.29 percent), as appropriate.[10] These cash deposit requirements, effective upon publication of these final results, shall remain in effect until further notice.

Administrative Protective Order

This notice also serves as a reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing these final results in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.221(b)(5).

Dated: December 1, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Subsidies Valuation Information
V. Analysis of Programs
VI. Discussion of Comments
Comment 1: Whether the Korea Emissions Trading System (K–ETS) Program Is Countervailable
Comment 2: Whether the Provision of Electricity for Less Than Adequate Remuneration (LTAR) Is Countervailable
Comment 3: Whether the Demand Response Resources (DRR) Program Is Countervailable
Comment 4: Whether Certain Programs Are *De Facto* Specific When Widely Available and Used
Comment 5: Whether the Energy Storage Systems (ESS) Program Is Specific
Comment 6: Whether the Employment Security Improvement (ESI) Program Is Countervailable
Comment 7: Whether To Adjust the Calculated Benefit Under Restriction of Special Local Taxation Act (RSLTA) Article 78 for the Payment of the Special Rural Development Tax (SRDT)
VII. Recommendation

[FR Doc. 2023–26901 Filed 12–6–23; 8:45 am]

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[6] Commerce finds Shinchang Construction Co., Ltd. to be cross-owned with Hyundai RB.

[7] Commerce finds the following companies to be cross-owned with SeAH Steel: SeAH Holdings Corporation; and ESAB SeAH Corporation.

[8] *See* 19 CFR 351.224(b).

[9] *See, e.g., Honey from Argentina: Results of Countervailing Duty Administrative Review,* 69 FR 29518 (May 24, 2004), and accompanying Issues and Decision Memorandum at Issue 4.

[10] *See Order,* 84 FR at 18775.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–844]

Certain Aluminum Foil From the Republic of Turkey: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily finds that the certain producers/exporters subject to this administrative review made sales of subject merchandise at less than normal value (NV) during the period of review (POR) September 23, 2021, through October 31, 2022. Interested parties are invited to comment on these preliminary results.

DATES: Applicable December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Christopher Williams or Bryan Hansen, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington DC 20230; telephone: (202) 482–5166 or (202) 482–3683, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 12, 2021, Commerce published in the **Federal Register** the antidumping duty order on certain aluminum foil (aluminum foil) from the Republic of Turkey (Turkey).[1] On November 1, 2022, we published in the **Federal Register** a notice of opportunity to request an administrative review of the *Order* for the POR.[2] On January 3, 2023, based on timely requests for an administrative review, Commerce initiated an administrative review of the *Order* with respect to four companies.[3] On January 26, 2023, Commerce selected the Assan Single Entity [4] for

[1] *See Certain Aluminum Foil from the Republic of Armenia, Brazil, the Sultanate of Oman, the Russian Federation, and the Republic of Turkey: Antidumping Duty Orders,* 86 FR 62790 (November 12, 2021) (*Order*).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review and Join Annual Inquiry Service List,* 87 FR 65750 (November 1, 2022).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 88 FR 50, 55 (January 3, 2023) (*Initiation Notice*).

[4] Commerce previously determined that Assan Aluminyum Sanayi ve Ticaret A.S., Kibar Dis Ticaret A.S., and Ispak Esnek Ambalaj Sanayi A.S., comprise the Assan Single Entity. *See Certain*

Continued

individual examination as a mandatory respondent in this administrative review.[5] On May 5, 2023, Commerce selected ASAS Aluminyum Sanayi Ve Ticaret (ASAS) as an additional mandatory respondent in this administrative review.[6]

On July 6, 2023, Commerce extended the time limit for these preliminary results to November 17, 2023.[7] On November 13, 2023, Commerce, again, extended the time limit for these preliminary results to November 30, 2023.[8] For a complete description of the events between the initiation of the administrative review and these preliminary results, *see* the Preliminary Decision Memorandum.[9]

A list of the topics discussed in the Preliminary Decision Memorandum is attached as the appendix to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order

The merchandise covered by the *Order* is aluminum foil from Turkey. For a full description of the scope of the *Order, see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act). We calculated export price and constructed export price in accordance with section 772 of the Act, and we calculated NV in accordance with section 773 of the Act. For a full description of the methodology underlying these preliminary results, *see* the Preliminary Decision Memorandum.

Rate for Non-Examined Companies

The statute and Commerce's regulations do not address the establishment of a rate to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a less-than-fair-value (LTFV) investigation, for guidance when calculating the weighted-average dumping margin for companies which were not selected for individual examination in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted-average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available}.''

In this administrative review, Commerce calculated individual weighted-average dumping margins for the Assan Single Entity and ASAS, the two mandatory respondents, that are not zero, *de minimis,* or based entirely on facts otherwise available. Because the calculated individual weighted-average dumping margins are not zero, *de minimis,* or based entirely on facts otherwise available, Commerce calculated the rate for non-examined companies using a weighted average of the weighted-average dumping margins calculated for the mandatory respondents using each company's publicly-ranged U.S. sales values for the merchandise under consideration, consistent with the guidance in section 735(c)(5)(B) of the Act.[10]

Preliminary Results of Review

We preliminarily determine that the following estimated weighted-average dumping margins exist for the period September 23, 2021, through October 31, 2022:

Producer and/ or exporter	Weighted-average dumping margin (percent)
ASAS Aluminyum Sanayi Ve Ticaret	1.33
Assan Single Entity [11]	1.30
Ilda Pack Ambalaj	1.30
Panda Aluminyum A.S	1.30

Disclosure and Public Comment

We intend to disclose the calculations performed for these preliminary results to interested parties within five days after the date of publication of this notice.[12] Pursuant to 19 CFR 351.309(c)(1)(ii), interested parties may submit case briefs to Commerce no later than 30 days after the date of publication of this notice.[13] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[14]

Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[15] As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this review, we instead request that interested parties

Aluminum Foil from the Republic of Turkey: Final Affirmative Determination of Sales at Less Than Fair Value, 86 FR 52880 n.10 (September 23, 2021); *see also Initiation Notice,* 88 FR at 51 (''Commerce will not conduct collapsing analyses at the respondent selection phase of this review and will not collapse companies at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this {antidumping duty} proceeding (*e.g.,* investigation, administrative review, new shipper review, or changed circumstances review).'').

[5] *See* Memorandum, ''Respondent Selection,'' dated January 26, 2023.

[6] *See* Memorandum, ''Additional Respondent Selection,'' dated May 5, 2023.

[7] *See* Memorandum, ''Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review; 2021–2022,'' dated July 6, 2023.

[8] *See* Memorandum, ''Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review; 2021–2022,'' dated November 13, 2023.

[9] *See* Memorandum, ''Certain Aluminum Foil from the Republic of Turkey: Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[10] With rates for two examined respondents, Commerce normally calculates: (A) a weighted-average of the weighted-average dumping margins calculated for the examined respondents using each company's actual total U.S. sales value; (B) a simple average of the weighted-average dumping margins calculated for the examined respondents; and (C) a weighted-average of the weighted-average dumping margins calculated for the examined respondents using each company's publicly-ranged total U.S. sales value. Commerce then compares (B) and (C) to (A), and, in order to not reveal the business proprietary total U.S. sales value of the two examined respondents, selects the rate closest to (A) as the most appropriate rate for the non-examined companies. *See* Memorandum, ''Certain Aluminum Foil from Turkey: Preliminary Rate for Non-Selected Respondents,'' dated November 30, 2023; *see also Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53662 (September 1, 2010), and accompanying Issues and Decision Memorandum at Comment 1.

[11] The Assan Single Entity consists of Assan Aluminyum Sanayi ve Ticaret A.S., Kibar Dis Ticaret A.S., and Ispak Esnek Ambalaj Sanayi A.S. *See also Initiation Notice,* 88 FR at 55.

[12] *See* 19 CFR 351.224(b).

[13] *See also* 19 CFR 351.303 (for general filing requirements).

[14] *See* 19 CFR 351.309(d)(1); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023).

[15] *See* 19 351.309(c)(2) and (d)(2).

provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[16] Further, we request that interested parties limit their executive summary of each issue to no more than 450 words, not including citations. We intend to use the executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final results in this administrative review. We request that interested parties include footnotes for relevant citations in the executive summary of each issue.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs.

All submissions, including case and rebuttal briefs, as well as hearing requests, should be filed using ACCESS.[17] An electronically filed document must be received successfully in its entirety by ACCESS by 5:00 p.m. Eastern Time on the established deadline. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[18]

Final Results of Review

Unless otherwise extended, Commerce intends to issue the final results of this administrative review, including the results of its analysis of issues raised in written briefs, not later than 120 days after the publication of this notice in the **Federal Register**, pursuant to 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(1).

Assessment of Antidumping Duties

Upon completion of the final results of this administrative review, pursuant to section 751(a)(2)(A) of the Act, Commerce shall determine, and the U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise covered by this review.[19]

If an examined respondent's weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.5 percent) in the final results of this review, we intend to calculate an importer-specific assessment rate for antidumping duties based on the ratio of the total amount of dumping calculated for each importer's examined sales and the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1). For the companies identified above that were not selected for individual examination, we will instruct CBP to assess antidumping duties at a rate equal to the weighted-average dumping margin established in the final results of review. If the respondent's weighted-average dumping margin or an importer-specific assessment rate is zero or *de minimis* in the final results of this review, we intend to instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

For entries of subject merchandise during the POR produced by either of the individually examined respondents for which they did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate these entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[20]

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

The final results of this administrative review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.[21]

Cash Deposit Requirements

The following cash deposit requirements for estimated antidumping duties will be effective upon publication in the **Federal Register** of the notice of the final results of this review for all shipments of aluminum foil from Turkey entered, or withdrawn from warehouse, for consumption on or after the date of publication as provided by section 751(a)(2) of the Act: (1) the cash deposit rate for companies subject to this review will be equal to the weighted-average dumping margins established in the final results of the review; (2) for merchandise exported by companies not covered in this review but covered in a prior completed segment of this proceeding, the cash deposit rate will continue to be the company-specific rate published in the completed segment for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the investigation but the producer is, then the cash deposit rate will be the rate established in the most recently completed segment of this proceeding for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 1.95 percent, the all-others rate established in the LTFV investigation, adjusted for the export-subsidy rate in the companion countervailing duty investigation.[22] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of double antidumping duties, and/or an increase in the amount of antidumping duties by the amount of countervailing duties.

Notification to Interested Parties

We are issuing and publishing these preliminary results in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213 and 19 CFR 351.221(b)(4).

Dated: November 30, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Rate for Non-Examined Companies
V. Discussion of the Methodology

[16] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[17] *See* 19 CFR 351.303.

[18] *See Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings; Final Rule,* 88 FR 67069 (September 29, 2023).

[19] *See* 19 CFR 351.212(b)(1).

[20] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[21] *See* section 751(a)(2)(C) of the Act.

[22] *See Order,* 86 FR at 62792.

VI. Currency Conversion
VII. Recommendation

[FR Doc. 2023–26859 Filed 12–6–23; 8:45 am]
BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–560–836]

Mattresses From Indonesia: Final Results of Antidumping Duty Administrative Review; 2020–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that PT Ecos Jaya Indonesia and PT Grantec Jaya Indonesia (collectively, Ecos/Grantec) and PT Zinus Global Indonesia (Zinus) made sales of subject merchandise in the United States at prices below normal value (NV) during the period of review (POR), November 3, 2020, through April 30, 2022. Commerce further determines that sales of subject merchandise made by the non-individually examined companies were at prices below NV.

DATES: Applicable December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Katherine Johnson or Brian Smith, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4929 or (202) 482–1766, respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 6, 2023, Commerce published the *Preliminary Results* of this administrative review.[1] We invited interested parties to comment on the *Preliminary Results.* On September 15, 2023, Commerce extended the deadline for the final results of this administrative review until December 1, 2023.[2] *For a summary of the events that occurred since the Preliminary Results*, see the Issues and Decision Memorandum.[3] Commerce conducted this review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order [4]

The merchandise covered by this *Order* is mattresses from Indonesia. A full description of the scope of the *Order* is contained in the Issues and Decision Memorandum.

Analysis of Comments Received

We addressed all issues raised in the case and rebuttal briefs filed in this administrative review in the Issues and Decision Memorandum. A list of the issues addressed in the Issues and Decision Memorandum is included in Appendix I. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade/gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on an analysis of the comments received and our findings at verification, we have made changes to the margin calculations in the *Preliminary Results* for both Ecos/Grantec and Zinus.[5]

Rate for Non-Examined Respondents

The statute and Commerce's regulations do not address the establishment of a weighted-average dumping margin to be determined for companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when determining the weighted-average dumping margin for companies which were not selected for individual examination in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely on the basis of facts available.

In this review, we calculated weighted-average dumping margins of 8.40 percent and 6.75 percent for Ecos/Grantec and Zinus, respectively. With two respondents under individual examination, Commerce normally calculates: (A) a weighted-average of the estimated dumping rates calculated for the examined respondents; (B) a simple average of the estimated dumping rates calculated for the examined respondents; and (C) a weighted-average of the estimated dumping rates calculated for the examined respondents using each company's publicly-ranged U.S. sales values for the merchandise under consideration. Commerce then compares (B) and (C) to (A) and selects the rates closest to (A) as the most appropriate rate for all other producers and exporters.[6] As a result of this comparison, we assigned a dumping margin of 7.04 percent to the non-examined companies.[7]

Final Results of Review

We determine that the following weighted-average dumping margins exist for the POR:

Exporter or producer	Weighted -average dumping margin (percent)
PT Ecos Jaya Indonesia/PT Grantec Jaya Indonesia [8] ..	8.40
PT Zinus Global Indonesia ...	6.75
Non-Examined Companies [9]	7.04

The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.[10]

Disclosure

We intend to disclose the calculations performed for these final results of

[1] *See Mattresses from Indonesia: Preliminary Results of Antidumping Duty Administrative Review; 2020–2022,* 88 FR 37027 (June 6, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Extension of Deadline for Final Results of Antidumping Duty Administrative Review,'' dated September 15, 2023.

[3] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the 2020–2022 Antidumping Duty Administrative Review: Mattresses from Indonesia,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] *See Mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, Republic of Turkey, and the Socialist Republic of Vietnam: Antidumping Duty Orders and Amended Final Affirmative Antidumping Determination for Cambodia,* 86 FR 26460 (May 14, 2021) (*Order*).

[5] *See* the Issues and Decision Memorandum.

[6] *See, e.g., Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661 (September 1, 2020).

[7] *See* Memorandum, ''Calculation of the Cash Deposit Rate for Non-Selected Companies,'' dated December 1, 2023.

[8] We are treating these companies as a single entity for purposes of this review. For a complete discussion, *see* Memorandum, ''Affiliation and Collapsing of PT Ecos Jaya Indonesia and PT Grantec Jaya Indonesia,'' dated December 8, 2022.

[9] *See* Appendix II for a list of these companies.

[10] *See* section 751(a)(2)(C) of the Act.

review to interested parties within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b)(1), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review.

Pursuant to 19 CFR 351.212(b)(1), because Ecos/Grantec and Zinus reported the entered value for their U.S. sales, we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of those sales. Where an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.[11]

Commerce's ''automatic assessment'' practice will apply to entries of subject merchandise during the POR produced by Ecos/Grantec or Zinus for which the reviewed companies did not know that the merchandise they sold to the intermediary (*e.g.,* a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[12]

For the companies that were not selected for individual review, we assigned an assessment rate based on the review-specific average rate, calculated as noted in the ''Rate for Non-Examined Respondents'' section, above.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

[11] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification,* 77 FR 8101, 8102 (February 14, 2012).

[12] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rates for the reviewed companies will be equal to the weighted-average dumping margin established in the final results of this review; (2) for producers or exporters not covered in this review but covered in a prior completed segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published in the most recently completed segment; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the producer is, then the cash deposit rate will be the rate established in the most recently completed segment for the producer of the merchandise; (4) the cash deposit rate for all other producers or exporters will continue to be 2.22 percent, the all-others rate established in the LTFV investigation in this proceeding.[13] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Administrative Protective Order

This notice also serves as a reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation subject to sanction.

[13] *See Order.*

Notification to Interested Parties

We are issuing and publishing these final results of administrative review in accordance with sections 751(a) and 777(i) of the Act, and 19 CFR 351.221(b)(5).

Dated: December 1, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Changes Since the *Preliminary Results*
V. Discussion of the Issues
General
Comment 1: Calculation of Constructed Value Profit, Selling Expense, and Constructed Export Price Profit Ratios
Ecos/Grantec
Comment 2: Whether Commerce Should Use Facts Available When Applying the Transactions Disregarded Rule
Comment 3: Whether Ecos/Grantec Failed to Report Sales and Cost Data for Subject Merchandise
Comment 4: Treatment of Allowances
Zinus
Comment 5: Whether Zinus' Reported Export Price Sales Should Be Considered As Constructed Export Price Sales
Comment 6: Zinus KR's Indirect Selling Expenses
Comment 7: Calculation of Zinus KR's General and Administrative Expenses
Comment 8: Treatment of Zinus' Unpaid Balances
Comment 9: Treatment of U.S. Sales of B Grade Mattresses
Comment 10: Treatment of Zinus KR's Research and Development Expenses
Comment 11: Appropriate Customer Code for Differential Pricing Analysis
Comment 12: Treatment of Advertising Expenses
Comment 13: Accounting for Scrap Offset
Comment 14: Application of Exchange Rate to Zinus Indonesia's Costs
Comment 15: Recalculation of Credit Expenses (CREDIT2U)
VI. Recommendation

Appendix II

Companies Not Selected for Individual Examination

1. Bali Natural Latex
2. CV. Aumireta Anggun
3. CV. Lautan Rezeki
4. Duta Abadi Primantara, Pt
5. Ecos Jaya JL Pasir Awi
6. Mimpi
7. PT. Ateja Multi Industri
8. PT. Ateja Tritunggal
9. PT. Aurora World Cianjur
10. P.T. Barat Daya Gemilang
11. PT. CJ Logistics Indonesia
12. PT. Cahaya Buana Furindotama;
13. PT Celebes Putra Prima
14. PT Demak Putra Mandiri

15. PT. Dinamika Indonusa Prima
16. PT. Dunlopillo Indonesia
17. PT. Dynasti Indomegah
18. PT Graha Anom Jaya
19. PT Graha Seribusatujaya
20. PT Kline Total Logistics Indonesia
21. PT. Massindo International
22. PT. Ocean Centra Furnindo
23. PT. Quantum Tosan Internasional
24. PT. Romance Bedding & Furniture
25. PT. Royal Abadi Sejahtera
26. PT Rubberfoam Indonesia
27. PT Solo Murni Epte
28. PT. Transporindo Buana Kargotama
29. Sonder Canada Inc
30. Super Poly Industry PT

[FR Doc. 2023–26899 Filed 12–6–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–112]

Certain Collated Steel Staples From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; and Final Determination of No Shipments; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that Tianjin Hweschun Fasteners Manufacturing Co., Ltd. (Tianjin Hweschun), the sole mandatory respondent in this review, did not sell subject merchandise to the United States at prices below normal value (NV) during the period of review (POR), July 1, 2021, through June 30, 2022. Commerce further determines that Zhejiang Best Nail Industrial Co., Ltd. (Best Nail)/Shaoxing Bohui Import & Export Co., Ltd. (Shaoxing Bohui) (collectively, Best Nail/Shaoxing Bohui), Tianjin Jinyifeng Hardware Co., Ltd. (Tianjin Jinyifeng), and Unicorn Fasteners Co., Ltd. (Unicorn Fasteners) made no shipments of subject merchandise from the People's Republic of China (China) during the POR. Commerce also determines that China Staple (Tianjin) Co., Ltd. (China Staple), Shanghai Yueda Nails Co., Ltd. (Shanghai Yueda), and Shijiazhuang Shuangming Trade Co., Ltd. (Shijiazhuang Shuangming) have not established eligibility for a separate rate and, therefore, are part of the China-wide entity.

DATES: Applicable December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Brian Smith, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1766.

SUPPLEMENTARY INFORMATION:

Background

On August 3, 2023, Commerce published the *Preliminary Results.*[1] For events subsequent to the *Preliminary Results, see* the Issues and Decision Memorandum.[2]

Scope of the Order[3]

The merchandise covered by the *Order* is certain collated steel staples, which are primarily classifiable under subheading 8305.20.0000 of the Harmonized Tariff Schedule of the United States (HTSUS). While the HTSUS subheading is provided for convenience and for customs purposes, the written description of the subject merchandise is dispositive. A full description of the scope of the *Order* is contained in the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised by interested parties in briefs are addressed in the Issues and Decision Memorandum. A list of the issues addressed in the Issues and Decision Memorandum is provided in Appendix I to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on our review of the record, and comments received from interested parties regarding our *Preliminary Results,* we made one change to the margin calculation for Tianjin Hweschun.[4]

Final Determination of No Shipments

In the *Preliminary Results,* we preliminarily determined that Best Nail/Shaoxing Bohai, Tianjin Jinyifeng, and Unicorn Fasteners had no shipments of subject merchandise to the United States during the POR.[5] No party filed comments with respect to this preliminary finding and we received no information to contradict it. Therefore, we continue to find that these three companies had no shipments of subject merchandise during the POR and will issue appropriate liquidation instructions that are consistent with our ''automatic assessment'' clarification for these final results.[6]

Separate Rate Eligibility

In our *Preliminary Results,* we determined that only Tianjin Hweschun demonstrated its eligibility for a separate rate.[7] As we received no information or interested party arguments to the contrary since the issuance of the *Preliminary Results,* we continue to find that this company is eligible for a separate rate.

The China-Wide Entity

In the *Preliminary Results,* Commerce found that China Staple, Shanghai Yueda, and Shijiazhuang Shuangming did not establish eligibility for a separate rate because they did not file timely separate rate applications or separate rate certifications, as appropriate.[8] No parties submitted comments on this preliminary finding, and we continue to determine that each of these entities did not establish its eligibility for a separate rate. Therefore, we determine China Staple, Shanghai Yueda, and Shijiazhuang Shuangming to be part of the China-wide entity. Because no party requested a review of the China-wide entity, and Commerce no longer considers the China-wide entity as an exporter conditionally subject to administrative reviews,[9] we did not conduct a review of the China-

[1] *See Certain Collated Steel Staples from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2021–2022,* 88 FR 51284 (August 3, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum, ''Certain Collated Steel Staples from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the 2021–2022 Antidumping Duty Administrative Review,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See Certain Collated Steel Staples from the People's Republic of China: Antidumping Duty Order,* 85 FR 43815 (July 20, 2020) (*Order*).

[4] *See* Issues and Decision Memorandum for further discussion; *see also* Memorandum, ''Final Results Calculation Memorandum for Tianjin Hweschun,'' dated concurrently with this notice.

[5] *See Preliminary Results,* 88 FR at 51284.

[6] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011) (*Assessment Practice Refinement*).

[7] *See Preliminary Results* PDM at 5–7.

[8] *Id.* at 7.

[9] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963, 65969–70 (November 4, 2013).

wide entity. Thus, the weighted-average dumping margin for the China-wide entity, as adjusted for export subsidies (*i.e.,* 112.01 percent),[10] is not subject to change as a result of this review.

Final Results of Review

Commerce determines that the following weighted-average dumping margin exists for Tianjin Hweschun for the period July 1, 2021, through June 30, 2022:

Exporter	Weighted-average dumping margin (percent)
Tianjin Hweschun Fasteners Manufacturing Co., Ltd	0.00

Disclosure

We intend to disclose the calculations performed to parties in this proceeding within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with these final results of review. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of these final results. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

For Tianjin Hweschun, we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.[11] For entries that were not reported in the U.S. sales database submitted by Tianjin Hweschun during this review, Commerce will instruct CBP to liquidate such entries at the China-wide rate (*i.e.,* 112.01 percent).

For the companies identified as part of the China-wide entity (*i.e.,* China Staple, Shanghai Yueda, and Shijiazhuang Shuangming), we will instruct CBP to apply the China-wide rate to all entries of subject merchandise during the POR which were exported by these companies.

For Best Nail/Shaoxing Bohai, Tianjin Jinyifeng, and Unicorn Fasteners, which Commerce determined had no shipments of the subject merchandise during the POR, any suspended entries that entered under each of these exporters' case numbers (*i.e.,* at that exporter's cash deposit rate) will be liquidated at the rate for the China-wide entity, consistent with Commerce's assessment practice in non-market economy cases.[12]

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for Tianjin Hweschun will be zero; (2) for previously investigated or reviewed Chinese and non-Chinese exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recently completed segment of this proceeding in which they were reviewed; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be equal to the weighted-average dumping margin for the China-wide entity (*i.e.,* 112.01 percent); and (4) for all non-Chinese exporters of subject merchandise which have not received their own separate rate, the cash deposit rate will be the rate applicable to the Chinese exporter(s) that supplied that non-Chinese exporter. These per-unit cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers Regarding the Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties has occurred and the subsequent assessment of double antidumping duties, and/or increase in the amount of antidumping duties by the amount of the countervailing duties.

Administrative Protective Order (APO)

This notice also serves as a reminder to parties subject to an APO of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

We are issuing and publishing these final results of administrative review and notice in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.221(b)(5).

Dated: November 30, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Changes Since the *Preliminary Results*
V. Discussion of the Issues
  Comment 1: Deduction of Countervailing Duties From U.S. Price
  Comment 2: Valuation of Labor
  Comment 3: Steel Scrap Offset
VI. Recommendation

[FR Doc. 2023–26893 Filed 12–6–23; 8:45 am]

BILLING CODE 3510–DS–P

[10] *See Order,* 86 FR at 43816. The weighted-average dumping margin for the China-wide entity (122.55 percent) was adjusted for export subsidies to determine the cash deposit rate (112.01 percent) for companies in the China-wide entity.

[11] *See* 19 CFR 351.106(c)(2).

[12] For a full discussion of this practice, *see Assessment Practice Refinement,* 76 FR at 65694.

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Domestic Manufacturing Waiver Request Form

AGENCY: National Institute of Standards and Technology (NIST), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the

Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before February 5, 2024.

ADDRESSES: Interested persons are invited to submit written comments by mail to Elizabeth Reinhart, Management Analyst, NIST, 100 Bureau Drive, Gaithersburg, MD 20899, or by email to *PRAcomments@doc.gov*. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Bethany Loftin, Interagency and iEdison Specialist, National Institute of Standards and Technology, 100 Bureau Drive, Gaithersburg, MD 20899, 202–941–7750, *bethany.loftin@nist.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Bayh-Dole Act (35 U.S.C. 18) and its implementing regulations (37 CFR 401) allow for recipients of federal research funding (Contractors) to retain ownership of inventions developed under federal funding agreements (Subject Inventions). In exchange, the government retains certain rights to the Subject Invention, including a world-wide right to use by or on behalf of the U.S. government, and the Contractor also has certain responsibilities and obligations. Among these obligations is a requirement that in certain circumstances products embodying the Subject Invention or produced through the use of the Subject Invention be manufactured substantially in the United States. The statute also allows the Contractor to request a waiver of this obligation if reasonable but unsuccessful efforts were made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or if under the circumstances domestic manufacture is not commercially feasible. This information collection will be utilized as a common form, which will allow other Federal agencies to request use.

II. Method of Collection

The form will be provided in PDF format. It may be submitted to funding agencies via email, via an attachment to a Domestic Manufacturing Waiver Request in the iEdison online reporting system if the agency participates in the iEdison online reporting system, or via other electronic transmission if the agency does not participate in the iEdison reporting system.

III. Data

OMB Control Number: 0693–XXXX.

Form Number(s): None.

Type of Review: Regular submission of a new Common Form.

Affected Public: Business or other for-profit organizations; not-for-profit institutions; State, local, or Tribal government.

Estimated Number of Respondents: 10.

Estimated Time per Response: 13 hours.

Estimated Total Annual Burden Hours: 130 hours.

Estimated Total Annual Cost to Public: $6355.00

Respondent's Obligation: Mandatory to obtain benefits.

Legal Authority: 35 U.S.C. 204.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–26910 Filed 12–6–23; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD253]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental To U.S. Navy 2024 Ice Exercise Activities in the Arctic Ocean

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. Navy (Navy) for authorization to take marine mammals incidental to 2024 Ice Exercise Activities in the Arctic Ocean. 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 Request for Public Comments 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. The Navy's activities are considered military readiness activities pursuant to the MMPA, as amended by the National Defense Authorization Act for Fiscal Year 2004 (2004 NDAA).

DATES: Comments and information must be received no later than January 8, 2024.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources (OPR), NMFS and should be submitted via email to *ITP.Davis@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-military-readiness-activities.* In case of problems accessing these documents, please call the contact listed above.

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: Leah Davis, 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 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.

The 2004 NDAA (Pub. L. 108–136) removed the ''small numbers'' and ''specified geographical region'' limitations indicated above and amended the definition of ''harassment'' as applied to a ''military readiness activity.'' The activity for which incidental take of marine mammals is being requested addressed here qualifies as a military readiness activity.

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. Accordingly, NMFS plans to adopt the Navy's Environmental Assessment (EA), provided our independent evaluation of the document finds that it includes adequate information analyzing the effects on the human environment of issuing the IHA. The Navy's EA was made available for public comment at *https://www.nepa.navy.mil/icex/* from September 29, 2023 to October 13, 2023.

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 24, 2023, NMFS received a request from the Navy for an IHA to take marine mammals incidental to submarine training and testing activities including establishment of a tracking range on an ice floe in the Arctic Ocean, north of Prudhoe Bay, Alaska. Following NMFS' review of the application, the Navy submitted a revised application on October 13, 2023 that removed the request for take of bearded seal and included an updated take estimate for ringed seals. The application was deemed adequate and complete on October 19, 2023. The Navy's request is for take of ringed seal by Level B harassment. Neither the Navy nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

NMFS previously issued IHAs to the Navy for similar activities (83 FR 6522; February 14, 2018, 85 FR 6518; February 5, 2020, 87 FR 7803; February 10, 2022). The Navy complied with all the requirements (*e.g.,* mitigation, monitoring, and reporting) of the previous IHAs, and information regarding their monitoring results may be found in the Estimated Take section.

Description of Proposed Activity

Overview

The Navy proposes to conduct submarine training and testing activities, which includes the establishment of a tracking range and temporary ice camp, and research in the Arctic Ocean for 6 weeks beginning in February 2024. Active acoustic transmissions may result in occurrence of Level B harassment, including temporary hearing impairment (temporary threshold shift (TTS)) and behavioral harassment, of ringed seals.

Dates and Duration

The specified activities would occur over approximately a six-week period between February and April 2024, including deployment and demobilization of the ice camp. The submarine training and testing activities would occur over approximately 4 weeks during the 6-week period. The proposed IHA would be effective from February 1, 2024 through April 30, 2024.

Geographic Region

The ice camp would be established approximately 100–200 nautical miles (nmi) north of Prudhoe Bay, Alaska. The exact location of the camp cannot be identified ahead of time as required conditions (*e.g.,* ice cover) cannot be forecasted until exercises are expected to commence. Prior to the establishment of the ice camp, reconnaissance flights would be conducted to locate suitable ice conditions. The reconnaissance flights would cover an area of approximately 70,374 square kilometers (km^2; 27,172 square miles (mi^2)). The actual ice camp would be no more than 1.6 kilometers (km; 1 mi) in diameter (approximately 2 km^2 (0.8 mi^2) in area). The vast majority of submarine training and testing would occur near the ice camp, however some submarine training and testing may occur throughout the deep Arctic Ocean basin near the North Pole within the larger Navy Activity Study Area. Figure 1 shows the locations of the Navy Activity Study Area and Ice Camp Study Area, collectively referred to in this document as the ''ICEX24 Study Area''.

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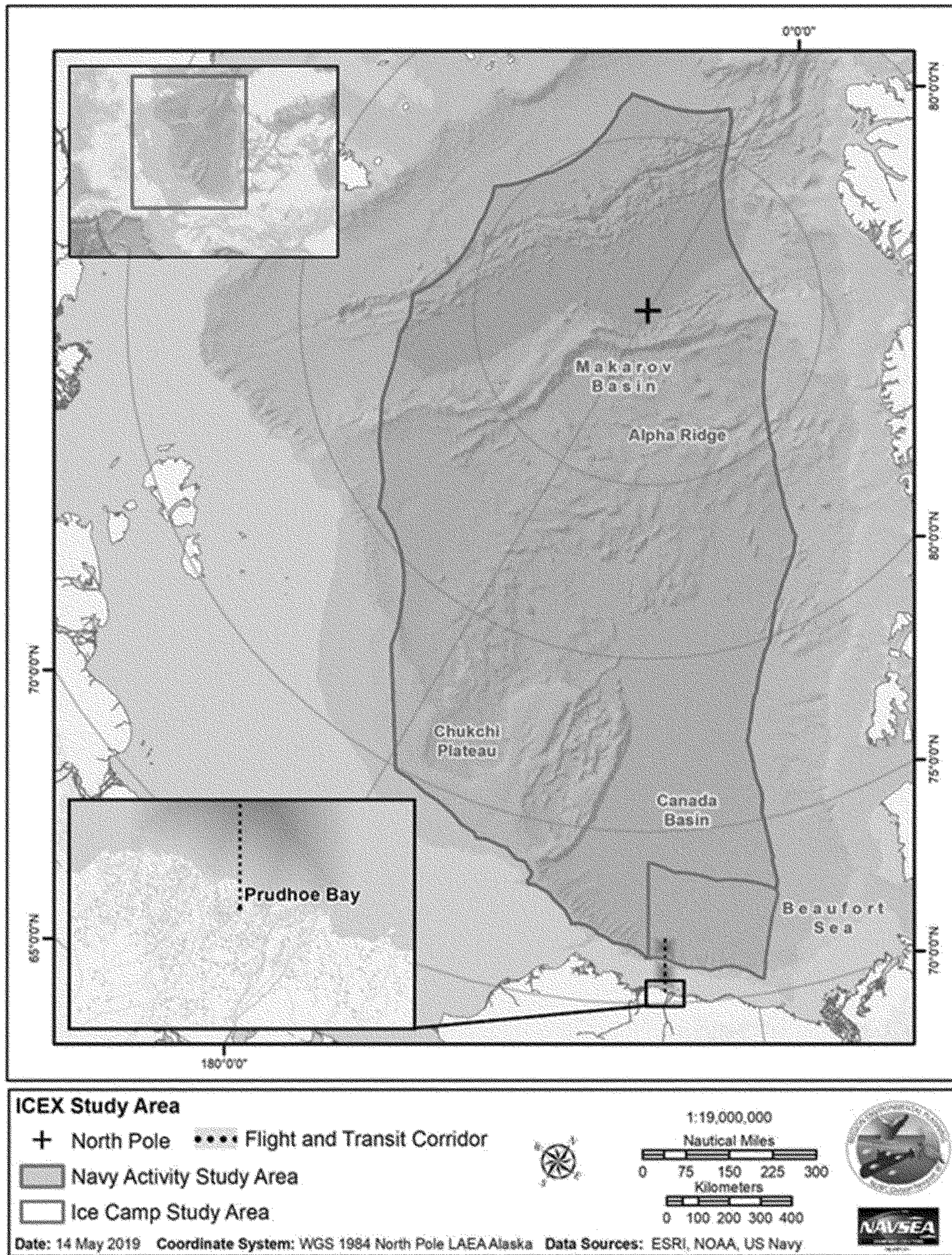

Figure 1 -- ICEX24 Study Area in the Arctic Ocean

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Detailed Description of the Specified Activity

The Navy proposes to conduct submarine training and testing activities, which includes the establishment of a tracking range and temporary ice camp, and research in the Arctic Ocean for six weeks beginning in February 2024. The activity proposed for 2024 and that is being evaluated for this proposed IHA—ICEX24—is part of a regular cycle of recurring training and testing activities that the Navy proposes to conduct in the Arctic, under which submarine and tracking range activities would be conducted biennially. Some of the submarine training and testing may occur throughout the deep Arctic Ocean basin near the North Pole, within the Navy Activity Study Area (Figure 1).

Additional information about the Navy's proposed training and testing activities in the Arctic is available in the Navy's 2023 Draft Supplemental Environmental Assessment/Overseas Environmental Assessment for the Ice Exercise Program, available at *https://www.nepa.navy.mil/icex/.* Only activities which may occur during ICEX24 are discussed in this section.

Ice Camp

ICEX24 includes the deployment of a temporary camp situated on an ice floe. Reconnaissance flights to search for suitable ice conditions for the ice camp would depart from the public airport in Deadhorse, Alaska. The camp generally would consist of a command hut, dining hut, sleeping quarters, a powerhouse, runway, and helipad. The number of structures and tents would range from 15–20, and each tent is typically 2 meters (m) by 6 m (6.6 ft by 19.7 ft) in size. The completed ice camp, including runway, would be approximately 1.6 km (1 mi) in diameter. Support equipment for the ice camp would include snowmobiles, gas-powered augers and saws (for boring holes through ice), and diesel generators. All ice camp materials, fuel, and food would be transported from Prudhoe Bay, Alaska, and delivered by air-drop from military transport aircraft (*e.g.,* C–17 and C–130), or by landing at the ice camp runway (*e.g.,* small twin-engine aircraft and military and commercial helicopters).

A portable tracking range for submarine training and testing would be installed in the vicinity of the ice camp. Hydrophones, located on the ice and extending to 30 m (90.4 ft) below the ice, would be deployed by drilling or melting holes in the ice and lowering the cable down into the water column. Hydrophones would be linked remotely to the command hut. Additionally, tracking pingers would be configured aboard each submarine to continuously monitor the location of the submarines. Acoustic communications with the submarines would be used to coordinate the training and research schedule with the submarines. An underwater telephone would be used as a backup to the acoustic communications. The Navy plans to recover the hydrophones; however, if emergency demobilization is required, or the hydrophones are frozen in place and are unrecoverable, they would be left in place.

Additional information about the ICEX24 ice camp is located in the 2023 Draft Supplemental Environmental Assessment/Overseas Environmental Assessment for the Ice Exercise Program. We have carefully reviewed this information and determined that activities associated with the ICEX24 ice camp, including *de minimis* acoustic communications, would not result in incidental take of marine mammals.

Submarine Activities

Submarine activities associated with ICEX24 generally would entail safety maneuvers and active sonar use. The safety maneuvers and sonar use are similar to submarine activities conducted in other undersea environments and are being conducted in the Arctic to test their performance in a cold environment. Submarine training and testing involves active acoustic transmissions, which have the potential to harass marine mammals. The Navy categorizes acoustic sources into "bins" based on frequency, source level, and mode of usage (U.S. Department of the Navy, 2013). The acoustic transmissions associated with submarine training fall within bins HF1 (hull-mounted submarine sonars that produce high-frequency (greater than 10 kHz but less than 200 kHz) signals) and M3 (mid-frequency (1–10 kHz) acoustic modems greater than 190 dB re 1 µPa) as defined in the Navy's Phase III at-sea environmental documentation (see Section 3.0.3.3.1, *Acoustic Stressors,* of the 2018 AFTT Final Environmental Impact Statement/Overseas Environmental Impact Statement, available at *https://www.nepa.navy.mil/AFTT-Phase-III/*). The specifics of ICEX24 submarine acoustic sources are classified, including the parameters associated with the designated bins. Details of source use for submarine training are also classified. Any ICEX-specific acoustic sources not captured under one of the at-sea bins were modeled using source-specific parameters.

Aspects of submarine training and testing activities other than active acoustic transmissions are fully analyzed within the 2023 Draft Supplemental Environmental Assessment/Overseas Environmental Assessment for the Ice Exercise Program. We have carefully reviewed and discussed with the Navy these other aspects, such as vessel use, and determined that aspects of submarine training and testing other than active acoustic transmissions would not result in take of marine mammals. These other aspects are therefore not discussed further, with the exception of potential vessel strike, which is discussed in the Potential Effects of Specified Activities on Marine Mammals and Their Habitat section.

Research Activities

Personnel and equipment proficiency testing and multiple research and development activities would be conducted as part of ICEX24. Unmanned underwater vehicle testing and various acoustic/communication sources (*i.e.,* echosounders, and transducers) involve active acoustic transmissions, which have the potential to harass marine mammals. Most acoustic transmissions that would be used in research activities for ICEX24 are considered *de minimis.* The Navy has defined *de minimis* sources as having the following parameters: low source levels, narrow beams, downward directed transmission, short pulse lengths, frequencies above (outside) known marine mammal hearing ranges, or some combination of these factors (U.S. Department of the Navy, 2013). NMFS reviewed the Navy's analysis and conclusions on *de minimis* sources and finds them complete and supportable. Parameters for scientific devices with active acoustics, including *de minimis* sources, are included in table 1. Additional information about ICEX24 research activities is located in table 1–1 of the Navy's IHA application as well as table 2–2 of the 2023 Draft Supplemental Environmental Assessment/Overseas Environmental Assessment for the Ice Exercise Program, and elsewhere in that document. The possibility of vessel strikes caused by use of unmanned underwater vehicles during ICEX24 is discussed in the Potential Effects of Vessel Strike subsection within the Potential Effects of Specified Activities on Marine Mammals and Their Habitat section.

TABLE 1—PARAMETERS FOR SCIENTIFIC DEVICES WITH ACTIVE ACOUSTICS

Research institution	Source name	Frequency range (kHz)	Source level (dB)	Pulse length	Source type
Woods Hole Oceanic Institute	LRAUV+	10 and 25	185 or less	14 and 3000 ms	Unmanned Underwater Vehicle.
Naval Postgraduate School	Echosounder	38 to 200	221	0.5 ms	Sonar.

TABLE 1—PARAMETERS FOR SCIENTIFIC DEVICES WITH ACTIVE ACOUSTICS—Continued

Research institution	Source name	Frequency range (kHz)	Source level (dB)	Pulse length	Source type
Massachusetts Institute of Technology Lincoln Lab.	Echosounder	115 and 200	227 or less	1 ms	Sonar.
Naval Postgraduate School	Geospectrum M72, Geospectrum M71, ITC 1007.	0.13, 0.8, and 5	190 or less	maximum length sequence of 20 min on and 40 min off.	Transducer.

Note: dB = decibels; kHz = kilohertz; LRAUV = Long Range Autonomous Underwater Vehicle; min = minutes; ms = millisecond(s).

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see Proposed Mitigation and Proposed Monitoring and Reporting).

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 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 [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]
Ringed Seal	*Pusa hispida*	Arctic	T, D, Y	UND [5] (UND, UND, 2013)	UND	6,459

[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). 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: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region.* CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance.
[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, ship 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.
[5] A reliable population estimate for the entire stock is not available. Using a sub-sample of data collected from the U.S portion of the Bering Sea, an abundance estimate of 171,418 ringed seals has been calculated, but this estimate does not account for availability bias due to seals in the water or in the shorefast ice zone at the time of the survey. The actual number of ringed seals in the U.S. portion of the Bering Sea is likely much higher. Using the N_{min} based upon this negatively biased population estimate, the PBR is calculated to be 4,755 seals, although this is also a negatively biased estimate.

As indicated in table 2, ringed seals (with one managed stock) temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur. While beluga whales (*Delphinapterus leucas*), gray whales (*Eschrichtius robustus*), bowhead whales (*Balaena mysticetus*), and spotted seals (*Phoca largha*) may occur in the ICEX24 Study 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. Bowhead whales are unlikely to occur in the ICEX24 Study Area between February and April, as they spend winter (December to April) in the northern Bering Sea and southern Chukchi Sea, and migrate north through the Chukchi Sea and Beaufort Sea during April and May (Young *et al.* 2023). On their spring migration, the earliest that bowhead whales reach Point Hope in the Chukchi Sea, well south of Point Barrow, is late March to mid-April (Braham *et al.* 1980). Although the ice camp location is not known with certainty, the distance between Point Barrow and the closest edge of the Ice Camp Study Area is over 200 km (124.3 mi). The distance between Point Barrow and the closest edge of the Navy Activity Study Area is over 50 km (31 mi), and the distance between Point Barrow and Point Hope is an additional 525 km (326.2 mi; straight line distance); accordingly, bowhead whales are unlikely to occur in the ICEX24 Study Area before ICEX24 activities conclude. Beluga whales follow a migration pattern similar to

bowhead whales. They typically overwinter in the Bering Sea and migrate north during the spring to the eastern Beaufort Sea where they spend the summer and early fall months (Young *et al.* 2023). Though the beluga whale migratory path crosses through the ICEX24 Study Area, they are unlikely to occur in the ICEX24 Study Area between February and April. (Of note, the ICEX24 Study Area does overlap the northernmost portion of the North Bering Strait, East Chukchi, West Beaufort Sea beluga whale migratory BIA (April and May), though the data support for this BIA is low, the boundary certainty is low, and the importance score is moderate. Given the spring migratory direction, the northernmost portion of the BIA is likely more important later in the April and May period, and overlap with this BIA does not imply that belugas are likely to be in the ICEX24 Study Area during the Navy's activities.) Gray whales feed primarily in the Beaufort Sea, Chukchi Sea, and Northwestern Bering Sea during the summer and fall, but migrate south to winter in Baja California lagoons (Young *et al.* 2023). Typically, northward migrating gray whales do not reach the Bering Sea before May or June (Frost and Karpovich 2008), after the ICEX24 activities would occur, and several hundred kilometers south of the ICEX24 Study Area. Further, gray whales are primarily bottom feeders (Swartz *et al.* 2006) in water less than 60 m (196.9 ft) deep (Pike 1962). Therefore, on the rare occasion that a gray whale does overwinter in the Beaufort Sea (Stafford *et al.* 2007), we would expect an overwintering individual to remain in shallow water over the continental shelf where it could feed. Therefore, gray whales are not expected to occur in the ICEX24 Study Area during the ICEX24 activity period. Spotted seals may also occur in the ICEX24 Study Area during summer and fall, but they are not expected to occur in the ICEX24 Study Area during the ICEX24 timeframe (Muto *et al.* 2020).

Further, while the Navy initially requested take of bearded seals (*Erignathus barbatus*), which do occur in the ICEX24 Study Area during the project timeframe, NMFS does not expect that bearded seals would occur in the areas near the ice camp or where submarine activities involving active acoustics would occur, and therefore incidental take is not anticipated to occur and has not been proposed for authorization. Bearded seals are not discussed further beyond the explanation provided here. The Navy anticipates that the ice camp would be established 100–200 nmi (185–370 km) north of Prudhoe Bay in water depths of 800 m (2,625 ft) or more, and also that submarine training and testing activities would occur in water depths of 800 m (2,625 ft) or more. Although acoustic data indicate that some bearded seals remain in the Beaufort Sea year round (MacIntyre *et al.* 2013, 2015; Jones *et al.* 2014), satellite tagging data (Boveng and Cameron 2013; ADF&G 2017) show that large numbers of bearded seals move south in fall/winter with the advancing ice edge to spend the winter in the Bering Sea, confirming previous visual observations (Burns and Frost 1979; Frost *et al.* 2008; Cameron and Boveng 2009). The southward movement of bearded seals in the fall means that very few individuals are expected to occur along the Beaufort Sea continental shelf in February through April, the timeframe for ICEX24 activities. The northward spring migration through the Bering Strait, begins in mid-April (Burns and Frost 1979).

In the event some bearded seals were to remain in the Beaufort Sea during the season when ICEX24 activities will occur, the most probable area in which bearded seals might occur during winter months is along the continental shelf. Bearded seals feed extensively on benthic invertebrates (*e.g.,* clams, gastropods, crabs, shrimp, bottom-dwelling fish; Quakenbush *et al.* 2011; Cameron *et al.* 2010) and are typically found in water depths of 200 m (656 ft) or less (Burns 1970). The Bureau of Ocean Energy Management (BOEM) conducted an aerial survey from June through October that covered the shallow Beaufort and Chukchi Sea shelf waters and observed bearded seals from Point Barrow to the border of Canada (Clarke *et al.* 2015). The farthest from shore that bearded seals were observed was the waters of the continental slope (though this study was conducted outside of the ICEX24 time frame). The Navy anticipates that the ice camp will be established 185–370 km (100–200 nmi) north of Prudhoe Bay in water depths of 800 m (2,625 ft) or more. The continental shelf near Prudhoe Bay is approximately 55 nmi (100 km) wide. Therefore, even if the ice camp were established at the closest estimated distance (100 nmi from Prudhoe Bay), it would still be approximately 45 nmi (83 km) distant from habitat potentially occupied by bearded seals. Empirical evidence has not shown responses to sonar that would constitute take beyond a few km from an acoustic source, and therefore, NMFS and the Navy conservatively set a distance cutoff of 10 km (6.2 mi). Regardless of the source level at that distance, take is not estimated to occur beyond 10 km (6.2 mi) from the source. Although bearded seals occur 20 to 100 nmi (37 to 185 km) offshore during spring (Simpkins *et al.* 2003, Bengtson *et al.* 2005), they feed heavily on benthic organisms (Hamilton *et al.* 2018; Hjelset *et al.* 1999; Fedoseev 1965), and during winter bearded seals are expected to select habitats where food is abundant and easily accessible to minimize the energy required to forage and maximize energy reserves in preparation for whelping, lactation, mating, and molting. Bearded seals are not known to dive as deep as 800 m (2,625 ft) to forage (Boveng and Cameron, 2013; Cameron and Boveng 2009; Cameron *et al.* 2010; Gjertz *et al.* 2000; Kovacs 2002), and it is highly unlikely that they would occur near the ice camp or where the submarine activities would be conducted. This conclusion is supported by the fact that the Navy did not visually observe or acoustically detect bearded seals during the 2020 or 2022 ice exercises.

In addition, the polar bear (*Ursus maritimus*) may be found in the ICEX24 Study Area. However, polar bears are managed by the U.S. Fish and Wildlife Service and are not considered further in this document.

Ringed Seal

Ringed seals are the most common pinniped in the ICEX24 Study Area and have wide distribution in seasonally and permanently ice-covered waters of the Northern Hemisphere (North Atlantic Marine Mammal Commission 2004), though the status of the Arctic stock of ringed seals is unknown (Young *et al.* 2023). Throughout their range, ringed seals have an affinity for ice-covered waters and are well adapted to occupying both shore-fast and pack ice (Kelly 1988c). Ringed seals can be found further offshore than other pinnipeds since they can maintain breathing holes in ice thickness greater than 2 m (6.6 ft; Smith and Stirling 1975). Breathing holes are maintained by ringed seals' sharp teeth and claws on their fore flippers. They remain in contact with ice most of the year and use it as a platform for molting in late spring to early summer, for pupping and nursing in late winter to early spring, and for resting at other times of the year (Young *et al.* 2023).

Ringed seals have at least two distinct types of subnivean lairs: haul-out lairs and birthing lairs (Smith and Stirling 1975). Haul-out lairs are typically single-chambered and offer protection from predators and cold weather. Birthing lairs are larger, multi-

chambered areas that are used for pupping in addition to protection from predators. Ringed seals pup on both land-fast ice as well as stable pack ice. Lentfer (1972) found that ringed seals north of Barrow, Alaska (which would be west of the ice camp), build their subnivean lairs on the pack ice near pressure ridges. They are also assumed to occur within the sea ice in the proposed ice camp area. Ringed seals excavate subnivean lairs in drifts over their breathing holes in the ice, in which they rest, give birth, and nurse their pups for 5–9 weeks during late winter and spring (Chapskii 1940; McLaren 1958; Smith and Stirling 1975). Snow depths of at least 50–65 centimeters (cm; 19.7–25.6 in) are required for functional birth lairs (Kelly 1988b; Lydersen 1998; Lydersen and Gjertz 1986; Smith and Stirling 1975), and such depths typically occur only where 20–30 cm (7.9–11.8 in) or more of snow has accumulated on flat ice and then drifted along pressure ridges or ice hummocks (Hammill 2008; Lydersen *et al.* 1990; Lydersen and Ryg 1991; Smith and Lydersen 1991). Ringed seal birthing season typically begins in March, but the majority of births occur in early April. About a month after parturition, mating begins in late April and early May.

In Alaskan waters, during winter and early spring when sea ice is at its maximal extent, ringed seals are abundant in the northern Bering Sea, Norton and Kotzebue Sounds, and throughout the Chukchi and Beaufort Seas (Frost 1985; Kelly 1988c), including in the ICEX24 Study Area. Passive acoustic monitoring (PAM) of ringed seals from a high-frequency recording package deployed at a depth of 240 m (787 ft) in the Chukchi Sea, 120 km (74.6 mi) north-northwest of Barrow, Alaska, detected ringed seals in the area between mid- December and late May over a four year study (Jones *et al.* 2014). With the onset of the fall freeze, ringed seal movements become increasingly restricted and seals will either move west and south with the advancing ice pack, with many seals dispersing throughout the Chukchi and Bering Seas, or remain in the Beaufort Sea (Crawford *et al.* 2012; Frost and Lowry 1984; Harwood *et al.* 2012). Kelly *et al.* (2010a) tracked home ranges for ringed seals in the subnivean period (using shorefast ice); the size of the home ranges varied from less than 1 km² (0.4 mi²) up to 27.9 km² (10.8 mi²; median of 0.62 km² (0.2 mi²) for adult males and 0.65 km² (0.3 mi²) for adult females). Most (94 percent) of the home ranges were less than 3 km² (1.2 mi²) during the subnivean period (Kelly *et al.* 2010a). Near large polynyas, ringed seals maintain ranges up to 7,000 km² (2.702.7 mi²) during winter and 2,100 km² (810 mi²) during spring (Born *et al.* 2004). Some adult ringed seals return to the same small home ranges they occupied during the previous winter (Kelly *et al.* 2010a). The size of winter home ranges can vary by up to a factor of 10 depending on the amount of fast ice; seal movements were more restricted during winters with extensive fast ice, and were much less restricted where fast ice did not form at high levels (Harwood *et al.* 2015). Ringed seals may occur within the ICEX24 Study Area throughout the year and during the proposed specified activities.

Since June 1, 2018, elevated ice seal strandings (bearded, ringed and spotted seals) have occurred in the Bering and Chukchi seas in Alaska. This event was declared an Unusual Mortality Event (UME), but is currently considered non-active and is pending closure. Given that the UME is non-active, it is not discussed further in this document.

Critical Habitat

Critical habitat for the ringed seal was designated in May 2022 and includes marine waters within one specific area in the Bering, Chukchi, and Beaufort Seas (87 FR 19232; April 1, 2022). Essential features established by NMFS for conservation of the ringed seal are (1) snow-covered sea ice habitat suitable for the formation and maintenance of subnivean birth lairs used for sheltering pups during whelping and nursing, which is defined as waters 3 m (9.8 ft) or more in depth (relative to Mean Lower Low Water (MLLW)) containing areas of seasonal landfast (shorefast) ice or dense, stable pack ice, which have undergone deformation and contain snowdrifts of sufficient depth to form and maintain birth lairs (typically at least 54 cm (21.3 in) deep); (2) sea ice habitat suitable as a platform for basking and molting, which is defined as areas containing sea ice of 15 percent or more concentration in waters 3 m (9.8 ft) or more in depth (relative to MLLW); and (3) primary prey resources to support Arctic ringed seals, which are defined to be small, often schooling, fishes, in particular, Arctic cod (*Boreogadus saida*), saffron cod (*Eleginus gracilis*), and rainbow smelt (*Osmerus dentex*), and small crustaceans, in particular, shrimps and amphipods.

The proposed ice camp study area was excluded from the ringed seal critical habitat because the benefits of exclusion due to national security impacts outweighed the benefits of inclusion of this area (87 FR 19232; April 1, 2022). However, as stated in NMFS' final rule for the Designation of Critical Habitat for the Arctic Subspecies of the Ringed Seal (87 FR 19232; April 1, 2022), the area proposed for exclusion contains one or more of the essential features of the Arctic ringed seal's critical habitat, although data are limited to inform NMFS' assessment of the relative value of this area to the conservation of the species. As noted above, a portion of the ringed seal critical habitat overlaps the larger proposed ICEX24 Study Area. However, as described later and in more detail in the Potential Effects of Specified Activities on Marine Mammals and Their Habitat section, we do not anticipate physical impacts to any marine mammal habitat as a result of the Navy's ICEX activities, including impacts to ringed seal sea ice habitat suitable as a platform for basking and molting and impacts on prey availability. Further, this proposed IHA includes mitigation measures, as described in the Proposed Mitigation section, which would minimize or prevent impacts to sea ice habitat suitable for the formation and maintenance of subnivean birth lairs.

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 decibels (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.

Description of Sound Sources

Here, we first provide background information on marine mammal hearing before discussing the potential effects of the use of active acoustic sources on marine mammals.

Sound travels in waves, the basic components of which are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in Hz or cycles per second. Wavelength is the distance between two peaks of a sound wave; lower frequency sounds have longer wavelengths than higher frequency sounds and attenuate (decrease) more rapidly in shallower water. Amplitude is the height of the sound pressure wave or the 'loudness' of a sound and is typically measured using the dB scale. A dB is the ratio between a measured pressure (with sound) and a reference pressure (sound at a constant pressure, established by scientific standards). It is a logarithmic unit that accounts for large variations in amplitude; therefore, relatively small changes in dB ratings correspond to large changes in sound pressure. When referring to sound pressure levels (SPLs; the sound force per unit area), sound is referenced in the context of underwater sound pressure to 1 microPascal (μPa). One pascal is the pressure resulting from a force of one newton exerted over an area of 1 square meter. The source level (SL) represents the sound level at a distance of 1 m from the source (referenced to 1 μPa). The received level is the sound level at the listener's position. Note that all underwater sound levels in this document are referenced to a pressure of 1 μPa.

Root mean square (RMS) is the quadratic mean sound pressure over the duration of an impulse. RMS is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick 1983). RMS accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

When underwater objects vibrate or activity occurs, sound-pressure waves are created. These waves alternately compress and decompress the water as the sound wave travels. Underwater sound waves radiate in all directions away from the source (similar to ripples on the surface of a pond), except in cases where the source is directional. The compressions and decompressions associated with sound waves are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound. Ambient sound is defined as environmental background sound levels lacking a single source or point (Richardson *et al.* 1995), and the sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* waves, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic sound (*e.g.,* vessels, dredging, aircraft, construction). A number of sources contribute to ambient sound, including the following (Richardson *et al.* 1995):

- Wind and waves: The complex interactions between wind and water surface, including processes such as breaking waves and wave-induced bubble oscillations and cavitation, are a main source of naturally occurring ambient noise for frequencies between 200 Hz and 50 kHz (Mitson, 1995). Under sea ice, noise generated by ice deformation and ice fracturing may be caused by thermal, wind, drift, and current stresses (Roth *et al.* 2012);
- Precipitation: Sound from rain and hail impacting the water surface can become an important component of total noise at frequencies above 500 Hz, and possibly down to 100 Hz during quiet

times. In the ice-covered ICEX24 Study Area, precipitation is unlikely to impact ambient sound;

- Biological: Marine mammals can contribute significantly to ambient noise levels, as can some fish and shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz; and
- Anthropogenic: Sources of ambient noise related to human activity include transportation (surface vessels and aircraft), dredging and construction, oil and gas drilling and production, seismic surveys, sonar, explosions, and ocean acoustic studies. Shipping noise typically dominates the total ambient noise for frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz and, if higher frequency sound levels are created, they attenuate rapidly (Richardson *et al.* 1995). Sound from identifiable anthropogenic sources other than the activity of interest (*e.g.,* a passing vessel) is sometimes termed background sound, as opposed to ambient sound. Anthropogenic sources are unlikely to significantly contribute to ambient underwater noise during the late winter and early spring in the ICEX24 Study Area as most anthropogenic activities would not be active due to ice cover (*e.g.* seismic surveys, shipping; Roth *et al.* 2012).

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 10–20 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.

Underwater sounds fall into one of two general sound types: impulsive and non-impulsive (defined in the following paragraphs). 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). Please see Southall *et al.* (2007) for an in-depth discussion of these concepts.

Impulsive sound sources (*e.g.,* explosions, gunshots, sonic booms, impact pile driving) produce signals that are brief (typically considered to be less than one second), broadband, atonal transients (ANSI 1986; Harris 1998; NIOSH 1998; ISO 2016; ANSI 2005) and occur either as isolated events or repeated in some succession. Impulsive sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures, and generally have an increased capacity to induce physical injury as compared with sounds that lack these features. There are no pulsed sound sources associated with any planned ICEX24 activities.

Non-impulsive sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or non-continuous (ANSI 1995; NIOSH 1998). Some of these non-impulsive sounds can be transient signals of short duration but without the essential properties of pulses (*e.g.,* rapid rise time). Examples of non-impulsive sounds include those produced by vessels, aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar sources (such as those planned for use by the Navy as part of the proposed ICEX24 activities) that intentionally direct a sound signal at a target that is reflected back in order to discern physical details about the target.

Modern sonar technology includes a variety of sonar sensor and processing systems. In concept, the simplest active sonar emits sound waves, or ''pings,'' sent out in multiple directions, and the sound waves then reflect off of the target object in multiple directions. The sonar source calculates the time it takes for the reflected sound waves to return; this calculation determines the distance to the target object. More sophisticated active sonar systems emit a ping and then rapidly scan or listen to the sound waves in a specific area. This provides both distance to the target and directional information. Even more advanced sonar systems use multiple receivers to listen to echoes from several directions simultaneously and provide efficient detection of both direction and distance. In general, when sonar is in use, the sonar 'pings' occur at intervals, referred to as a duty cycle, and the signals themselves are very short in duration. For example, sonar that emits a 1-second ping every 10 seconds has a 10 percent duty cycle. The Navy's most powerful hull-mounted mid-frequency sonar source used in ICEX activities typically emits a 1-second ping every 50 seconds representing a 2 percent duty cycle. The Navy utilizes sonar systems and other acoustic sensors in support of a variety of mission requirements.

Acoustic Impacts

Please refer to the information provided previously regarding sound, characteristics of sound types, and metrics used in this document. Anthropogenic sounds cover a broad range of frequencies and sound levels and can have a range of highly variable impacts on marine life, from none or minor to potentially severe responses, depending on received levels, duration of exposure, behavioral context, and various other factors. The potential effects of underwater sound from active acoustic sources can include one or more of the following: temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, stress, and masking (Richardson *et al.* 1995; Gordon *et al.* 2004; Nowacek *et al.* 2007; Southall *et al.* 2007; Gotz *et al.* 2009). The degree of effect is intrinsically related to the signal characteristics, received level, distance from the source, and duration of the sound exposure. In general, sudden, high level sounds can cause hearing loss, as can longer exposures to lower level sounds. Temporary or permanent loss of hearing will occur almost exclusively for noise within an animal's hearing range. In this section, we first describe specific manifestations of acoustic effects before providing discussion specific to the proposed activities in the next section.

Permanent Threshold Shift—Marine mammals exposed to high-intensity sound, or to lower-intensity sound for prolonged periods, can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Finneran 2015). TS can be permanent (PTS), in which case the loss of hearing sensitivity is not fully recoverable, or temporary (TTS), in which case the animal's hearing threshold would recover over time (Southall *et al.* 2007). Repeated sound exposure that leads to TTS could cause PTS. In severe cases of PTS, there can be total or partial deafness, while in most cases the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter 1985).

When PTS occurs, there is physical damage to the sound receptors in the ear (*i.e.,* tissue damage), whereas TTS

represents primarily tissue fatigue and is reversible (Southall *et al.* 2007). In addition, other investigators have suggested that TTS is within the normal bounds of physiological variability and tolerance and does not represent physical injury (*e.g.,* Ward 1997). Therefore, NMFS does not consider TTS to constitute auditory injury.

Relationships between TTS and PTS thresholds have not been studied in marine mammals—PTS data exists only for a single harbor seal (*Phoca vitulina;* Kastak *et al.* 2008)—but are assumed to be similar to those in humans and other terrestrial mammals. PTS typically occurs at exposure levels at least several dB above (a 40-dB threshold shift approximates PTS onset; *e.g.,* Kryter *et al.* 1966; Miller, 1974) those inducing mild TTS (a 6-dB threshold shift approximates TTS onset; *e.g.,* Southall *et al.* 2007). Based on data from terrestrial mammals, a precautionary assumption is that the PTS thresholds for impulse sounds (such as impact pile driving pulses as received close to the source) are at least six dB higher than the TTS threshold on a peak-pressure basis and PTS cumulative sound exposure level (SEL) thresholds are 15 to 20 dB higher than TTS cumulative SEL thresholds (Southall *et al.* 2007).

Temporary Threshold Shift—TTS is the mildest form of hearing impairment that can occur during exposure to sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises, and a sound must be at a higher level in order to be heard. In terrestrial and marine mammals, TTS can last from minutes or hours to days (in cases of strong TTS). In many cases, hearing sensitivity recovers rapidly after exposure to the sound ends.

Marine mammal hearing plays a critical role in communication with conspecifics, and interpretation of environmental cues for purposes such as predator avoidance and prey capture. 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. 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 occurs during a time 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.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin (*Tursiops truncatus*), beluga whale, harbor porpoise (*Phocoena phocoena*), and Yangtze finless porpoise (*Neophocoena asiaeorientalis*)) and three species of pinnipeds (northern elephant seal (*Mirounga angustirostris*), harbor seal, and California sea lion (*Zalophus californianus*)) 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 and ringed 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. Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species. There are no data 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), and Finneran (2015).

Behavioral effects—Behavioral disturbance may include a variety of effects, including subtle changes in behavior (*e.g.,* minor or brief avoidance of an area or changes in vocalizations), more conspicuous changes in similar behavioral activities, and more sustained and/or potentially severe reactions, such as displacement from or abandonment of high-quality habitat. Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.,* species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.,* Richardson *et al.* 1995; Wartzok *et al.* 2003; Southall *et al.* 2007; Weilgart, 2007; Archer *et al.* 2010). 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). Please see Appendices B–C of Southall *et al.* (2007) for a review of studies involving marine mammal behavioral responses to sound.

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 shown 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; see also Richardson *et al.* 1995; Nowacek *et al.* 2007).

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; NRC 2003). However, 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 breathing, interference with or alteration of vocalization, avoidance, and flight.

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). 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.

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). A determination of whether foraging disruptions incur fitness consequences would require 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.

Variations in respiration naturally vary with different behaviors and alterations to breathing 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. Various studies have shown that respiration rates may either be unaffected or could increase, depending on the species and signal characteristics, 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.* 2001, 2005b, 2006; Gailey *et al.* 2007).

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 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). In some cases, animals may cease sound production during production of aversive signals (Bowles *et al.* 1994).

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). For example, gray whales are known to change direction—deflecting from customary migratory paths—in order to avoid noise from seismic surveys (Malme *et al.* 1984). Avoidance may be short-term, with animals returning to the area once the noise has ceased (*e.g.,* Bowles *et al.* 1994; Goold, 1996; Morton and Symonds, 2002; 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).

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). 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 demonstrated for marine mammals, but studies involving fish and terrestrial animals have shown that increased vigilance may substantially reduce feeding rates (*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). However, Ridgway *et al.* (2006) reported that increased vigilance in bottlenose dolphins exposed to sound over a five-day period did not cause any sleep deprivation or stress effects.

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 one 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.

For non-impulsive sounds (*i.e.,* similar to the sources used during the proposed specified activities), data suggest that exposures of pinnipeds to received levels 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). Additional data on hooded seals (*Cystophora cristata*) indicate avoidance

responses to signals above 160–170 dB re 1 μPa (Kvadsheim *et al.* 2010), and data on gray seals (*Halichoerus grypus*) and harbor seals indicate avoidance response at received levels of 135–144 dB re 1 μPa (Götz *et al.* 2010). In each instance where food was available, which provided the seals motivation to remain near the source, habituation to the signals occurred rapidly. In the same study, it was noted that habituation was not apparent in wild seals where no food source was available (Götz *et al.* 2010). This implies that the motivation of the animal is necessary to consider in determining the potential for a reaction. In one study that aimed to investigate the under-ice movements and sensory cues associated with under-ice navigation of ice seals, acoustic transmitters (60–69 kHz at 159 dB re 1 μPa at 1 m) were attached to ringed seals (Wartzok *et al.* 1992a; Wartzok *et al.* 1992b). An acoustic tracking system then was installed in the ice to receive the acoustic signals and provide real-time tracking of ice seal movements. Although the frequencies used in this study are at the upper limit of ringed seal hearing, the ringed seals appeared unaffected by the acoustic transmissions, as they were able to maintain normal behaviors (*e.g.,* finding breathing holes).

Seals exposed to non-impulsive sources with a received sound pressure level within the range of calculated exposures for ICEX activities (142–193 dB re 1 μPa), have been shown to change their behavior by modifying diving activity and avoidance of the sound source (Götz *et al.* 2010; Kvadsheim *et al.* 2010). Although a minor change to a behavior may occur as a result of exposure to the sources in the proposed specified activities, these changes would be within the normal range of behaviors for the animal (*e.g.,* the use of a breathing hole further from the source, rather than one closer to the source, would be within the normal range of behavior; Kelly *et al.* 1988).

Adult ringed seals spend up to 20 percent of the time in subnivean lairs during the winter season (Kelly *et al.* 2010a). Ringed seal pups spend about 50 percent of their time in the lair during the nursing period (Lydersen and Hammill 1993). During the warm season ringed seals haul out on the ice. In a study of ringed seal haulout activity by Born *et al.* (2002), ringed seals spent 25–57 percent of their time hauled out in June, which is during their molting season. Ringed seal lairs are typically used by individual seals (haulout lairs) or by a mother with a pup (birthing lairs); large lairs used by many seals for hauling out are rare (Smith and Stirling 1975). If the non-impulsive acoustic transmissions are heard and are perceived as a threat, ringed seals within subnivean lairs could react to the sound in a similar fashion to their reaction to other threats, such as polar bears (their primary predators). Responses of ringed seals to a variety of human-induced sounds (*e.g.,* helicopter noise, snowmobiles, dogs, people, and seismic activity) have been variable; some seals entered the water and some seals remained in the lair. However, according to Kelly *et al.* (1988), in all instances in which observed seals departed lairs in response to noise disturbance, they subsequently reoccupied the lair.

Ringed seal mothers have a strong bond with their pups and may physically move their pups from the birth lair to an alternate lair to avoid predation, sometimes risking their lives to defend their pups from potential predators (Smith 1987). If a ringed seal mother perceives the proposed acoustic sources as a threat, the network of multiple birth and haulout lairs allows the mother and pup to move to a new lair (Smith and Hammill 1981; Smith and Stirling 1975). The acoustic sources from these proposed specified activities are not likely to impede a ringed seal from finding a breathing hole or lair, as captive seals have been found to primarily use vision to locate breathing holes and no effect to ringed seal vision would occur from the acoustic disturbance (Elsner *et al.* 1989; Wartzok *et al.* 1992a). It is anticipated that a ringed seal would be able to relocate to a different breathing hole relatively easily without impacting their normal behavior patterns.

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). 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).

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.,* 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.

Under certain circumstances, marine mammals experiencing significant masking could also be impaired from maximizing their performance fitness in survival and reproduction. Therefore, when the coincident (masking) sound is anthropogenic, it may be considered harassment when disrupting or altering critical behaviors. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs during the sound exposure. Because masking (without resulting in TS) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

The frequency range of the potentially masking sound is important in determining any potential behavioral impacts. For example, low-frequency signals may have less effect on high-frequency echolocation sounds produced by odontocetes but are more likely to affect detection of mysticete communication calls and other potentially important natural sounds such as those produced by surf and some prey species. The masking of communication signals by anthropogenic noise may be considered as a reduction in the communication space of animals (*e.g.,* Clark *et al.* 2009) and may result in energetic or other costs as animals change their vocalization behavior (*e.g.,* Miller *et al.* 2000; Foote *et al.* 2004; Parks *et al.* 2007b; Di Iorio and Clark, 2009; Holt *et al.* 2009). Masking can be reduced in situations where the signal and noise come from different directions (Richardson *et al.* 1995), through amplitude modulation of the signal, or through other compensatory behaviors (Houser and Moore, 2014). Masking can be tested directly in captive species (*e.g.,* Erbe 2008), but in wild populations it must be either modeled or inferred from evidence of masking compensation. There are few studies addressing real-world masking sounds likely to be experienced by marine mammals in the wild (*e.g.,* Branstetter *et al.* 2013).

Masking affects both senders and receivers of acoustic signals and can potentially have long-term chronic effects on marine mammals at the population level as well as at the individual level. Low-frequency ambient sound levels have increased by as much as 20 dB (more than three times in terms of SPL) in the world's ocean from pre-industrial periods, with most of the increase from distant commercial shipping (Hildebrand 2009). All anthropogenic sound sources, but especially chronic and lower-frequency signals (*e.g.,* from vessel traffic), contribute to elevated ambient sound levels, thus intensifying masking.

Potential Effects of Sonar on Prey—Ringed seals feed on marine invertebrates and fish. Marine invertebrates occur in the world's oceans, from warm shallow waters to cold deep waters, and are the dominant animals in all habitats of the ICEX24 Study Area. Although most species are found within the benthic zone, marine invertebrates can be found in all zones (sympagic (within the sea ice), pelagic (open ocean), or benthic (bottom dwelling)) of the Beaufort Sea (Josefson *et al.* 2013). The diverse range of species include oysters, crabs, worms, ghost shrimp, snails, sponges, sea fans, isopods, and stony corals (Chess and Hobson 1997; Dugan *et al.* 2000; Proctor *et al.* 1980).

Hearing capabilities of invertebrates are largely unknown (Lovell *et al.* 2005; Popper and Schilt 2008). Outside of studies conducted to test the sensitivity of invertebrates to vibrations, very little is known on the effects of anthropogenic underwater noise on invertebrates (Edmonds *et al.* 2016). While data are limited, research suggests that some of the major cephalopods and decapods may have limited hearing capabilities (Hanlon 1987; Offutt 1970), and may hear only low-frequency (less than 1 kHz) sources (Offutt 1970), which is most likely within the frequency band of biological signals (Hill 2009). In a review of crustacean sensitivity of high amplitude underwater noise by Edmonds *et al.* (2016), crustaceans may be able to hear the frequencies at which they produce sound, but it remains unclear which noises are incidentally produced and if there are any negative effects from masking them. Acoustic signals produced by crustaceans range from low frequency rumbles (20–60 Hz) to high frequency signals (20–55 kHz) (Henninger and Watson 2005; Patek and Caldwell 2006; Staaterman *et al.* 2016). Aquatic invertebrates that can sense local water movements with ciliated cells include cnidarians, flatworms, segmented worms, urochordates (tunicates), mollusks, and arthropods (Budelmann 1992a, 1992b; Popper *et al.* 2001). Some aquatic invertebrates have specialized organs called statocysts for determination of equilibrium and, in some cases, linear or angular acceleration. Statocysts allow an animal to sense movement and may enable some species, such as cephalopods and crustaceans, to be sensitive to water particle movements associated with sound (Goodall *et al.* 1990; Hu *et al.* 2009; Kaifu *et al.* 2008; Montgomery *et al.* 2006; Popper *et al.* 2001; Roberts and Breithaupt 2016; Salmon 1971). Because any acoustic sensory capabilities, if present at all, are limited to detecting water motion, and water particle motion near a sound source falls off rapidly with distance, aquatic invertebrates are probably limited to detecting nearby sound sources rather than sound caused by pressure waves from distant sources.

Studies of sound energy effects on invertebrates are few, and identify only behavioral responses. Non-auditory injury, PTS, TTS, and masking studies have not been conducted for invertebrates. Both behavioral and auditory brainstem response studies suggest that crustaceans may sense frequencies up to 3 kHz, but best sensitivity is likely below 200 Hz (Goodall *et al.* 1990; Lovell *et al.* 2005; Lovell *et al.* 2006). Most cephalopods likely sense low-frequency sound below 1 kHz, with best sensitivities at lower frequencies (Budelmann 2010; Mooney *et al.* 2010; Offutt 1970). A few cephalopods may sense higher frequencies up to 1,500 Hz (Hu *et al.* 2009).

It is expected that most marine invertebrates would not sense the frequencies of the sonar associated with the proposed specified activities. Most marine invertebrates would not be close enough to active sonar systems to potentially experience impacts to sensory structures. Any marine invertebrate capable of sensing sound may alter its behavior if exposed to sonar. Although acoustic transmissions produced during the proposed specified activities may briefly impact individuals, intermittent exposures to sonar are not expected to impact survival, growth, recruitment, or reproduction of widespread marine invertebrate populations.

The fish species located in the ICEX24 Study Area include those that are closely associated with the deep ocean habitat of the Beaufort Sea. Nearly 250 marine fish species have been described in the Arctic, excluding the larger parts of the sub-Arctic Bering, Barents, and Norwegian Seas (Mecklenburg *et al.* 2011). However, only about 30 are

known to occur in the Arctic waters of the Beaufort Sea (Christiansen and Reist 2013). Largely because of the difficulty of sampling in remote, ice-covered seas, many high-Arctic fish species are known only from rare or geographically patchy records (Mecklenburg *et al.* 2011). Aquatic systems of the Arctic undergo extended seasonal periods of ice cover and other harsh environmental conditions. Fish inhabiting such systems must be biologically and ecologically adapted to surviving such conditions. Important environmental factors that Arctic fish must contend with include reduced light, seasonal darkness, ice cover, low biodiversity, and low seasonal productivity.

All fish have two sensory systems to detect sound in the water: the inner ear, which functions very much like the inner ear in other vertebrates, and the lateral line, which consists of a series of receptors along the fish's body (Popper and Fay 2010; Popper *et al.* 2014). The inner ear generally detects relatively higher-frequency sounds, while the lateral line detects water motion at low frequencies (below a few hundred Hz) (Hastings and Popper 2005). Lateral line receptors respond to the relative motion between the body surface and surrounding water; this relative motion, however, only takes place very close to sound sources and most fish are unable to detect this motion at more than one to two body lengths distance away (Popper *et al.* 2014). Although hearing capability data only exist for fewer than 100 of the approximately 32,000 fish species known to exist, current data suggest that most species of fish detect sounds from 50 to 1,000 Hz, with few fish hearing sounds above 4 kHz (Popper 2008). It is believed that most fish have their best hearing sensitivity from 100 to 400 Hz (Popper 2003). Permanent hearing loss has not been documented in fish. A study by Halvorsen *et al.* (2012) found that for temporary hearing loss or similar negative impacts to occur, the noise needed to be within the fish's individual hearing frequency range; external factors, such as developmental history of the fish or environmental factors, may result in differing impacts to sound exposure in fish of the same species. The sensory hair cells of the inner ear in fish can regenerate after they are damaged, unlike in mammals where sensory hair cells loss is permanent (Lombarte *et al.* 1993; Smith *et al.* 2006). As a consequence, any hearing loss in fish may be as temporary as the timeframe required to repair or replace the sensory cells that were damaged or destroyed (Smith *et al.* 2006), and no permanent loss of hearing in fish would result from exposure to sound.

Fish species in the ICEX24 Study Area are expected to hear the low-frequency sources associated with the proposed specified activities, but most are not expected to detect the higher-frequency sounds. Only a few fish species are able to detect mid-frequency sonar above 1 kHz and could have behavioral reactions or experience auditory masking during these activities. These effects are expected to be transient, and long-term consequences for the population are not expected. Fish with hearing specializations capable of detecting high-frequency sounds are not expected to be within the ICEX24 Study Area. If hearing specialists were present, they would have to be in close vicinity to the source to experience effects from the acoustic transmission. Human-generated sound could alter the behavior of a fish in a manner that would affect its way of living, such as where it tries to locate food or how well it can locate a potential mate; behavioral responses to loud noise could include a startle response, such as the fish swimming away from the source, the fish ‘‘freezing’’ and staying in place, or scattering (Popper 2003). Auditory masking could also interfere with a fish's ability to hear biologically relevant sounds, inhibiting the ability to detect both predators and prey, and impacting schooling, mating, and navigating (Popper 2003). If an individual fish comes into contact with low-frequency acoustic transmissions and is able to perceive the transmissions, they are expected to exhibit short-term behavioral reactions, when initially exposed to acoustic transmissions, which would not significantly alter breeding, foraging, or populations. Overall effects to fish from ICEX24 active sonar sources would be localized, temporary, and infrequent.

Effects of Acoustics on Physical and Foraging Habitat—Unless the sound source is stationary and/or continuous over a long duration in one area, neither of which applies to ICEX24 activities, the effects of the introduction of sound into the environment are generally considered to have a less severe impact on marine mammal habitat compared to any physical alteration of the habitat. Acoustic exposures are not expected to result in long-term physical alteration of the water column or bottom topography as the occurrences are of limited duration and would occur intermittently. Acoustic transmissions also would have no structural impact to subnivean lairs in the ice. Furthermore, since ice dampens acoustic transmissions (Richardson *et al.* 1995) the level of sound energy that reaches the interior of a subnivean lair would be less than that ensonifying water under surrounding ice. For these reasons, it is unlikely that the Navy's acoustic activities in the ICEX24 Study Area would have any effect on marine mammal habitat.

Potential Effects of Vessel Strike

Because ICEX24 would occur only when there is ice coverage and conditions are appropriate to establish an ice camp on an ice floe, no ships or smaller boats would be involved in the activity. Vessel use would be limited to submarines and unmanned underwater vehicles (hereafter referred to together as ‘‘vessels’’ unless noted separately). The potential for vessel strike during ICEX24 would therefore only arise from the use of submarines during training and testing activities, and the use of unmanned underwater vehicles during research activities. Depths at which vessels would operate during ICEX24 would overlap with known dive depths of ringed seals, which have been recorded to 300 m (984.3 ft) in depth (Gjertz *et al.* 2000; Lydersen 1991). Few authors have specifically described the responses of pinnipeds to vessels, and most of the available information on reactions to boats concerns pinnipeds hauled out on land or ice. No information is available on potential responses to submarines or unmanned underwater vehicles. Brueggeman *et al.* (1992) stated ringed seals hauled out on the ice showed short-term escape reactions when they were within 0.25–0.5 km (0.2–0.3 mi) from a vessel; ringed seals would likely show similar reactions to submarines and unmanned underwater vehicles, decreasing the likelihood of vessel strike during ICEX24 activities.

The Navy has kept strike records for over 20 years and has no records of individual pinnipeds being struck by a vessel as a result of Navy activities and, further, the smaller size and maneuverability of pinnipeds make a vessel strike unlikely. Also, NMFS has never received any reports indicating that pinnipeds have been struck by vessels of any type. Review of additional sources of information in the form of worldwide ship strike records shows little evidence of strikes of pinnipeds from the shipping sector. Further, a review of seal stranding data from Alaska found that during 2020, 9 ringed seal strandings were recorded by the Alaska Marine Mammal Stranding Network. Within the Arctic region of Alaska, 7 ringed seal strandings were

recorded. Of the 9 strandings reported in Alaska (all regions included), none were found to be caused by vessel collisions (Savage 2021).

Vessel speed, size, and mass are all important factors in determining both the potential likelihood and impacts of a vessel strike to marine mammals (Conn and Silber, 2013; Gende *et al.* 2011; Silber *et al.* 2010; Vanderlaan and Taggart, 2007; Wiley *et al.* 2016). When submerged, submarines are generally slow moving (to avoid detection) and therefore marine mammals at depth with a submarine are likely able to avoid collision with the submarine. For most of the research and training and testing activities during the specified activity, submarine and unmanned underwater vehicle speeds would not typically exceed 10 knots during the time spent within the ICEX24 Study Area, which would lessen the already extremely unlikely chance of collisions with marine mammals, specifically ringed seals.

Based on consideration of all this information, NMFS does not anticipate incidental take of marine mammals by vessel strike from submarines or unmanned underwater vehicles.

Other Non-Acoustic Impacts

Deployment of the ice camp could potentially affect ringed seal habitat by physically damaging or crushing subnivean lairs, which could potentially result in ringed seal injury or mortality. March 1 is generally expected to be the onset of ice seal lairing season, and ringed seals typically construct lairs near pressure ridges. As described in the Proposed Mitigation section, the ice camp and runway would be established on a combination of first-year ice and multi-year ice without pressure ridges, which would minimize the possibility of physical impacts to subnivean lairs and habitat suitable for lairs. Ice camp deployment would begin mid-February, and be gradual, with activity increasing over the first five days. So in addition, this schedule would discourage seals from establishing birthing lairs in or near the ice camp, and would allow ringed seals to relocate outside of the ice camp area as needed, though both scenarios are unlikely as described below in this section. Personnel on on-ice vehicles would observe for marine mammals, and would follow established routes when available, to avoid potential disturbance of lairs and habitat suitable for lairs. Personnel on foot and operating on-ice vehicles would avoid deep snow drifts near pressure ridges, also to avoid potential lairs and habitat suitable for lairs. Implementation of these measures are expected to prevent ringed seal lairs from being crushed or damaged during ICEX24 activities, and are expected to minimize any other potential impacts to sea ice habitat suitable for the formation of lairs. Given the proposed mitigation requirements, we also do not anticipate ringed seal injury or mortality as a result of damage to subnivean lairs.

ICEX24 personnel would be actively conducting testing and training operations on the sea ice and would travel around the camp area, including the runway, on snowmobiles. Although the Navy does not anticipate observing any seals on the ice given the lack of observations during previous ice exercises (U.S. Navy, 2020), as a general matter, on-ice activities could cause a seal that would have otherwise built a lair in the area of an activity to be displaced and therefore, construct a lair in a different area outside of an activity area, or a seal could choose to relocate to a different existing lair outside of an activity area. However, in the case of the ice camp associated with ICEX24, displacement of seal lair construction or relocation to existing lairs outside of the ice camp area is unlikely, given the low average density of structures (the average ringed seal ice structure density in the vicinity of Prudhoe Bay, Alaska is 1.58 structures per km^2 (table 4)), the relative footprint of the Navy's planned ice camp (2 km^2; 0.8 mi^2), the lack of previous ringed seal observations on the ice during ICEX activities, and proposed mitigation requirements that would require the Navy to construct the ice camp and runway on first-year or multiyear ice without pressure ridges and would require personnel to avoid areas of deep snow drift or pressure ridges (see the Proposed Mitigation section for additional information about the proposed mitigation requirements). This measure, in combination with the other mitigation measures required for operation of the ice camp are expected to avoid impacts to the construction and use of ringed seal subnivean lairs, particularly given the already low average density of lairs, as described above.

TABLE 4—RINGED SEAL ICE STRUCTURE DENSITY IN THE VICINITY OF THE PRUDHOE BAY, ALASKA

Year	Ice structure density (structures per km^2)	Source
1982	3.6	Frost and Burns 1989.
1983	0.81	Kelly *et al.* 1986.
1999	0.71	Williams *et al.* 2001.
2000	1.2	Williams *et al.* 2001.
Average Density	1.58	

Given the required mitigation measures and the low density of ringed seals anticipated in the Ice Camp Study Area during ICEX24, we do not anticipate behavioral disturbance of ringed seals due to human presence.

The Navy's activities would occur prior to the late spring to early summer ''basking period,'' which occurs between abandonment of the subnivean lairs and melting of the seasonal sea ice, and is when the seals undergo their annual molt (Kelly *et al.* 2010b). Given that the ice camp would be demobilized prior to the basking period, and the remainder of the Navy's activities occur below the sea ice, impacts to sea ice habitat suitable as a platform for basking and molting are not anticipated to result from the Navy's ICEX24 activities.

Our preliminary determination of potential effects to the physical environment includes minimal possible impacts to marine mammals and their habitat from camp operation or deployment activities, given the proposed mitigation and the timing of the Navy's proposed activities. In addition, given the relatively short duration of submarine testing and training activities, the relatively small area that would be affected, and the lack of impacts to physical or foraging habitat, the proposed specified activities are not likely to have an adverse effect on prey species or marine mammal habitat, other than potential localized, temporary, and infrequent effects to fish as discussed above. Therefore, any impacts to ringed seals and their habitat, as discussed above in this section, are not expected to cause significant or

long-term consequences for individual ringed seals or the population. Please see the Negligible Impact Analysis and Determination section for additional discussion regarding the likely impacts of the Navy's activities on ringed seals, including the reproductive success or survivorship of individual ringed seals, and how those impacts on individuals are likely to impact the species or stock.

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 NMFS' consideration of the negligible impact determinations and impacts on subsistence uses.

Harassment is the only type of take expected to result from these activities. For this military readiness activity, the MMPA defines ''harassment'' as (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) Any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where the behavioral patterns are abandoned or significantly altered (Level B harassment).

Authorized takes would be by Level B harassment only, in the form of behavioral reactions and/or TTS for individual marine mammals resulting from exposure to acoustic transmissions. Based on the nature of the activity, Level A harassment is neither anticipated nor proposed to be authorized. 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 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—In coordination with NMFS, the Navy developed behavioral thresholds to support environmental analyses for the Navy's testing and training military readiness activities utilizing active sonar sources; these behavioral harassment thresholds are used here to evaluate the potential effects of the active sonar components of the proposed specified activities. 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).

The Navy's Phase III proposed pinniped behavioral threshold was updated based on controlled exposure experiments on the following captive animals: Hooded seal, gray seal, and California sea lion (Götz *et al.* 2010; Houser *et al.* 2013a; Kvadsheim *et al.* 2010). Overall exposure levels were 110–170 dB re 1 μPa for hooded seals, 140–180 dB re 1 μPa for gray seals, and 125–185 dB re 1 μPa for California sea lions; responses occurred at received levels ranging from 125 to 185 dB re 1 μPa. However, the means of the response data were between 159 and 170 dB re 1 μPa. Hooded seals were exposed to increasing levels of sonar until an avoidance response was observed, while the grey seals were exposed first to a single received level multiple times, then an increasing received level. Each individual California sea lion was exposed to the same received level ten times. These exposure sessions were combined into a single response value, with an overall response assumed if an animal responded in any single session. Because these data represent a dose-response type relationship between received level and a response, and because the means were all tightly clustered, the Bayesian biphasic Behavioral Response Function for pinnipeds most closely resembles a traditional sigmoidal dose-response function at the upper received levels and has a 50 percent probability of response at 166 dB re 1 μPa. Additionally, to account for proximity to the source discussed above and based on the best scientific information, a conservative distance of 10 km is used beyond which exposures would not constitute a take under the military readiness definition of Level B harassment.

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). The Navy's activities include the use of non-impulsive (active sonar) 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.*

For previous ICEXs, the Navy's PTS/TTS analysis began with mathematical modeling to predict the sound transmission patterns from Navy sources, including sonar. These data were then coupled with marine species distribution and abundance data to determine the sound levels likely to be received by various marine species. These criteria and thresholds were applied to estimate specific effects that animals exposed to Navy-generated sound may experience. For weighting function derivation, the most critical data required were TTS onset exposure levels as a function of exposure frequency. These values can be estimated from published literature by examining TTS as a function of sound exposure level (SEL) for various frequencies.

Table 5 below provides the weighted criteria and thresholds used in previous ICEX analyses for estimating quantitative acoustic exposures of marine mammals from the specified activities.

TABLE 5—ACOUSTIC THRESHOLDS IDENTIFYING THE ONSET OF BEHAVIORAL DISTURBANCE, TTS, AND PTS FOR NON-IMPULSIVE SOUND SOURCES [1]

Functional hearing group	Species	Behavioral criteria	Physiological criteria	
			TTS threshold SEL (weighted)	PTS threshold SEL (weighted)
Phocid Pinnipeds (Underwater)	Ringed seal	Pinniped Dose Response Function [2]	181 dB SEL cumulative	201 dB SEL cumulative.

[1] The threshold values provided are assumed for when the source is within the animal's best hearing sensitivity. The exact threshold varies based on the overlap of the source and the frequency weighting.
[2] See Figure 6–1 in the Navy's IHA application.
Note: SEL thresholds in dB re: 1 μPa^2 s.

Marine Mammal Occurrence and Take Calculation and Estimation

In previous ICEX analyses, the Navy has performed a quantitative analysis to estimate the number of ringed seals that could be harassed by the underwater acoustic transmissions during the proposed specified activities using marine mammal density estimates (Kaschner *et al.* 2006 and Kaschner 2004), marine mammal depth occurrence distributions (U.S Department of the Navy, 2017), oceanographic and environmental data, marine mammal hearing data, and criteria and thresholds for levels of potential effects. Given the lack of recent density estimates for the ICEX Study Area and the lack of ringed seal observations and acoustic detections during ICEXs in the recent past (described in further detail below), NMFS expects that the ringed seal density relied upon in previous ICEX analyses was an overestimate to a large degree, and that the resulting take estimates were likely overestimates as well. Please see the notice of the final IHA for ICEX 22 for additional information on that analysis (87 FR 7803; January 10, 2022).

For ICEX24, rather than relying on a density estimate, the Navy estimated take of ringed seals based on an occurrence estimate of ringed seals within the ICEX Study Area. Ringed seal presence in the ICEX Study Area was obtained using sighting data from the Ocean Biodiversity Information System-Spatial Ecological Analysis of Megavertebrate Populations (OBIS–SEAMAP; Halpin *et al.* 2009). The ICEX Study Area was overlaid on the OBIS–SEAMAP ringed seal sightings map that included sightings for years 2000 to 2007 and 2013. Sighting data were only available for the mid-to-late summer and fall months. Due to the paucity of winter and spring data, the average number of individual ringed seals per year was assumed to be present in the ICEX Study Area during ICEX24; therefore, it is assumed that three ringed seals would be present in the ICEX Study Area.

Table 6 provides range to effects for active acoustic sources proposed for ICEX24 to phocid pinniped-specific criteria. Phocids within these ranges would be predicted to receive the associated effect. Range to effects can be important information for predicting acoustic impacts, but also in determining adequate mitigation ranges to avoid higher level effects, especially physiological effects, to marine mammals.

TABLE 6—RANGE TO BEHAVIORAL DISTURBANCE, TTS, AND PTS IN THE ICEX24 STUDY AREA

Source/exercise	Range to effects (m)		
	Behavioral disturbance	TTS	PTS
Submarine Exercise	10,000 [a]	5,050	130 [b]

[a] Empirical evidence has not shown responses to sonar that would constitute take beyond a few km from an acoustic source, which is why NMFS and the Navy conservatively set a distance cutoff of 10 km. Regardless of the source level at that distance, take is not estimated to occur beyond 10 km from the source.
[b] The distance represents the range to effects for all ICEX24 activities.

Though likely conservative given the size of the ICEX Study Area in comparison to the size of the anticipated Level B harassment zone (10,000 m), Navy estimated that three ringed seals may be taken by Level B harassment per day of activity within the ICEX Study Area. Navy anticipates conducting active acoustic transmissions on 42 days, and therefore requested 126 takes by Level B harassment of ringed seals (3 seals per day × 42 days = 126 takes by Level B harassment; Table 7). NMFS concurs and proposes to authorize 126 takes by Level B harassment. Modeling for the three previous ICEXs (2018, 2020, and 2022), which employed similar acoustic sources, did not result in any estimated takes by PTS; therefore, particularly in consideration of the fact that total takes were likely overestimated for those ICEX activities given the density information used in the analyses (NMFS anticipates that the density of ringed seals is actually much lower) and the relatively small range to effects for PTS (130 m), the Navy did not request, and NMFS is not proposing to authorize, take by Level A harassment of ringed seal.

TABLE 7—QUANTITATIVE MODELING RESULTS OF POTENTIAL EXPOSURES FOR ICEX ACTIVITIES

Species	Level B harassment	Level A harassment	Total
Ringed seal	126	0	126

During monitoring for the 2018 IHA covering similar military readiness activities in the ICEX22 Study Area, the Navy did not visually observe or acoustically detect any marine mammals (U.S. Navy, 2018). During monitoring for the 2020 IHA covering similar military readiness activities in the ICEX22 Study Area, the Navy also did not visually observe any marine mammals (U.S. Navy, 2020). Acoustic monitoring associated with the 2020 IHA did not detect any discernible marine mammal vocalizations (Henderson *et al.* 2021). The monitoring report states that ''there were a few very faint sounds that could have been (ringed seal) barks or yelps.'' However, these were likely not from ringed seals, given that ringed seal vocalizations are generally produced in series (Jones *et al.* 2014). Henderson *et al.* (2021) expect that these sounds were likely ice-associated or perhaps anthropogenic. While the distance at which ringed seals could be acoustically detected is not definitive, Henderson *et al.* (2021) states that Expendable Mobile ASW Training Targets (EMATTs) ''traveled a distance of 10 nmi (18.5 km) away and were detected the duration of the recordings; although ringed seal vocalization source levels are likely far lower than the sounds emitted by the EMATTs, this gives some idea of the potential detection radius for the cryophone. The periods when the surface anthropogenic activity is occurring in close proximity to the cryophone are dominated by those broadband noises due to the shallow hydrophone placement in ice (only 10 cm down), and any ringed seal vocalizations that were underwater could have been masked.'' During monitoring for the 2022 IHA covering similar military readiness activities in the ICEX24 Study Area, the Navy also did not visually observe any marine mammals (U.S. Navy, 2022). With the exception of PAM conducted during activities for mitigation purposes (no detections), PAM did not occur in 2022 because the ice camp ice flow broke up, and therefore, Navy had to relocate camp. Given the lost time, multiple research projects were canceled, including the under-ice PAM that the Naval Postgraduate School was planning to conduct.

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. 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)). The 2004 NDAA amended the MMPA as it relates to military readiness activities and the incidental take authorization process such that ''least practicable impact'' shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

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, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

The proposed IHA requires that appropriate personnel (including civilian personnel) involved in mitigation and training or testing activity reporting under the specified activities must complete Arctic Environmental and Safety Awareness Training. Modules include: Arctic Species Awareness and Mitigations, Environmental Considerations, Hazardous Materials Management, and General Safety.

Further, the following general mitigation measures are required to prevent incidental take of ringed seals on the ice floe associated with the ice camp (further explanation of certain mitigation measures is provided in parentheses following the measure):

- The ice camp and runway must be established on first-year and multi-year ice without pressure ridges. (This will minimize physical impacts to subnivean lairs and impacts to sea ice habitat suitable for lairs);
- Ice camp deployment must begin no later than mid-February 2024, and be gradual, with activity increasing over the first 5 days. Camp deployment must be completed by March 15, 2024. (Given that mitigation measures require that the ice camp and runway be established on first-year or multi-year ice without pressure ridges, as well as the average ringed seal lair density in the area, and the relative footprint of the Navy's planned ice camp (2 km^2 0.8 mi^2), it is extremely unlikely that a ringed seal would build a lair in the vicinity of the ice camp. Additionally, based on the best available science, Arctic ringed seal whelping is not expected to occur prior to mid-March, and therefore, construction of the ice camp will be completed prior to whelping in the area of ICEX24. Further, as noted above, ringed seal lairs are not expected to occur in the ice camp study area, and therefore, NMFS does not expect ringed seals to relocate pups due to human disturbance from ice camp activities, including construction);
- Personnel on all on-ice vehicles must observe for marine and terrestrial animals;
- Snowmobiles must follow established routes, when available. On-ice vehicles must not be used to follow any animal, with the exception of actively deterring polar bears if the situation requires;
- Personnel on foot and operating on-ice vehicles must avoid areas of deep snowdrifts near pressure ridges. (These areas are preferred areas for subnivean lair development);
- Personnel must maintain a 100 m (328 ft) avoidance distance from all observed marine mammals; and
- All material (*e.g.,* tents, unused food, excess fuel) and wastes (*e.g.,* solid waste, hazardous waste) must be removed from the ice floe upon completion of ICEX24 activities.

The following mitigation measures are required for activities involving acoustic transmissions (further explanation of certain mitigation measures is provided in parentheses following the measure):

- Personnel must begin passive acoustic monitoring (PAM) for vocalizing marine mammals 15 minutes prior to the start of activities involving active acoustic transmissions from

submarines. (This PAM would be conducted for the area around the submarine in real time by technicians on board the submarine.);

• Personnel must delay active acoustic transmissions if a marine mammal is detected during pre-activity PAM and must shutdown active acoustic transmissions if a marine mammal is detected during acoustic transmissions; and

• Personnel must not restart acoustic transmissions until 15 minutes have passed with no marine mammal detections.

Ramp up procedures for acoustic transmissions are not required as the Navy determined, and NMFS concurs, that they would result in impacts on military readiness and on the realism of training that would be impracticable.

The following mitigation measures are required for aircraft activities to prevent incidental take of marine mammals due to the presence of aircraft and associated noise.

• Fixed wing aircraft must operate at the highest altitudes practicable taking into account safety of personnel, meteorological conditions, and need to support safe operations of a drifting ice camp. Aircraft must not reduce altitude if a seal is observed on the ice. In general, cruising elevation must be 305 m (1,000 ft) or higher;

• Unmanned Aircraft Systems (UAS) must maintain a minimum altitude of at least 15.2 m (50 ft) above the ice. They must not be used to track or follow marine mammals;

• Helicopter flights must use prescribed transit corridors when traveling to or from Prudhoe Bay and the ice camp. Helicopters must not hover or circle above marine mammals or within 457 m (1,500 ft) of marine mammals;

• Aircraft must maintain a minimum separation distance of 1.6 km (1 mi) from groups of 5 or more seals; and

• Aircraft must not land on ice within 800 m (0.5 mi) of hauled-out seals.

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.

The Navy has coordinated with NMFS to develop an overarching program, the Integrated Comprehensive Monitoring Program (ICMP), intended to coordinate marine species monitoring efforts across all regions and to allocate the most appropriate level and type of effort for each range complex based on a set of standardized objectives, and in acknowledgement of regional expertise and resource availability. The ICMP was created in direct response to Navy requirements established in various MMPA regulations and ESA consultations. As a framework document, the ICMP applies by regulation to those activities on ranges and operating areas for which the Navy is seeking or has sought incidental take authorizations.

The ICMP is focused on Navy training and testing ranges where the majority of Navy activities occur regularly, as those areas have the greatest potential for being impacted by the Navy's activities. In comparison, ICEX is a short duration exercise that occurs approximately every other year. Due to the location and expeditionary nature of the ice camp, the number of personnel on site is extremely limited and is constrained by the requirement to be able to evacuate all personnel in a single day with small planes. As such, the Navy asserts that a dedicated ICMP monitoring project is not feasible as it would require additional personnel and equipment, and NMFS concurs. However, the Navy is exploring the potential of implementing an environmental DNA (eDNA) study on ice seals.

Nonetheless, the Navy must conduct the following monitoring and reporting under the IHA. Ice camp personnel must generally monitor for marine mammals in the vicinity of the ice camp and record all observations of marine mammals, regardless of distance from the ice camp, as well as the additional data indicated below. Additionally, Navy personnel must conduct PAM during all active sonar use. Ice camp personnel must also maintain an awareness of the surrounding environment and document any observed marine mammals.

In addition, the Navy is required to provide NMFS with a draft exercise monitoring report within 90 days of the conclusion of the specified activity. 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. The report, at minimum, must include:

• Marine mammal monitoring effort (dedicated hours);

• Ice camp activities occurring during each monitoring period (*e.g.,* construction, demobilization, safety watch, field parties);

• Number of marine mammals detected;

• Upon observation of a marine mammal, record the following information:

○ Environmental conditions when animal was observed, including relevant weather conditions such as cloud cover,

snow, sun glare, and overall visibility, and estimated observable distance;

◦ Lookout location and ice camp activity at time of sighting (or location and activity of personnel who made observation, if observed outside of designated monitoring periods);

◦ Time and approximate location of sighting;

◦ Identification of the animal(s) (*e.g.,* seal, or unidentified), also noting any identifying features;

◦ Distance and location of each observed marine mammal relative to the ice camp location for each sighting;

◦ Estimated number of animals (min/max/best estimate); and

◦ Description of any marine mammal behavioral observations (*e.g.,* observed behaviors such as 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).

Also, all sonar usage will be collected via the Navy's Sonar Positional Reporting System database. The Navy is required to provide data regarding sonar use and the number of shutdowns during ICEX24 activities in the Atlantic Fleet Training and Testing (AFTT) Letter of Authorization 2024 annual classified report. The Navy is also required to analyze any declassified underwater recordings collected during ICEX24 for marine mammal vocalizations and report that information to NMFS, including the types and nature of sounds heard (*e.g.,* clicks, whistles, creaks, burst pulses, continuous, sporadic, strength of signal) and the species or taxonomic group (if determinable). This information will also be submitted to NMFS with the 2024 annual AFTT declassified monitoring report.

Finally, in the event that personnel discover an injured or dead marine mammal, personnel must report the incident to OPR, NMFS and to the Alaska regional stranding network as soon as feasible. 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(s) was discovered (*e.g.,* during submarine activities, observed on ice floe, or by transiting aircraft).

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).

Underwater acoustic transmissions associated with ICEX24, as outlined previously, have the potential to result in Level B harassment of ringed seals in the form of TTS and behavioral disturbance. No take by Level A harassment, serious injury, or mortality are anticipated to result from this activity. Further, at close ranges and high sound levels approaching those that could cause PTS, seals would likely avoid the area immediately around the sound source.

NMFS anticipates that take of ringed seals by TTS could occur from the submarine activities. TTS is a temporary impairment of hearing and can last from minutes or hours to days (in cases of strong TTS). In many cases, however, hearing sensitivity recovers rapidly after exposure to the sound ends. This activity has the potential to result in only minor levels of TTS, and hearing sensitivity of affected animals would be expected to recover quickly. Though TTS may occur as indicated, the overall fitness of the impacted individuals is unlikely to be affected given the temporary nature of TTS and the minor levels of TTS expected from these activities. Negative impacts on the reproduction or survival of affected ring seals as well as impacts on the stock are not anticipated.

Effects on individuals that are taken by Level B harassment by behavioral disturbance could include alteration of dive behavior, alteration of foraging behavior, effects to breathing, interference with or alteration of vocalization, avoidance, and flight. More severe behavioral responses are not anticipated due to the localized, intermittent use of active acoustic sources and mitigation using PAM, which would limit exposure to active acoustic sources. Most likely, individuals would be temporarily displaced by moving away from the sound source. As described previously in the *Acoustic Impacts* section, 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 *et al.* 2010; Kvadsheim *et al.* 2010). Although a minor change to a behavior may occur as a result of exposure to the sound sources associated with the proposed specified activity, these changes would be within the normal range of behaviors for the animal (*e.g.,* the use of a breathing hole further from the source, rather than one closer to the source). Further, given the limited number of total instances of takes and the unlikelihood that any single individuals would be taken repeatedly, multiple times over sequential days, these takes are unlikely to impact the reproduction or survival of any individuals.

The Navy's proposed activities are localized and of relatively short duration. While the total ICEX24 Study Area is large, the Navy expects that most activities would occur within the Ice Camp Study Area in relatively close proximity to the ice camp. The larger Navy Activity Study Area depicts the range where submarines may maneuver during the exercise. The ice camp would be in existence for up to 6 weeks with acoustic transmission occurring intermittently over approximately 4 weeks.

The project is not expected to have significant adverse effects on marine mammal habitat. The project activities are limited in time and would not

modify physical marine mammal habitat. While the activities may cause some fish to leave a specific area ensonified by acoustic transmissions, temporarily impacting marine mammals' foraging opportunities, these fish would likely return to the affected area. As such, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

For on-ice activity, Level A harassment, Level B harassment, serious injury, and mortality are not anticipated, given the nature of the activities, the lack of previous ringed seal observations, and the mitigation measures NMFS has proposed to include in the IHA. The ringed seal pupping season on the ice lasts for 5 to 9 weeks during late winter and spring. As stated in the Potential Effects of Specified Activities on Marine Mammals and Their Habitat section, March 1 is generally expected to be the onset of ice seal lairing season. The ice camp and runway would be established on first-year ice or multi-year ice without pressure ridges, as ringed seals tend to build their lairs near pressure ridges. Ice camp deployment will begin no later than mid-February, and be gradual, with activity increasing over the first 5 days. Ice camp deployment will be completed by March 15, before the pupping season. Displacement of seal lair construction or relocation to existing lairs outside of the ice camp area is unlikely, given the low average density of lairs (the average ringed seal lair density in the vicinity of Prudhoe Bay, Alaska is 1.58 lairs per km^2 (Table 4) the relative footprint of the Navy's planned ice camp (2 km^2; 0.77 mi^2), the lack of previous ringed seal observations on the ice during ICEX activities, and mitigation requirements that require the Navy to construct the ice camp and runway on first-year or multi-year ice without pressure ridges and require personnel to avoid areas of deep snow drift or pressure ridges.

Given that mitigation measures require that the ice camp and runway be established on first-year or multi-year ice without pressure ridges, where ringed seals tend to build their lairs, it is extremely unlikely that a ringed seal would build a lair in the vicinity of the ice camp. This measure, together with the other mitigation measures required for operation of the ice camp, are expected to avoid impacts to the construction and use of ringed seal subnivean lairs, particularly given the already low average density of lairs, as described above. Given that ringed seal lairs are not expected to occur in the ice camp study area, NMFS would not expect ringed seals to relocate pups due to human disturbance from ice camp activities.

Additional mitigation measures would also prevent damage to and disturbance of ringed seals and their lairs that could otherwise result from on-ice activities. Personnel on on-ice vehicles would observe for marine mammals, and would follow established routes when available, to avoid potential damage to or disturbance of lairs. Personnel on foot and operating on-ice vehicles would avoid deep snow drifts near pressure ridges, also to avoid potential damage to or disturbance of lairs. Further, personnel would maintain a 100 m (328 ft) distance from all observed marine mammals to avoid disturbing the animals due to the personnel's presence. Implementation of these measures would prevent ringed seal lairs from being crushed or damaged during ICEX24 activities.

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 Level A harassment (injury), serious injury, or mortality is anticipated or proposed for authorization;
- Impacts would be limited to Level B harassment, primarily in the form of behavioral disturbance that results in minor changes in behavior;
- TTS is expected to affect only a limited number of animals and is expected to be minor and short term;
- The number of takes proposed to be authorized are low relative to the estimated abundances of the affected stock, even given the extent to which abundance is significantly underestimated;
- Submarine training and testing activities would occur over only 4 weeks of the total 6-week activity period;
- There would be no loss or modification of ringed seal habitat and minimal, temporary impacts on prey;
- Physical impacts to ringed seal subnivean lairs would be avoided; and
- Mitigation requirements for ice camp activities would prevent impacts to ringed seals during the pupping season.

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.

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.

Impacts to marine mammals from the specified activity would mostly include limited, temporary behavioral disturbances of ringed seals; however, some TTS is also anticipated. No Level A harassment (injury), serious injury, or mortality of marine mammals is expected or proposed for authorization, and the activities are not expected to have any impacts on reproductive or survival rates of any marine mammal species.

The specified activity and associated harassment of ringed seals would not be expected to impact marine mammals in numbers or locations sufficient to reduce their availability for subsistence harvest given the short-term, temporary nature of the activities, and the distance offshore from known subsistence hunting areas. The specified activity would occur for a brief period of time outside of the primary subsistence hunting season, and though seals are harvested for subsistence uses off the North Slope of Alaska, the ICEX24 Study Area is seaward of known subsistence hunting areas. (The Study Area boundary is approximately 50 km from shore at the closest point, though exercises will occur farther offshore.)

The Navy proposes to provide advance public notice to local residents and other users of the Prudhoe Bay region of Navy activities and measures used to reduce impacts on resources. This includes notification to local Alaska Natives who hunt marine mammals for subsistence. If any Alaska Natives express concerns regarding project impacts to subsistence hunting of marine mammals, the Navy would

further communicate with the concerned individuals or community. The Navy would provide project information and clarification of the mitigation measures that will reduce impacts to marine mammals.

Based on the description of the specified activity, the measures described to minimize adverse effects on the availability of marine mammals for subsistence purposes, and the proposed mitigation and monitoring measures, NMFS has preliminarily determined that there will not be an unmitigable adverse impact on subsistence uses from the Navy's proposed activities.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (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 NMFS' Alaska Regional Office (AKRO).

NMFS OPR is proposing to authorize take of ringed seals, which are listed under the ESA. OPR has requested a section 7 consultation with the AKRO for the issuance of this IHA. The Navy has also requested a section 7 consultation with AKRO for ICEX Study Area activities. OPR 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 the Navy for conducting submarine training and testing activities in the Arctic Ocean beginning in February 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/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities.*

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 ICEX24 activities. 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 1-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); and
- 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 proposed renewal timeframe does not significantly alter the agency's initial impact findings, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: December 4, 2023.

Catherine Marzin,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–26913 Filed 12–6–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Evaluation of Sapelo Island National Estuarine Research Reserve; Notice of Public Meeting; Request for Comments

AGENCY: Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration, Department of Commerce.

ACTION: Notice of public meeting and opportunity to comment.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA), Office for Coastal Management, will hold an in-person public meeting to solicit input on the performance evaluation of the Sapelo Island National Estuarine Research Reserve. NOAA also invites the public to submit written comments.

DATES: NOAA will hold an in-person public meeting on Wednesday, February 7, 2024, at 6:30 p.m. eastern. NOAA will consider all relevant written comments received by Friday, February 16, 2024.

ADDRESSES: Comments may be submitted by one of the following methods:

- *In-Person Public Meeting:* Provide oral comments during the in-person public meeting on Wednesday, February 7, 2024, at 6:30 p.m. eastern at the Sapelo Island Visitor Center, 1766 Landing Road Southeast, Darien, GA 31305.
- *Email:* Send written comments to Ralph Cantral, Evaluator, NOAA Office for Coastal Management, at *Ralph.Cantral@noaa.gov.* Include ''Comments on Performance Evaluation of Sapelo Island National Estuarine Research Reserve'' in the subject line of the message.

NOAA will accept anonymous comments; however, the written comments NOAA receives are considered part of the public record, and the entirety of the comment, including the name of the commenter, email address, attachments, and other supporting materials, will be publicly accessible. Sensitive personally identifiable information, such as account numbers and Social Security numbers, should not be included with the comments. Comments that are not related to the performance evaluation of the Sapelo Island National Estuarine Research Reserve or that contain profanity, vulgarity, threats, or other inappropriate language will not be considered.

FOR FURTHER INFORMATION CONTACT: Ralph Cantral, Evaluator, NOAA Office for Coastal Management, by email at *Ralph.Cantral@noaa.gov* or by phone at (843) 474–1357. Copies of the previous evaluation findings, reserve management plan, and reserve site profile may be viewed and downloaded at *https://coast.noaa.gov/czm/evaluations/.* A copy of the evaluation notification letter and most recent progress report may be obtained upon request by contacting Ralph Cantral.

SUPPLEMENTARY INFORMATION: Section 315(f) of the Coastal Zone Management Act (CZMA) requires NOAA to conduct periodic evaluations of federally approved national estuarine research reserves. The evaluation process includes holding one or more public meetings, considering public comments, and consulting with interested Federal, State, and local agencies and members of the public. During the evaluation, NOAA will consider the extent to which the State of Georgia has met the national objectives, and has adhered to the management program approved by the Secretary of Commerce, the requirements of section 315(b)(2) of the CZMA, and the terms of financial assistance under the CZMA. When the evaluation is complete, NOAA's Office for Coastal Management will place a notice in the **Federal Register** announcing the availability of the final evaluation findings.

Authority: 16 U.S.C. 1461.

Keelin Kuipers,

Deputy Director, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2023–26906 Filed 12–6–23; 8:45 am]

BILLING CODE 3510–JE–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Implementation of the National Spectrum Strategy

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Notice of opportunity for public input.

SUMMARY: The White House released a Presidential Memorandum (PM), *Modernizing United States Spectrum Policy and Establishing a National Spectrum Strategy,* and the *National Spectrum Strategy* (Strategy), on November 13, 2023. The PM tasks the Secretary of Commerce, through the National Telecommunications and Information Administration (NTIA), with publishing an Implementation Plan for the Strategy within 120 days after its release. NTIA welcomes public input on the implementation of the Strategy and is providing the opportunity to submit written comments and/or request meetings with NTIA staff regarding the implementation plan.

DATES: Parties should submit written comments no later than January 2, 2024. Parties requesting meetings should do so as soon as practicable.

ADDRESSES: All written inputs and any requests for meetings should be sent to *NSSimplementationplan@ntia.gov.* Responders should include a page number on each page of their submissions. Please do not include in your input information of a confidential nature, such as sensitive personal or business information. All comments received are part of the public record and generally will be posted to the NTIA website without change. All personally identifiable information (*e.g.,* name, address) voluntarily submitted may be publicly accessible.

FOR FURTHER INFORMATION CONTACT: Please direct questions regarding this Notice to John Alden, Telecommunications Specialist, Office of Spectrum Management, NTIA, at (202) 482–8046 or *jalden@ntia.gov.* Please direct media inquiries to NTIA's Office of Public Affairs, (202) 482–7002; or *press@ntia.gov.*

SUPPLEMENTARY INFORMATION: NTIA serves as the President's principal advisor on telecommunications policies and manages the use of the radio-frequency spectrum by federal agencies. *See* 47 U.S.C. 902(b)(2). NTIA is interested in public views on implementing the Strategy, with a focus on the next 1–3 years, as such inputs allow NTIA and other federal agencies to benefit from expertise and viewpoints outside the federal government. These views will be considered in developing the implementation plan, which is intended to help accelerate U.S. leadership in wireless communications and other spectrum-based technologies and to unlock innovations that benefit the American people.

America is increasingly dependent on secure and reliable access to radio frequency spectrum. Sufficient access to spectrum is vital to national security, critical infrastructure, transportation, emergency response, public safety, scientific discovery, economic growth, competitive next-generation communications, and diversity, equity, and inclusion. Increased spectrum access will also advance U.S. innovation, connectivity, and competition, create high-paying and highly skilled jobs, and produce improvements to the overall quality of life. Access to more spectrum, in short, will help the United States continue to lead the world in advanced technology and enhance our national and economic security.

Spectrum access, however, must be managed responsibly and efficiently. NTIA jointly manages the nation's spectrum resources with the Federal Communications Commission. NTIA is welcoming public input from interested stakeholders to help inform the development of an implementation plan for the Strategy, which is needed for the U.S. to bolster investment in spectrum-related innovative technologies and plan effectively for its current and future spectrum needs.

Sean Conway,

Deputy Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 2023–26810 Filed 12–6–23; 8:45 am]

BILLING CODE P

CONSUMER PRODUCT SAFETY COMMISSION

In re Amazon.Com, Inc.

AGENCY: Consumer Product Safety Commission.

ACTION: Commission meeting: Oral Argument—open to the public; remainder of the meeting is closed to the public.

SUMMARY: The Consumer Product Safety Commission (''CPSC'' or ''Commission'') will meet on Thursday, December 14, 2023, in Hearing Room 420 of the Headquarters Building of the CPSC for an Oral Argument in *In the Matter of Amazon.com, Inc.,* CPSC Docket No. 21–2. The public is invited to attend and observe the open portion of the meeting, which is scheduled to begin at 10 a.m. The remainder of the meeting will be closed to the public.

DATES: Oral argument is scheduled for December 14, 2023 at 10 a.m.

ADDRESSES: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, MD 20814. A live webcast of the meeting can be viewed at the following link: *https://cpsc.webex.com/weblink/register/rd3a8cbedeac231e01896d8d56252d109.*

FOR FURTHER INFORMATION CONTACT: Alberta Mills, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504–7479.

SUPPLEMENTARY INFORMATION:

Open Meeting

(1) Oral Argument in *In the Matter of Amazon.com, Inc.,* Docket No. 21–2.

Closed Meeting

(2) Executive Session to follow Oral Argument in *In the Matter of Amazon.com, Inc.,* Docket No. 21–2.

Record of Commission's Vote

On December 1, 2023, Chair Hoehn-Saric and Commissioners Peter A. Feldman, Richard Trumka Jr., and Mary T. Boyle, voted unanimously to close the Executive Session.

Commission's Explanation of Closing

The Commission has determined that the Executive Session may be closed under 16 CFR 1013.4(b)(10) because the meeting will ''[s]pecifically concern . . . disposition by the Agency of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554,'' and that the public interest does not require the matter to be open.

General Counsel Certification

The General Counsel has certified that the Executive Session may properly be closed, citing the following relevant provision: 16 CFR 1013.4(b)(10).

Expected Attendees

Expected to attend the closed meeting are the Commissioners and their immediate staff, and such other Commission staff as may be appropriate.

Dated: December 4, 2023.

Alberta E. Mills,

Secretary.

[FR Doc. 2023–26874 Filed 12–6–23; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Reserve Forces Policy Board; Notice of Federal Advisory Committee Meeting AGENCY: Under Secretary of Defense for Personnel and Readiness (USD(P&R)), Department of Defense (DoD).

ACTION: Notice of Federal advisory committee meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal advisory committee meeting of the Reserve Forces Policy Board (RFPB) will take place. DATES: The RFPB will hold a meeting on Wednesday, December 6, 2023, from 8:30 a.m. to 2:30 p.m. The first portion of the meeting, from 8:30 a.m. to 11:45 a.m., will be closed to the public. The second portion of the meeting, from 11:50 a.m. to 2:30 p.m., will be open to the public.

ADDRESSES: The RFPB meetings will be held in person at the Pentagon Library and Conference Center, Room M2, The Pentagon, Arlington, Virginia 20301.

FOR FURTHER INFORMATION CONTACT: Eric Flowers, Designated Federal Officer (DFO), at *Eric.P.Flowers2.civ@mail.mil* or 703–697–1795. Mailing address is Reserve Forces Policy Board, 5109 Leesburg Pike, Suite 501, Falls Church, Virginia 22041. The most up-to- date changes to the meeting agenda can be found on the website: *https://rfpb.defense.gov/.*

SUPPLEMENTARY INFORMATION: Due to circumstances beyond the control of the Designated Federal Officer, the Reserve Forces Policy Board was unable to provide public notification required by 41 CFR 102–3.150(a) concerning its December 6, 2023, meeting. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

This meeting is being held under the provisions of chapter 10 of title 5, United States Code (U.S.C.) (commonly known as the ''Federal Advisory Committee Act'' or ''FACA''), 5 U.S.C. 552b (commonly known as the ''Government in the Sunshine Act''), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: The purpose of the meeting is to obtain, review, and evaluate relevant information related to strategies, policies, and practices designed to improve and enhance the capabilities, efficiency, and effectiveness of the Reserve Component (RC).

Agenda: The RFPB will hold a closed meeting to the public from 8:30 a.m. to 11:45 a.m. After opening comments by the RFPB's DFO, Military Executive, and Chairperson, participants will receive classified briefings on cyber and homeland defense matters and engage in a classified discussion on the National Guard and Reserve Equipment Appropriation (NGREA). Dr. Paul Stockton, a member of the RFPB, will provide introductory comments to the cyber and homeland defense brief by addressing specific portions of the DoD Classified Cyber Security Strategy that pertain to unique mission sets that are solely applicable to the RCs in various cyber defense and defense of critical infrastructure missions. Dr. Stockton's comments will provide the RFPB members with relevant context to the cyber and homeland defense brief. The cyber and homeland defense brief will be jointly presented by Major General William J. Hartman, U.S. Army, Cyber National Mission Force Commander and Major General Rich Neely, U.S. Air National Guard, Adjutant General/Commander of the Illinois National Guard. The generals will discuss the RCs' expected roles in various cyber-related contingency plans associated with the DoD Classified Cyber Security Strategy. The closed portion concludes with a classified discussion on the NGREA facilitated by Colonel Sam Cook, U.S. Army (Retired). Colonel (Retired) Cook will provide an analysis and facilitate a classified discussion on the feasible impacts on the Military Services' Fiscal Year 2025 Presidential Budget requests and the RC's corresponding use of the NGREA to mitigate modernization and interoperability shortcomings resulting from the United States' execution of classified military plans related to the Presidential Drawdown's transference of RC equipment to the Ukrainian armed forces. The open session will commence with opening statements by The RFPB's DFO and Chairperson. The RFPB will receive updates from the subcommittees. The Subcommittee for RCs' Role in Homeland Defense and Support to Civil Authorities will provide an update on its task to provide to the RFPB independent advice on improving strategies, policies, and practices of the RCs' capabilities in homeland defense and support to civil authorities specifically as it relates to defense of critical infrastructure. The Subcommittee for Integration of Total Force Personnel Policy will provide an update on its task to provide to the RFPB independent advice on improving strategies, policies, and practices of the RCs' personnel management, specifically as it relates to mobilization considerations pertaining to RC personnel with cyber-related military occupational specialties. The Subcommittee for Total Force Integration will provide an update on its task to provide to the RFPB independent advice to improve and enhance the capabilities, efficiency, and effectiveness of the RCs in support of the Total Force, specifically as it relates to equipping parity between the Active Component and RC. At the conclusion of the RFPB business segment, participants will break for lunch. After lunch, the Acting Under Secretary of Defense for Personnel and Readiness, the Honorable Ashish Vazirani, will provide an overview of the Department's guidance on policies and

programs specifically related to the RCs. Honorable Vazirani will be followed by Secretary of Defense, Lloyd Austin, who will provide a brief on the role of the RC and the new National Defense Strategy. The meeting will adjourn at the conclusion of Secretary Austin's remarks.

Meeting Accessibility: In accordance with section 1009(d) of the FACA and 41 CFR 102- 3.155, the DoD has determined that between 8:30 a.m. to 11:45 a.m. the meeting will be closed to the public. Specifically, the USD(P&R), in coordination with the DoD FACA attorney, has determined in writing that this portion of the meeting will be closed to the public because it is likely to disclose classified matters covered by 5 U.S.C. 552b(c)(1). Such classified material is so intertwined with the unclassified material that it cannot reasonably be segregated into separate discussions without defeating the effectiveness and meaning of these portions of the meeting. Pursuant to section 1009(a)(1) of the FACA and 41 CFR 102–3.140 and 102–3.150, the portions of the meeting from 11:50 a.m. to 2:30 p.m. are open to the public. All members of the public who wish to attend the public meeting must contact Mr. Eric Flowers, DFO, no later than 7:00 a.m. on Wednesday, December 6, 2023, at 703–697–1795 or 703–945–5203, or *eric.p.flowers2.civ@mail.mil.*

Written Statements: Pursuant of Title 41 CFR 102–3.105(j) and section 1009(a)(3) of the FACA, the public and interested parties may submit written statements to the RFPB at any time about its approved agenda or at any time on the RFPB's mission. Written statements should be submitted to the RFPB's DFO at the address or email listed in the **FOR FURTHER INFORMATION CONTACT** section. If statements pertain to a specific topic being discussed at the meeting that is the subject of this notice, then these statements must be submitted no later than 3 business days prior to the scheduled meeting date. Written statements received after this date may not be provided to or considered by the RFPB until its next scheduled meeting. The DFO will review all timely submitted written statements and provide copies to the RFPB members before the meeting that is the subject of this notice. Please note that all submitted comments will be made available for public inspection, including but not limited to being posted on the RFPB's website.

Dated: December 4, 2023.

Natalie M. Ragland,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–26890 Filed 12–6–23; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF EDUCATION

Applications for New Awards; American Indian Vocational Rehabilitation Services

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

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for fiscal year (FY) 2024 for American Indian Vocational Rehabilitation Services (AIVRS)—Assistance Listing Number 84.250Q—to partner with Indian Tribes in providing eligible American Indians with disabilities with vocational rehabilitation (VR) services. This notice relates to the approved information collection under OMB control number 1820–0018.

DATES: *Applications Available:* December 7, 2023.

Deadline for Transmittal of Applications: March 26, 2024.

Pre-Application Webinar Information: No later than January 3, 2024, the Office of Special Education and Rehabilitative Services will post pre-recorded informational webinars designed to provide technical assistance to interested applicants. The webinars may be found at *https://ncrtm.ed.gov/index.php/grant-info.*

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045) and available at *https://www.federalregister.gov/documents/2022/12/07/2022-26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs.* Please note that these Common Instructions supersede the version published on December 27, 2021.

FOR FURTHER INFORMATION CONTACT: August Martin, U.S. Department of Education, 400 Maryland Avenue SW, room 4A10, Washington, DC 20202–5076. Telephone: (202) 987–0116. Email: *August.Martin@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:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of this program is to provide VR services, including culturally appropriate services, to American Indians with disabilities who reside on or near Federal or State reservations, consistent with such eligible individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice, so that such individuals may prepare for, and engage in, high-quality employment that will increase opportunities for economic self-sufficiency.

Priority: In accordance with 34 CFR 75.105(b)(2)(iv), this priority is from section 121(b)(4) of the Rehabilitation Act of 1973, as amended (Rehabilitation Act) (29 U.S.C. 741(b)(4)).

Competitive Preference Priority: For FY 2024 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is a competitive preference priority. Under 34 CFR 75.105(c)(2)(i), we award an additional five points to an application that meets this priority.

This priority is:

Continuation of Previously Funded Tribal Programs.

In making new awards under this program, we give priority to applications for the continuation of programs that have been funded under the AIVRS program.

Program Authority: 29 U.S.C. 741.

Note: Projects will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 81, 82, and 84. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for this program in 34 CFR part 371.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration intends to use approximately $28,503,407 for new awards for this program for FY 2024.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in subsequent years from the list of unfunded applications from this competition.

Estimated Range of Awards (per year): $300,000–$1,000,000.

Estimated Average Size of Awards (per year): $550,000.

Note: The estimated range of awards and the estimated average size of the award is for each individual year of the five years of the grant and not the total for all five years.

Estimated Number of Awards: 44.

Project Period: Up to 60 months.

Note: The Department is not bound by any estimates in this notice.

III. Eligibility Information

1. *Eligible Applicants:* Applications may be made only by Indian Tribes (and consortia of those Indian Tribes) located on Federal and State reservations. The definition of ''Indian Tribe'' in section 7(19)(B) of the Rehabilitation Act is ''any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaskan native village or regional village corporation (as defined in or established pursuant to the Alaska Native Claims Settlement Act) and a tribal organization (as defined in section 4(l) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(l)).''

''Reservation'' is defined in 34 CFR 371.6 as ''a Federal or State Indian reservation, public domain Indian allotment, former Indian reservation in Oklahoma, land held by incorporated Native groups, regional corporations and village corporations under the provisions of the Alaska Native Claims Settlement Act; or a defined area of land recognized by a State or the Federal Government where there is a concentration of tribal members and on which the tribal government is providing structured activities and services.''

Under 34 CFR 371.2, the applicant for an AIVRS grant must be—

(1) The governing body of an Indian Tribe, either on behalf of the Indian Tribe or on behalf of a consortium of Indian Tribes; or

(2) A Tribal organization that is a separate legal organization from an Indian Tribe.

To receive an AIVRS grant, a Tribal organization that is not a governing body of an Indian Tribe must—

(1) Have as one of its functions the vocational rehabilitation of American Indians with disabilities; and

(2) Have the approval of the Tribe to be served by such organization.

If a grant is made to the governing body of an Indian Tribe, either on its own behalf or on behalf of a consortium, or to a Tribal organization to perform services benefiting more than one Indian Tribe, the approval of each such Indian Tribe is a prerequisite to the making of such a grant.

2.a. *Cost Sharing or Matching:* Cost sharing is required by section 121(a) of the Rehabilitation Act and 34 CFR 371.40 at 10 percent of the total cost of the project. However, if an applicant can demonstrate that they do not have sufficient resources to contribute the non-Federal share of the cost of the project, the applicant may request a waiver, in part or in whole, to the cost sharing requirement in accordance with section 121(a) of the Rehabilitation Act of 1973 and the implementing regulations at 34 CFR 371.40(c).

b. *Indirect Cost Rate Information:* This program uses an unrestricted indirect cost rate. Applicants for this program are the governing bodies of Indian Tribes (or consortia of governing bodies) and have negotiated indirect cost rate agreements with a cognizant agency if indirect costs will be charged to the grant. For more information regarding indirect costs, or to obtain a negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

c. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application. While subgrants are not permitted, under 34 CFR 371.42(a), grantees are permitted to provide the VR services by contract or otherwise enter into an agreement with a designated State unit (DSU), a community rehabilitation program, or another agency to assist in the implementation of the Tribal VR program, as long as such contract or agreement is identified in the application.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045) and available at *https://www.federalregister.gov/documents/2022/12/07/2022-26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs,* which contain requirements and information on how to submit an application.

Note: RSA invites an applicant to indicate whether it intends to consolidate its AIVRS grant funds into a current or future 477 plan in accordance with the provisions of Public Law 115–93, the Indian Employment, Training and Related Services Consolidation Act of 2017 (25 U.S.C. 3401 *et seq.*). Any request to consolidate AIVRS funds into a 477 plan must be made separately to the U.S. Department of Interior. For further information on the integration of grant funds under this program and related programs, contact the Division of Workforce Development, Office of Indian Services, Bureau of Indian Affairs, U.S. Department of the Interior at Office of Indian Services, Division of Workforce Development, Bureau of Indian Affairs, 1849 C Street NW, MS–3645–MIB, Washington, DC 20245, Telephone: (202) 219–3938.

AIVRS grantees who are in their last year of AIVRS funding from a previous grant and have currently integrated that previous grant under an approved 477 plan must apply for a new AIVRS grant under this competition by submitting an application that meets all of the requirements included in this notice. If such an applicant receives a new AIVRS grant under this competition and wants to consolidate the new AIVRS grant in a 477 plan, it must submit a request to the U.S. Department of Interior to do so.

2. *Intergovernmental Review:* This competition is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

3. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210, have a maximum score of 100 points, and are as follows:

(a) *Need for Project and Significance* (10 Points):

The Secretary considers the need for and significance of the proposed project. In determining the need for and significance of the proposed project, the

Secretary considers the following factors:

(1) The magnitude of the need for the services to be provided or the activities to be carried out by the proposed project.

(2) The extent to which specific gaps or weaknesses in services, infrastructure, or opportunities have been identified and will be addressed by the proposed project, including the nature and magnitude of those gaps or weaknesses.

(3) The potential contribution of the proposed project to increased knowledge or understanding of rehabilitation problems, issues, or effective strategies.

(4) The extent to which the proposed project is likely to build local capacity to provide, improve, or expand services that address the needs of the target population.

(b) *Quality of the Project Design* (20 Points):

The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(1) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

(2) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs.

(3) The extent to which the proposed project will establish linkages with other appropriate agencies and organizations providing services to the target population.

(c) *Quality of Project Services* (20 Points):

The Secretary considers the quality of the services to be provided by the proposed project. In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

In addition, the Secretary considers the following factors:

(1) The extent to which the services to be provided by the proposed project are appropriate to the needs of the intended recipients or beneficiaries of those services.

(2) The likely impact of the services to be provided by the proposed project on the intended recipients of those services.

(3) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services.

(d) *Quality of Project Personnel* (15 Points):

In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

In addition, the Secretary considers the qualifications, including relevant training and experience, of key project personnel.

(e) *Adequacy of Resources* (10 Points):

The Secretary considers the adequacy of resources for the proposed project. In determining the adequacy of resources for the proposed project, the Secretary considers the following factors:

(1) The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization or the lead applicant organization.

(2) The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project.

(3) The extent to which the costs are reasonable in relation to the number of persons to be served and to the anticipated results and benefits.

(f) *Quality of the Management Plan* (15 Points):

The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(1) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(2) The adequacy of procedures for ensuring feedback and continuous improvement in the operation of the proposed project.

(3) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project.

(g) *Quality of the Project Evaluation* (10 Points):

The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the evaluation, the Secretary considers the following factors:

(1) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project.

(2) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

(3) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

Applicants for the AIVRS program must provide evidence regarding the following special application requirements in 34 CFR 371.21(a)–(k). The application package includes a Special Application Requirements form in Section D that must be completed. An application is not complete without the Special Application Requirements form and will not be considered for review without that completed form submitted by the applicant. These requirements are:

(a) Effort will be made to provide a broad scope of VR services in a manner and at a level of quality at least comparable to those services provided by the DSU.

(b) All decisions affecting eligibility for VR services, the nature and scope of available VR services, and the provision of such services will be made by a representative of the Tribal VR program funded through this grant and such decisions will not be delegated to another agency or individual.

(c) Priority in the delivery of VR services will be given to those American Indians with disabilities who are the most significantly disabled.

(d) An order of selection of individuals with disabilities to be served under the program will be specified if services cannot be provided to all eligible American Indians with disabilities who apply.

(e) All VR services will be provided according to an individualized plan for employment (IPE) that has been developed jointly by the representative of the Tribal VR program and each American Indian with disabilities being served.

(f) American Indians with disabilities living on or near Federal or State reservations where Tribal VR service programs are being carried out under this part will have an opportunity to participate in matters of general policy development and implementation affecting VR service delivery by the Tribal VR program.

(g) Cooperative working arrangements will be developed with the DSU, or DSUs, as appropriate, which are providing VR services to other individuals with disabilities who reside in the State or States being served.

(h) Any comparable services and benefits available to American Indians with disabilities under any other program, which might meet in whole or in part the cost of any VR service, will be fully considered in the provision of VR services.

(i) Any American Indian with disabilities who is an applicant or recipient of services, and who is dissatisfied with a determination made by a representative of the Tribal VR program and files a request for a review, will be afforded a review under procedures developed by the grantee comparable to those under the provisions of section 102(c)(1)–(5) and (7) of the Rehabilitation Act.

(j) The Tribal VR program funded under this part must assure that any facility used in connection with the delivery of VR services meets facility and program accessibility requirements consistent with the requirements, as applicable, of the Architectural Barriers Act of 1968, the Americans with Disabilities Act of 1990, section 504 of the Rehabilitation Act, and the regulations implementing these laws.

(k) The Tribal VR program funded under this part must ensure that providers of VR services are able to communicate in the native language of, or by using an appropriate mode of communication with, applicants and eligible individuals who have limited English proficiency, unless it is clearly not feasible to do so.

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions and, under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with:

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

5. *Performance Measures:* For the purposes of reporting under 34 CFR 75.110, the Department has established four performance measures for the AIVRS program. The measures are:

(a) Of all those exiting the program, the percentage of individuals who leave the program with an employment outcome after receiving services under an IPE.

(b)(1) The percentage of individuals who leave the program with an employment outcome after receiving services under an IPE.

(2) The percentage of individuals who leave the program without an employment outcome after receiving services under an IPE.

(3) The percentage of individuals who have not left the program and are continuing to receive services under an IPE.

(c) The percentage of projects that demonstrate an average annual cost per employment outcome of no more than $35,000.

(d) The percentage of projects that demonstrate an average annual cost of services per participant of no more than $10,000.

Each grantee must annually report the data needed to measure its performance on these measures through the Annual Performance Reporting Form for the AIVRS program.

Note: For purposes of this section, the term ''employment outcome'' means, with respect to an individual, (a) entering or retaining full-time or, if appropriate, part-time competitive employment in the integrated labor market; (b) satisfying the vocational outcome of supported employment; or (c) satisfying any other vocational outcome the Secretary of Education may determine to be appropriate (including satisfying the vocational outcome of customized employment, self-employment, telecommuting, or business ownership). (Section 7(11) of the Rehabilitation Act (29 U.S.C. 705(11)).

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, whether the grantee has made substantial progress in achieving the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package 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, 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.

Glenna Wright-Gallo,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2023–26856 Filed 12–6–23; 8:45 am]

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DEPARTMENT OF EDUCATION

Applications for New Awards; Personnel Development To Improve Services and Results for Children With Disabilities—Personnel Preparation of Special Education, Early Intervention, and Related Services Personnel at Historically Black Colleges and Universities, Tribally Controlled Colleges and Universities, and Other Minority Serving Institutions

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

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for new awards for fiscal year (FY) 2024 for Personnel Development to Improve Services and Results for Children with Disabilities—Personnel Preparation of Special Education, Early Intervention, and Related Services Personnel at Historically Black Colleges and Universities, Tribally Controlled Colleges and Universities, and Other Minority Serving Institutions, Assistance Listing Number (ALN) 84.325M. This notice relates to the approved information collection under OMB control number 1820–0028.

DATES: *Applications Available:* December 7, 2023.

Deadline for Transmittal of Applications: February 20, 2024.

Deadline for Intergovernmental Review: April 22, 2024.

Pre-Application Webinar Information: No later than December 12, 2023, the Office of Special Education and Rehabilitative Services will post details on pre-recorded informational webinars designed to provide technical assistance to interested applicants. Links to the webinars may be found at *https://www2.ed.gov/fund/grant/apply/osep/new-osep-grants.html.*

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045) and available at

www.federalregister.gov/documents/2022/12/07/2022–26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs.

FOR FURTHER INFORMATION CONTACT: Tracie Dickson, U.S. Department of Education, 400 Maryland Avenue SW, room 4A10, Washington, DC 20202. Telephone: 202–245–7844. Email: *Tracie.Dickson@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:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purposes of this program are to (1) help address State-identified needs for personnel preparation in special education, early intervention, related services, and regular education to work with children, including infants, toddlers, and youth with disabilities; and (2) ensure that those personnel have the necessary skills and knowledge, derived from practices that have been determined through scientifically based research, to be successful in serving those children.

Priority: This competition includes one absolute priority and, within that absolute priority, one competitive preference priority. In accordance with 34 CFR 75.105(b)(2)(v), the absolute priority is from allowable activities specified in the statute (see sections 662 and 681 of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. 1462 and 1481)).

Absolute Priority: For FY 2024 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Personnel Preparation of Special Education, Early Intervention, and Related Services Personnel at Historically Black Colleges and Universities, Tribally Controlled Colleges and Universities, and other Minority Serving Institutions.

Background

The purpose of this priority is to prepare scholars who are fully credentialed to serve children, including infants, toddlers, and youth, with disabilities (children with disabilities). The Department is committed to promoting equity for children with disabilities in accessing educational resources and opportunities. The Department also places a high priority on increasing the number of personnel, including increasing personnel from racially and ethnically diverse backgrounds and personnel who are multilingual, who provide services to children with disabilities. To support these goals, under this absolute priority, the Department will fund projects within Historically Black Colleges and Universities (HBCUs), Tribally Controlled Colleges and Universities (TCCUs), and other Minority Serving Institutions (MSIs) that prepare special education, early intervention, and related services personnel at the bachelor's degree, certification, master's degree, educational specialist degree, or clinical doctoral degree levels to serve in a variety of settings, including natural environments (the home and community settings in which children with and without disabilities participate), early learning programs, child care, classrooms, schools, and distance learning.

Over time, the population of children receiving services under the IDEA is increasingly racially and ethnically diverse. In 2021, approximately 50 percent of infants and toddlers with disabilities, ages birth through two, were children of color; approximately 49 percent of preschool children with disabilities, ages three through five (not in kindergarten), were from racially and ethnically diverse backgrounds; while approximately 54 percent of students with disabilities, ages five (in kindergarten) through 21, were from racially and ethnically diverse backgrounds (U.S. Department of Education, 2022a).

While children of color make up approximately 54 percent of public school enrollment (National Center for Education Statistics, 2022) and greater than 50 percent of children receiving early intervention and special education services, results from the 2020–2021 National Teacher and Principal Survey (U.S. Department of Education, 2022b) show that about 80 percent of all public K–12 school teachers were non-Hispanic White.

Moreover, the demographics of personnel entering the early intervention and special education fields are not aligned with the demographics of the children and families served under IDEA, though IDEA specifically authorizes grants to recruit and prepare personnel, especially from groups that are underrepresented in the teaching profession. The U.S. Department of Education Office of Special Education Programs (OSEP) Personnel Development Program Data Collection System data reveals that scholars supported under this program are predominantly White. Specifically, the race/ethnicity of scholars obtaining a graduate degree to serve children with disabilities in FY 2020 was 65.8 percent White, 14.5 percent Hispanic, 11.5 percent Black, 3.9 percent Asian, 0.7 percent American Indian or Alaska Native, 1.4 percent Native Hawaiian or Other Pacific Islander, and 2.2 percent Two or More Races. Similarly, data from related services professional organizations reveal that the majority of those enrolled in related service personnel preparation programs are White (American Occupational Therapy Association, 2022; American Speech-Language Hearing Association, 2021; Data USA, 2022).

The data demonstrate that there is insufficient ethnic and racial diversity among special education, early intervention, and related service personnel (Ondrasek et al., 2020; Carver-Thomas, 2018; Sutcher et al., 2016). This lack of diversity is of concern, as research indicates that increasing the racial, ethnic, and linguistic diversity of personnel can have positive impacts on all children. Children of color and children who are multilingual, with and without disabilities, demonstrate improved academic achievement and behavioral and social and emotional development when they are taught by teachers who are from racially and ethnically diverse backgrounds and multilingual teachers (Bryan, 2021; Carver-Thomas, 2018, April). States and policymakers are also highlighting the need to address the lack of racial and ethnic diversity of those working in early intervention and special education and are recognizing the need to develop career pathways and comprehensive strategies to recruit, prepare, develop, and retain educators from racially and ethnically diverse backgrounds (Carver-Thomas, 2018; Colorado Department of Higher Education, 2022; Gardner et al., 2019).

Priority

The purpose of this priority is to prepare and increase the number of personnel, including personnel from racially and ethnically diverse backgrounds and personnel who are multilingual, who are fully credentialed to serve children with disabilities. Under this absolute priority, the Department will fund projects within

HBCUs,[1] TCCUs,[2] and other MSIs[3] that prepare scholars[4] in special education, early intervention, and related services[5] at the bachelor's degree, certification,[6] master's degree, educational specialist degree, or clinical doctoral degree levels to serve in a variety of settings, including natural environments (the home and community settings in which children with and without disabilities participate), early learning programs, child care, classrooms, schools, and distance learning. This priority will provide support to help address identified needs for personnel, including personnel from racially and ethnically diverse backgrounds and personnel who are multilingual, with the knowledge and skills to promote high expectations and provide effective evidence-based[7] interventions and services that improve outcomes for children with disabilities, including children of color with disabilities and children with disabilities who are multilingual.

Note: Projects may include individuals who are not funded as scholars, but are in degree programs (*e.g.,* general education, early childhood education, administration) that are cooperating with the grantee's project. These individuals may participate in the coursework, assignments, field or clinical experiences, and other opportunities required by the scholars' program of study (*e.g.,* speaker series, monthly seminars) if doing so does not diminish the benefit for project-funded scholars (*e.g.,* by reducing funds available for scholar support or limiting opportunities for scholars to participate in project activities).

Note: Personnel preparation degree programs that prepare all scholars to be dually certified can qualify under this priority.

Note: Applicants under this priority may not submit the same proposal under Preparation of Related Services Personnel Serving Children with Disabilities who have High-Intensity Needs, ALN 84.325R. Applicants may submit substantively different proposals under ALN 84.325M and ALN 84.325R. OSEP may fund applications out of rank order based on funding decisions across ALN 84.325M and ALN 84.325R in FY 2024 to ensure that similar personnel preparation projects are not funded within the same institution of higher education (IHE) across the ALN 84.325M and ALN 84.325R competitions.

Focus Areas

Within this absolute priority, the Secretary intends to support projects under the following two focus areas: (A) Preparing Personnel to Serve Infants, Toddlers, and Preschool-Age Children with Disabilities; and (B) Preparing Personnel to Serve School-Age Children with Disabilities.

Applicants must identify the specific focus area (*i.e.,* A or B) under which they are applying as part of the competition title on the application cover sheet (SF 424, line 12). Applicants may not submit the same proposal under both Focus Area A and B. However, applicants may submit substantively different proposals for Focus Areas A and B. OSEP may fund out of rank order applications from HBCUs and TCCUs to increase the number of funded applications from these institutions. OSEP may also fund applications out of rank order to ensure that projects are funded in both Focus Area A and Focus Area B.

Focus Area A: Preparing Personnel to Serve Infants, Toddlers, and Preschool-Age Children with Disabilities.

This focus area is for projects that prepare early intervention, early childhood special education, and related services personnel, including scholars from racially and ethnically diverse backgrounds and scholars who are multilingual, to provide services to infants, toddlers, and preschool children with disabilities. Programs preparing early intervention special educators and early childhood special educators must prepare graduates to meet State and national professional organization standards for early intervention special educators and early childhood special educators such as the Division of Early Childhood (DEC) Initial Practice-Based Professional Preparation Standards for Early Intervention/Early Childhood Special Education (DEC, 2020). In States where certification in early intervention is combined with certification in early childhood special education, applicants may propose a combined early intervention and early childhood special education personnel preparation project under this focus area. In States where the certification age range is other than birth through five, applicants must propose a preparation project that complies with the State's certification requirements for early intervention and early childhood special education personnel. Programs that prepare general early childhood educators are not eligible under this competition regardless of whether a degree in early childhood education complies with the State's certification requirements for early intervention special educators or early childhood special educators.

Focus Area B: Preparing Personnel to Serve School-Age Children with Disabilities. This focus area is for projects that prepare special education and related services personnel, including personnel from racially and ethnically diverse backgrounds and personnel who are multilingual, to work with school-age children with disabilities.

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[1] For purposes of this priority, "Historically Black Colleges and Universities" means colleges and universities that meet the criteria in 34 CFR 608.2.

[2] For purposes of this priority, "Tribally Controlled Colleges and Universities" has the meaning ascribed to it in section 316(b)(3) of the HEA of 1965.

[3] For purposes of this priority, "Minority-Serving Institution" means an institution that is eligible to receive assistance under sections 316 through 320 of part A of title III, under part B of title III, or under title V of the HEA. For purposes of this priority, the Department will use the FY 2023 Eligibility Matrix to determine MSI eligibility (see *https://www2.ed.gov/about/offices/list/ope/idues/eligibility.html*).

[4] For the purposes of this priority, "scholar" is limited to an individual who: (a) is pursuing a bachelor's, certification, master's, educational specialist degree, or clinical doctoral degree in special education, early intervention, or related services (as defined in this notice); (b) receives scholarship assistance as authorized under section 662 of IDEA (34 CFR 304.3(g)); (c) will be eligible for a license, endorsement, or certification from a State or national credentialing authority following completion of the degree program identified in the application; and (d) will be able to be employed in a position that serves children with disabilities for a minimum of 51 percent of their time or case load. Individuals pursuing degrees in general education or early childhood education do not qualify as "scholars" eligible for scholarship assistance.

[5] For the purposes of this priority, "related services" includes the following: speech-language pathology and audiology services; assistive technology services; interpreting services; intervener services; psychological services; applied behavior analysis; physical therapy and occupational therapy; recreation, including therapeutic recreation; artistic and cultural services, including music, art, dance and movement therapy; social work services; counseling services, including rehabilitation counseling; and orientation and mobility services.

[6] For the purposes of this priority, "certification" refers to programs of study for individuals with bachelor's, master's, educational specialist, or clinical doctoral degrees that lead to licensure, endorsement, or certification from a State or national credentialing authority following completion of the degree program that qualifies graduates to teach or provide services to children with disabilities. Programs of study that lead to a certificate of completion awarded from an HBCU, TCCU, or MSI, but do not lead to licensure, endorsement, or certification from a State or national credentialing authority, do not qualify.

[7] For the purposes of this priority, "evidence-based" means, at a minimum, evidence that demonstrates a rationale (as defined in 34 CFR 77.1), where a key project component (as defined in 34 CFR 77.1) included in the project's logic model (as defined in 34 CFR 77.1) is informed by research or evaluation findings that suggest the project component is likely to improve relevant outcomes (as defined in 34 CFR 77.1).

Focus Areas A and B

Applicants may, but are not required to, use up to the first 12 months of the project period and up to $100,000 awarded in the first budget period for planning, including enhancing an existing program, without enrolling scholars. If an applicant chooses to use the first year for program planning, then the applicant must provide sufficient justification for requesting program planning time and include the goals, objectives, key personnel and collaborators, and intended outcomes of program planning in year one, a description of the proposed strategies and activities to be supported, and a timeline for the work. The proposed strategies may include activities such as—

(1) Updating coursework, course outcomes, scholar competencies, assignments, or extensive and coordinated field or clinical experiences needed to support preparation for special education, early intervention, or related services scholars, including scholars from racially and ethnically diverse backgrounds, scholars who are multilingual, and scholars with disabilities serving children with disabilities, including children of color with disabilities and children with disabilities who are multilingual;

(2) Building the capacity (*e.g.,* hiring a field supervisor, providing professional development for faculty and field supervisors) of the project to prepare scholars, including scholars from racially and ethnically diverse backgrounds, scholars who are multilingual, and scholars with disabilities, to serve children with disabilities and their families, including children and families of color and who are multilingual;

(3) Purchasing needed resources (*e.g.,* additional teaching supplies, technology-based resources, or other specialized equipment to enhance instruction); or

(4) Establishing relationships, which may include developing memorandums of understandings or other formal agreements, with early intervention and early childhood programs or schools, to serve as sites for field or clinical experiences needed to support the project. These sites may include high-need local educational agencies (LEAs),[8] high-poverty schools,[9] schools identified for comprehensive support and improvement,[10] and schools implementing a targeted support and improvement plan [11] for children with disabilities; early childhood and early intervention programs located within the geographic boundaries of a high-need LEA; and early childhood and early intervention programs located within the geographical boundaries of an LEA serving the highest percentage of schools identified for comprehensive support and improvement or implementing targeted support and improvement plans in the State.

In addition to requesting up to $100,000 for planning, additional Federal funds may also be requested for scholar support and other grant activities occurring in year one of the project.

Note: Applicants proposing projects to develop, expand, or add a new area of emphasis within the curriculum of early intervention, special education, or related services programs must provide, in their applications, information on how these new areas will be sustained once Federal funding ends.

Note: Project periods under this priority may be up to 60 months. Projects should be designed to ensure that all proposed scholars successfully complete the program within 60 months from the start of the project. The Secretary may reduce continuation awards for any project in which scholar recruitment is not on track or scholars are not on track to complete the program by the end of the 60 months.

To be considered for funding under this absolute priority, applicants must meet the application requirements contained in the priority. All projects funded under this absolute priority also must meet the programmatic and administrative requirements specified in the priority.

To meet the requirements of this priority, an applicant must—

(a) Demonstrate, in the narrative section of the application under ''Significance'' how—

(1) The proposed project will address the need in the proposed preparation focus area to increase the number of personnel, including increasing the number from racially and ethnically diverse backgrounds, the number of personnel who are multilingual, and the number of personnel with disabilities, who are prepared to provide effective and equitable, evidence-based, and culturally and linguistically responsive instruction, interventions, and services that improve outcomes, including literacy and math outcomes, for children with disabilities;

(2) The proposed project will increase the number of personnel with competencies [12] in the proposed preparation focus area to provide effective and equitable, evidence-based, and culturally and linguistically responsive instruction, interventions, and services, including through distance education, that improve outcomes, including literacy and math outcomes, for children with disabilities, including children of color with disabilities and children with disabilities who are multilingual; and

(3) The applicant has successfully graduated students from its program, including students who are from racially and ethnically diverse backgrounds, students who are multilingual, and students with disabilities, by including data disaggregated by race, national origin and primary language(s), and disability status; and the number of students who have graduated in the last five years.

(b) Demonstrate, in the narrative section of the application under ''Quality of project services,'' how—

(1) The project will conduct its planning activities if the applicant elects to use up to the first 12 months of the project period and up to $100,000 awarded in the first budget period for planning;

(2) The project will recruit and retain scholars to participate in the project. To meet this requirement, the applicant must describe—

[8] For the purposes of this priority, ''high-need LEA'' means an LEA (a) that serves not fewer than 10,000 children from families with incomes below the poverty line; or (b) for which not less than 20 percent of the children are from families with incomes below the poverty line.

[9] For the purposes of this priority, ''high-poverty school'' means a school in which at least 50 percent of students are from low-income families as determined using one of the measures of poverty specified in section 1113(a)(5) of the Elementary and Secondary Education Act of 1965, as amended (ESEA). For middle and high schools, eligibility may be calculated on the basis of comparable data from feeder schools. Eligibility as a high-poverty school under this definition is determined on the basis of the most currently available data.

[10] For the purposes of this priority, ''school implementing a comprehensive support and improvement plan'' means a school identified for comprehensive support and improvement by a State under section 1111(c)(4)(D) of the ESEA that includes (a) not less than the lowest performing 5 percent of all schools in the State receiving funds under title I, part A of the ESEA; (b) all public high schools in the State failing to graduate one third or more of their students; and (c) public schools in the State described in section 1111(d)(3)(A)(i)(II) of the ESEA.

[11] For the purposes of this priority, ''school implementing a targeted support and improvement plan'' means a school identified for targeted support and improvement by a State that has developed and is implementing a school-level targeted support and improvement plan to improve student outcomes based on the indicators in the statewide accountability system as defined in section 1111(d)(2) of the ESEA.

[12] For the purposes of this priority, ''competencies'' means what a person knows and can do—the knowledge, skills, and dispositions necessary to effectively function in a role (National Professional Development Center on Inclusion, 2011).

(i) The selection criteria the project will use to identify program applicants for admission into the program;

(ii) The specific recruitment strategies the project will use to attract a diverse pool of applicants, including from groups that are underrepresented in the field, including applicants from racially and ethnically diverse backgrounds, applicants who are multilingual, and applicants with disabilities; and

Note: Applicants should engage in focused outreach and recruitment to increase the number of applicants from groups that are traditionally underrepresented in the field, including applicants from racially and ethnically diverse backgrounds, applicants who are multilingual, and applicants with disabilities, but the selection criteria the applicant intends to use must ensure equal access and treatment of all applicants seeking admission to the program, and must be consistent with applicable law, including Federal civil rights laws.

(iii) The approach that will be used to mentor and support all scholars, including any specific approaches to supporting scholars from groups that are underrepresented in the field, including scholars from racially and ethnically diverse backgrounds, scholars who are multilingual, and scholars with disabilities, with the goal of helping them complete the program within the project period and preparing them for careers in special education, early intervention, or related services;

(3) The project will promote the acquisition of competencies needed by special education, early intervention, or related services personnel in the project's proposed preparation focus area to provide effective and equitable, evidence-based, and culturally and linguistically responsive instruction, interventions, and services that improve outcomes, including literacy and math outcomes, for children with disabilities, including children of color with disabilities and children with disabilities who are multilingual. To address this requirement, the applicant must—

(i) Describe how the proposed components, such as coursework; field or clinical experiences in early intervention, early childhood, or school settings; work-based experiences; or other opportunities provided to scholars, and sequence of the components will enable the scholars to acquire the competencies needed by applicable personnel to serve children with disabilities, including children of color and children who are multilingual in a school or early intervention setting;

(ii) Describe how the proposed project will reflect current evidence-based practices (EBPs) to prepare scholars to provide effective and equitable, evidence-based, and culturally and linguistically responsive instruction, interventions, and services that improve outcomes for children with disabilities, including literacy and math outcomes, including children of color and children who are multilingual, in a variety of early childhood and early intervention settings or educational settings, including in-person and distance learning;

(iii) Describe the pedagogical practices that will be used to ensure that the program is inclusive regarding race, ethnicity, culture, language, and disability status so that scholars are prepared to create inclusive, supportive, equitable, unbiased, and identity-safe learning environments for children with disabilities; and

(iv) Describe how the project will engage various partners, including families of color, families who are multilingual, and parents with disabilities; public or private partnering agencies, schools, or programs, including those that serve racially and ethnically diverse populations, multilingual populations, and children with disabilities; and centers or organizations that provide services to children with disabilities, including children of color with disabilities and children with disabilities who are multilingual, to inform and support project components.

(c) Demonstrate, in the narrative section of the application under ''Quality of the project personnel and management plan,'' how—

(1) The project director and other key project personnel are qualified to prepare scholars in the project's preparation focus area;

(2) The project director and other key project personnel will manage the components of the project; and

(3) The time commitments of the project director and other key project personnel are adequate to meet the objectives of the proposed project.

(d) Demonstrate, in the narrative section of the application under ''Adequacy of resources,'' how—

(1) Information regarding the types of accommodations and resources available to fully support scholars' well-being and a work-life balance (*e.g.,* university and community mental health supports, counseling services, health resources, housing resources, child care) will be disseminated and how the project will support scholars to access those accommodations and resources on a timely basis, if needed, while the scholar is in the program;

(2) The types of accommodations and resources provided to support scholars' well-being and a work-life balance will be individualized based on scholars' cultural, academic, social emotional, and disability-related needs with the goals of supporting them to complete the program; and

(3) The budget is adequate for meeting the project objectives and mitigating financial burden to scholars in completing the program of study.

Note: Scholar support does not need to be uniform for all scholars and should be customized for individual scholars based on scholars' financial needs, including consideration of all costs associated with the cost of attendance, even if that means enrolling fewer scholars. Scholar support can include support for cost of attendance (*e.g.,* tuition and fees; university student health insurance; an allowance for books, materials, and supplies; an allowance for miscellaneous personal expenses; an allowance for dependent care, such as child care; and an allowance for room and board), travel in conjunction with training assignments, including conference registration, and stipends to support scholars' completion of the program. Projections for scholar support should consider tuition increases and cost of living increases over the project period.

(e) Demonstrate, in the narrative section of the application under ''Quality of the project evaluation,'' how the applicant will—

(1) Evaluate how well the goals or objectives of the proposed project have been met. To meet this requirement the applicant must describe—

(i) The relevant outcomes to be measured for both the project and the scholars, particularly the acquisition of scholars' competencies; and

(ii) The evaluation methodologies, data collection methods, and data analyses that will be used; and

(2) Collect and analyze data on all scholars supported by the project, including data disaggregated by race, national origin, primary language(s), and disability status, to inform the proposed project on an ongoing basis.

(f) Demonstrate, in the appendices or narrative under ''Required project assurances'' as directed, that the following requirements are met. The applicant must—

(1) Include, in Appendix A of the application—

(i) Charts, tables, figures, graphs, screen shots, and visuals that provide information directly relating to the application requirements for the

narrative. Appendix A should not be used for supplementary information. Please note that charts, tables, figures, graphs, and screen shots can be single-spaced when placed in Appendix A; and

(ii) A letter of support from a public or private partnering agency, school, or program, that states it will provide scholars with a field or clinical experience in a high-need LEA, a high-poverty school, a school implementing a comprehensive support and improvement plan, a school implementing a targeted support and improvement plan for children with disabilities, a State educational agency, an early childhood or early intervention program located within the geographical boundaries of a high-need LEA, or an early childhood or early intervention program located within the geographical boundaries of an LEA serving the highest percentage of schools identified for comprehensive support and improvement or implementing targeted support and improvement plans in the State;

(2) Include in Appendix B of the application—

(i) A table that lists the project's required coursework and includes the course title, brief description, learning goals, and relevant State or national professional organization personnel standards for each course; and

(ii) Four exemplars of course syllabi required by the degree program that reflect EBPs across the areas of assessment; social, emotional, and behavioral development and learning; inclusive practices; instructional strategies; and literacy if appropriate, and consider the unique needs of children of color with disabilities and children with disabilities who are multilingual;

(3) Include in the application budget attendance by the project director at a three-day project directors' meeting in Washington, DC, during each year of the project; and

(4) Provide an assurance that—

(i) The project will meet the requirements in 34 CFR 304.23, particularly those related to (A) informing all scholarship recipients of their service obligation commitment; and (B) disbursing scholarships. Failure by a grantee to properly meet these requirements is a violation of the grant award that may result in the grantee being liable for returning any misused funds to the Department;

(ii) The project will meet the statutory requirements in section 662(e) through (h) of IDEA;

(iii) The project will be operated in a manner consistent with nondiscrimination requirements contained in Federal civil rights laws;

(iv) All the syllabi for the project's required coursework will be provided at the request of OSEP;

(v) At least 65 percent of the total award over the project period (*i.e.,* up to 60 months) will be used for scholar support;

(vi) Scholar support provided by the project (*e.g.,* tuition and fees; university student health insurance; an allowance for books, materials, and supplies; an allowance for miscellaneous personal expenses; an allowance for dependent care, such as child care; an allowance for room and board) is not conditioned on scholars working for the grantee (*e.g.,* personnel at the IHE);

(vii) The project director, key personnel, and scholars will actively participate in learning opportunities (*e.g.,* webinars, briefings) supported by OSEP. This is intended to promote opportunities for participants to understand reporting requirements, share resources, and generate new ideas by discussing topics of common interest to participants across projects including Department priorities and needs in the field;

(viii) The project website, if applicable, will be of high quality, with an easy-to-navigate design that meets government or industry-recognized standards for accessibility;

(ix) Scholar accomplishments (*e.g.,* public service, awards, publications, conference presentations) will be reported in annual and final performance reports; and

(x) Annual data will be submitted on each scholar who receives grant support (OMB Control Number 1820–0686). The primary purposes of the data collection are to track the service obligation fulfillment of scholars who receive funds from OSEP grants and to collect data for program performance measure reporting under 34 CFR 75.110. Data collection includes the submission of a signed, completed pre-scholarship agreement and exit certification for each scholar funded under an OSEP grant (see paragraph (f)(4)(i) of this priority). Applicants are encouraged to visit the Personnel Development Program Data Collection System website at *https://pdp.ed.gov/osep* for further information about this data collection requirement.

Competitive Preference Priority: Within this absolute priority, we give competitive preference to applications that address the following priority. Under 34 CFR 75.105(c)(2)(i), we award an additional 3 points to an application that meets the competitive preference priority. Applicants should indicate in the abstract if the competitive preference priority is addressed.

The competitive preference priority is:

Applications from New Potential Grantees (0 or 3 points).

(a) Under this priority, an applicant must demonstrate that the applicant (*e.g.,* the IHE) has not had an active discretionary grant under the ALN 84.325M, 84.325R, or ALN 84.325K in the last five years before the deadline date for submission of applications under this program (ALN 84.325M).

(b) For the purpose of this priority, a grant or contract is active until the end of the grant's or contract's project or funding period, including any extensions of those periods that extend the grantee's or contractor's authority to obligate funds.

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Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (APA) (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed priorities. Section 681(d) of IDEA, however, makes the public comment requirements of the APA inapplicable to the priorities in this notice.

Program Authority: 20 U.S.C. 1462 and 1481.

Note: Projects will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for this program in 34 CFR part 304.

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration has requested $250,000,000 for the Personnel Development to Improve Services and Results for Children with Disabilities program for FY 2024, of which we intend to use an estimated $7,250,000 for this competition. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2025 from the list of unfunded applications from this competition.

Estimated Range of Awards: $1,150,000–$1,250,000.

Estimated Average Size of Awards: $1,200,000.

Maximum Award: We will not make an award exceeding $1,250,000 per project for a project period of 60 months or an award that exceeds $350,000 for any single budget period.

Note: Applicants must describe, in their applications, the amount of funding being requested for each 12-month budget period.

Estimated Number of Awards: 29.

Project Period: Up to 60 months.

Note: The Department is not bound by any estimates in this notice.

III. Eligibility Information

1. *Eligible Applicants:* HBCUs, TCCUs, MSIs, and private nonprofit organizations associated with HBCUs, TCCUs, and MSIs.

Note: If you are a nonprofit organization, under 34 CFR 75.51, you may demonstrate your nonprofit status by providing: (1) proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code; (2) a statement from a State taxing body or the State attorney general certifying that the organization is a nonprofit organization operating within the State and that no part of its net earnings may lawfully benefit any private shareholder or individual; (3) a certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant; or (4) any item described above if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

2.a. *Cost Sharing or Matching:* Cost sharing or matching is not required for this competition.

b. *Indirect Cost Rate Information:* This program uses a training indirect cost rate. This limits indirect cost reimbursement to an entity's actual indirect costs, as determined in its negotiated indirect cost rate agreement, or eight percent of a modified total direct cost base, whichever amount is less. For more information regarding training indirect cost rates, see 34 CFR 75.562. For more information regarding indirect costs, or to obtain a negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

c. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* Under 34 CFR 75.708(b) and (c), a grantee under this competition may award subgrants—to directly carry out project activities described in its application—to the following types of entities: IHEs, nonprofit organizations suitable to carry out the activities proposed in the application, and other public agencies. The grantee may award subgrants to entities it has identified in an approved application or that it selects through a competition under procedures established by the grantee, consistent with 34 CFR 75.708(b)(2).

4. *Other General Requirements:*

a. Recipients of funding under this competition must make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of IDEA).

b. Applicants for, and recipients of, funding must, with respect to the aspects of their proposed projects relating to the absolute priority, involve individuals with disabilities, or parents of individuals with disabilities ages birth through 26, in planning, implementing, and evaluating the project (see section 682(a)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs,

published in the **Federal Register** on December 7, 2022 (87 FR 75045) and available at *www.federalregister.gov/documents/2022/12/07/2022–26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs,* which contain requirements and information on how to submit an application.

2. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

3. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

4. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you limit the application narrative to no more than 40 pages and use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double-space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, reference citations, and captions, as well as all text in charts, tables, figures, graphs, and screen shots.
- Use a font that is 12 point or larger.
- *Use one of the following fonts:* Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the abstract (follow the guidance provided in the application package for completing the abstract), the table of contents, the list of priority requirements, the resumes, the reference list, the letters of support, or the appendices. However, the recommended page limit does apply to all of the application narrative, including all text in charts, tables, figures, graphs, and screen shots.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are as follows:

(a) *Significance (10 points).*

(1) The Secretary considers the significance of the proposed project.

(2) In determining the significance of the proposed project, the Secretary considers the following factors:

(i) The extent to which the proposed project will prepare personnel for fields in which shortages have been demonstrated; and

(ii) The importance or magnitude of the results or outcomes likely to be attained by the proposed project, especially improvements in teaching and student achievement.

(b) *Quality of project services (45 points).*

(1) The Secretary considers the quality of the services to be provided by the proposed project.

(2) In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The extent to which the services to be provided by the proposed project reflect up-to-date knowledge from research and effective practice;

(ii) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services;

(iii) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services; and

(iv) The extent to which the proposed activities constitute a coherent, sustained program of training in the field.

(c) *Quality of project personnel and quality of the management plan (20 points).*

(1) The Secretary considers the quality of the project personnel and the quality of the management plan for the proposed project.

(2) In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The qualifications, including relevant training and experience, of key project personnel;

(ii) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks; and

(iii) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project.

(d) *Adequacy of resources (10 points).*

(1) The Secretary considers the adequacy of resources of the proposed project.

(2) In determining the adequacy of resources of the proposed project, the Secretary considers the following factors:

(i) The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization or the lead applicant organization; and

(ii) The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project.

(e) *Quality of the project evaluation (15 points).*

(1) The Secretary considers the quality of the evaluation to be conducted of the proposed project.

(2) In determining the quality of the evaluation, the Secretary considers the following factors:

(i) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project; and

(ii) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Additional Review and Selection Process Factors:* In the past, the Department has had difficulty finding peer reviewers for certain competitions because many individuals who are eligible to serve as peer reviewers have conflicts of interest. The standing panel requirements under section 682(b) of IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that for some discretionary grant competitions, applications may be separated into two or more groups and ranked and selected for funding within specific groups. This procedure will make it easier for the Department to find peer reviewers by ensuring that greater numbers of individuals who are eligible to serve as reviewers for any particular group of applicants will not have conflicts of interest. It also will increase the quality, independence, and fairness of the review process, while permitting panel members to review applications under discretionary grant competitions for which they also have submitted applications.

4. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions, and under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

5. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

6. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with—

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115—232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection analysis and reporting. In this case the Secretary establishes a data collection period.

5. *Performance Measures:* For the purposes of Department reporting under 34 CFR 75.110, the Department has established a set of performance measures, including long-term measures, that are designed to yield information on various aspects of the effectiveness and quality of the Personnel Development to Improve Services and Results for Children with Disabilities program. These measures include: (1) the percentage of

preparation programs that incorporate scientifically or evidence-based practices into their curricula; (2) the percentage of scholars completing the preparation program who are knowledgeable and skilled in evidence-based practices that improve outcomes for children with disabilities; (3) the percentage of scholars who exit the preparation program prior to completion due to poor academic performance; (4) the percentage of scholars completing the preparation program who are working in the area(s) in which they were prepared upon program completion; (5) the Federal cost per scholar who completed the preparation program; (6) the percentage of scholars who completed the preparation program and are employed in high-need districts; and (7) the percentage of scholars who completed the preparation program and who are rated effective by their employers.

In addition, the Department will gather information on the following outcome measures: the number and percentage of scholars proposed by the grantee in its application that were actually enrolled and making satisfactory academic progress in the current academic year; the number and percentage of enrolled scholars who are on track to complete the training program by the end of the project's original grant period; and the percentage of scholars who completed the preparation program and are employed in the field of special education for at least two years.

Grantees may be asked to participate in assessing and providing information on these aspects of program quality.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package 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 featureat *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Glenna Wright-Gallo,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2023–26855 Filed 12–6–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0201]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Indian Education Professional Development (PD) Application Package—1894–0001

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing an extension without change of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before January 8, 2024.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. Reginfo.gov provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Donna Sabis-Burns, (202) 453–7499.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Indian Education Professional Development (PD) Application Package—1894–0001.

OMB Control Number: 1810–0580.

Type of Review: Extension without change of a currently approved ICR.

Respondents/Affected Public: State, local, and Tribal governments.

Total Estimated Number of Annual Responses: 40.

Total Estimated Number of Annual Burden Hours: 1,600.

Abstract: The Office of Indian Education (OIE) of the Department of Education (ED) requests an extension for the Indian Education Professional Development Grant Application authorized under title VI, part A, of the Elementary and Secondary Education Act, as amended. The Every Student Succeeds Act (ESSA) amended the Elementary and Secondary Education Act (ESEA); included amongst those amendments was new statutory

language for the PD program in section 6122 of the ESSA. It is a competitive discretionary grant program. The grant application submitted for this program is evaluated on the basis of how well an applicant addresses the selection criteria, and is used to determine applicant eligibility and amount of award for projects selected for funding.

This collection is being submitted under the Streamlined Clearance Process for Discretionary Grant Information Collections (1894–0001). Therefore, the 30-day public comment period notice will be the only public comment notice published for this information collection.

Dated: December 4, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–26875 Filed 12–6–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23–200–000]

Transcontinental Gas Pipe Line Company, LLC and Northern Natural Gas Company; Notice of Availability of the Environmental Assessment for the Proposed Pelto Area Abandonment Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the Pelto Area Abandonment Project (Project), in Louisiana state waters offshore of Terrebonne Parish and within the Pelto and Ship Shoal Blocks of Federal offshore waters. Transcontinental Gas Pipe Line Company, LLC (Transco) and Northern Natural Gas Company (Northern) propose to abandon six pipeline segments with different ownership interests that account for a total of about 32.1 miles of natural gas pipelines.

The EA assesses the potential environmental effects of the Project in accordance with the requirements of the National Environmental Policy Act (NEPA). The FERC staff concludes that approval of the Project, with appropriate mitigating measures, would not constitute a major Federal action significantly affecting the quality of the human environment.

The Commission mailed a copy of the *Notice of Availability* of the EA to Federal, State, and local government representatives and agencies; elected officials; non-governmental organizations, environmental and public interest groups; and newspapers and libraries in the project area. The EA is only available in electronic format. It may be viewed and downloaded from the FERC's website (*www.ferc.gov*), on the natural gas environmental documents page (*https://www.ferc.gov/industries-data/natural-gas/environment/environmental-documents*). In addition, the EA may be accessed by using the eLibrary link on the FERC's website. Click on the eLibrary link (*https://elibrary.ferc.gov/eLibrary/search*), select ''General Search'' and enter the docket number in the ''Docket Number'' field, (*i.e.* CP23–200). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

The EA is not a decision document. It presents Commission staff's independent analysis of the environmental issues for the Commission to consider when addressing the merits of all issues in this proceeding. Any person wishing to comment on the EA may do so. Your comments should focus on the EA's disclosure and discussion of potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure consideration of your comments on the proposal, it is important that the Commission receive your comments on or before 5:00 p.m. Eastern Time on January 2, 2024.

For your convenience, there are three methods you can use to submit your comments to the Commission. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208–3676 or *FercOnlineSupport@ferc.gov.* Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the eComment feature on the Commission's website (*www.ferc.gov*) under the link to FERC Online. This is an easy method for submitting brief, text-only comments on a project;

(2) You can also file your comments electronically using the eFiling feature on the Commission's website (*www.ferc.gov*) under the link to FERC Online. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the Commission. Be sure to reference the Project docket number (CP23–200–000) on your letter. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Filing environmental comments will not give you intervenor status, but you do not need intervenor status to have your comments considered. Only intervenors have the right to seek rehearing or judicial review of the Commission's decision. At this point in this proceeding, the timeframe for filing timely intervention requests has expired. Any person seeking to become a party to the proceeding must file a motion to intervene out-of-time pursuant to Rule 214(b)(3) and (d) of the Commission's Rules of Practice and Procedures (18 CFR 385.214(b)(3) and (d)) and show good cause why the time limitation should be waived. Motions to intervene are more fully described at *https://www.ferc.gov/how-intervene.*

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website (*www.ferc.gov*) using the eLibrary link. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

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.*

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific

dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

Dated: December 1, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–26871 Filed 12–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG24–47–000.
Applicants: Elkhart County Solar Project LLC.
Description: Elkhart County Solar Project LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.
Filed Date: 12/1/23.
Accession Number: 20231201–5295.
Comment Date: 5 p.m. ET 12/22/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER22–910–004.
Applicants: Rockland Electric Company PJM Interconnection L.L.C.
Description: Compliance filing: Rockland Electric Company submits tariff filing per 35: RECO Compliance Filing in ER22–910 to be effective 1/1/2024.
Filed Date: 12/1/23.
Accession Number: 20231201–5230.
Comment Date: 5 p.m. ET 12/22/23.

Docket Numbers: ER23–2820–001.
Applicants: Alabama Power Company Georgia Power Company Mississippi Power Company.
Description: Tariff Amendment: Alabama Power Company submits tariff filing per 35.17(b): Laurens Solar I LGIA Deficiency Response Filing to be effective 9/6/2023.
Filed Date: 12/1/23.
Accession Number: 20231201–5229.
Comment Date: 5 p.m. ET 12/22/23.

Docket Numbers: ER24–228–002.
Applicants: South Cheyenne Solar LLC.
Description: Tariff Amendment: Revision of Proposed Market-Based Rate Tariff to be effective 12/1/2023.
Filed Date: 12/1/23.
Accession Number: 20231201–5248.
Comment Date: 5 p.m. ET 12/22/23.

Docket Numbers: ER24–509–000.
Applicants: Pacific Gas and Electric Company.
Description: § 205(d) Rate Filing: November 2023 Western WDT Service Agreement Biannual Filing (SA 17) to be effective 2/1/2024.
Filed Date: 11/30/23.
Accession Number: 20231130–5254.
Comment Date: 5 p.m. ET 12/21/23.

Docket Numbers: ER24–510–000.
Applicants: Pacific Gas and Electric Company.
Description: § 205(d) Rate Filing: November 2023 Western Interconnection Biannual Filing (SA 59) to be effective 2/1/2024.
Filed Date: 11/30/23.
Accession Number: 20231130–5260.
Comment Date: 5 p.m. ET 12/21/23.

Docket Numbers: ER24–511–000.
Applicants: Duke Energy Florida LLC.
Description: § 205(d) Rate Filing: DEF–SECI Reimbursement Agmt RS No. 357 to be effective 1/30/2024.
Filed Date: 11/30/23.
Accession Number: 20231130–5268.
Comment Date: 5 p.m. ET 12/21/23.

Docket Numbers: ER24–512–000.
Applicants: New England Power Pool Participants Committee.
Description: § 205(d) Rate Filing: Dec 2023 Membership Filing to be effective 12/1/2023.
Filed Date: 11/30/23.
Accession Number: 20231130–5280.
Comment Date: 5 p.m. ET 12/21/23.

Docket Numbers: ER24–513–000.
Applicants: Idaho Power Company.
Description: § 205(d) Rate Filing: Revisions to Attachment C to be effective 2/1/2024.
Filed Date: 12/1/23.
Accession Number: 20231201–5000.
Comment Date: 5 p.m. ET 12/22/23.

Docket Numbers: ER24–513–001.
Applicants: Idaho Power Company.
Description: Tariff Amendment: Errata to Revisions to Attachment C to be effective 2/1/2024.
Filed Date: 12/1/23.
Accession Number: 20231201–5292.
Comment Date: 5 p.m. ET 12/22/23.

Docket Numbers: ER24–515–000.
Applicants: Midcontinent Independent System Operator Inc. American Transmission Company LLC.
Description: § 205(d) Rate Filing: Midcontinent Independent System Operator Inc. submits tariff filing per 35.13(a)(2)(iii): 2023–12–01_SA 4200–4205 ATC–WEPCo PCAs (SW WI ED Area) to be effective 1/31/2024.
Filed Date: 12/1/23.
Accession Number: 20231201–5022.
Comment Date: 5 p.m. ET 12/22/23.

Docket Numbers: ER24–516–000.
Applicants: Midcontinent Independent System Operator Inc.
Description: § 205(d) Rate Filing: 2023–12–01_SA 6522 MISO-Manitowoc Public Utilities Second SSR Agrmt Lakefront 9 to be effective 2/1/2024.
Filed Date: 12/1/23.
Accession Number: 20231201–5156.
Comment Date: 5 p.m. ET 12/22/23.

Docket Numbers: ER24–517–000.
Applicants: Duke Energy Florida LLC.
Description: § 205(d) Rate Filing: DEF–SECI Reimbursement Agmt (Gilchrist) RS No. 356 to be effective 1/31/2024.
Filed Date: 12/1/23.
Accession Number: 20231201–5177.
Comment Date: 5 p.m. ET 12/22/23.

Docket Numbers: ER24–518–000.
Applicants: Duke Energy Florida LLC.
Description: § 205(d) Rate Filing: DEF–SECI Reimbursement Agmt (Columbia) RS No. 355 to be effective 1/31/2024.
Filed Date: 12/1/23.
Accession Number: 20231201–5193.
Comment Date: 5 p.m. ET 12/22/23.

Docket Numbers: ER24–519–000.
Applicants: Morongo Transmission LLC.
Description: § 205(d) Rate Filing: Annual Operating Cost Update Filing 2024 to be effective 1/1/2024.
Filed Date: 12/1/23.
Accession Number: 20231201–5199.
Comment Date: 5 p.m. ET 12/22/23.

Docket Numbers: ER24–520–000.
Applicants: Morongo Transmission LLC.
Description: § 205(d) Rate Filing: Annual TRBAA Filing 2024 to be effective 1/1/2024.
Filed Date: 12/1/23.
Accession Number: 20231201–5205.
Comment Date: 5 p.m. ET 12/22/23.

Docket Numbers: ER24–521–000.
Applicants: Duke Energy Florida LLC.
Description: § 205(d) Rate Filing: DEF-Shady Hills Amended and Restated LGIA to be effective 11/14/2023.
Filed Date: 12/1/23.
Accession Number: 20231201–5215.
Comment Date: 5 p.m. ET 12/22/23.

Docket Numbers: ER24–522–000.
Applicants: Alabama Power Company Georgia Power Company Mississippi Power Company.
Description: § 205(d) Rate Filing: Alabama Power Company submits tariff filing per 35.13(a)(2)(iii): Amendment of Americus Solar & Battery Amended and Restated LGIA to be effective 11/20/2023.
Filed Date: 12/1/23.
Accession Number: 20231201–5225.

Comment Date: 5 p.m. ET 12/22/23.

Docket Numbers: ER24–523–000.

Applicants: Alabama Power Company Georgia Power Company Mississippi Power Company.

Description: § 205(d) Rate Filing: Alabama Power Company submits tariff filing per 35.13(a)(2)(iii): SR Hope Hull LGIA Filing to be effective 11/20/2023.

Filed Date: 12/1/23.

Accession Number: 20231201–5233.

Comment Date: 5 p.m. ET 12/22/23.

Docket Numbers: ER24–524–000.

Applicants: San Diego Gas & Electric Company.

Description: Informational Filing [Cycle 6] of Fifth Transmission Owner Rate Formula Rate Mechanism of San Diego Gas & Electric Company.

Filed Date: 12/1/23.

Accession Number: 20231201–5262.

Comment Date: 5 p.m. ET 12/22/23.

Docket Numbers: ER24–525–000.

Applicants: Manitowoc Public Utilities.

Description: Baseline eTariff Filing: RS FERC No. 4–Monthly SSR Payment for Lakefront No. 9 with MISO to be effective 2/1/2024.

Filed Date: 12/1/23.

Accession Number: 20231201–5278.

Comment Date: 5 p.m. ET 12/22/23.

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: December 1 2023.

Kimberly D. Bose

Secretary.

[FR Doc. 2023–26868 Filed 12–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC23–15–000]

Commission Information Collection Activities (FERC–516H) Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of information collection and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the currently approved information collection, FERC–516H, (Electric Rate Schedules and Tariff Filings, Pro Forma Open Access Transmission Tariff), which will be submitted to the Office of Management and Budget (OMB) for review. No Comments were received on the 60-day notice published on September 28, 2023.

DATES: Comments on the collection of information are due January 8, 2024.

ADDRESSES: Send written comments on FERC–516H to OMB through *www.reginfo.gov/public/do/PRAMain.* Attention: Federal Energy Regulatory Commission Desk Officer. Please identify the OMB Control Number (1902–0303) in the subject line of your comments. Comments should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.*

Please submit copies of your comments to the Commission. You may submit copies of your comments (identified by Docket No. IC23–15–000) by one of the following methods:

Electronic filing through *https://www.ferc.gov,* is preferred.

- *Electronic Filing:* Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.
- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery.
  - *Mail via U.S. Postal Service Only:* Addressed to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.
  - *Hand (including courier) Delivery:* Deliver to: Federal Energy Regulatory Commission, Secretary of the Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

Instructions: OMB submissions must be formatted and filed in accordance with submission guidelines at *www.reginfo.gov/public/do/PRAMain.* Using the search function under the ''Currently Under Review'' field, select Federal Energy Regulatory Commission; click ''submit,'' and select ''comment'' to the right of the subject collection.

FERC submissions must be formatted and filed in accordance with submission guidelines at: *https://www.ferc.gov.* For user assistance, contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free).

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *https://www.ferc.gov/ferc-online/overview.*

FOR FURTHER INFORMATION CONTACT: Jean Sonneman may be reached by email at *DataClearance@FERC.gov,* telephone at (202) 502–6362.

SUPPLEMENTARY INFORMATION:

Title: FERC–516H, Electric Rate Schedules and Tariff Filings, Pro Forma Open Access Transmission Tariff.

OMB Control No.: 1902–0303.

Type of Request: Three-year extension of the FERC–516H information collection requirements with no changes to the current reporting requirements.

Abstract: As of March 14, 2022, FERC–516H, requires respondents that are subject to 18 CFR 35.28 to submit compliance filings that add a new Attachment M to their *pro forma* Open Access Transmission Tariffs (OATTs). The regulation at 18 CFR 35.28, which pertains to non-discriminatory open access transmission tariffs, applies to:

- Commission-jurisdictional public utilities that own, control, or operate facilities used for the transmission of electric energy in interstate commerce; and
- Non-jurisdictional utilities that seek voluntary compliance with jurisdictional transmission tariff reciprocity conditions.

In Order No. 881, the Commission added 18 CFR 35.28(c)(5) to require any public utility that owns transmission facilities that are not under the public utility's control to, consistent with the *pro forma* OATT required by 18 CFR 35.28(c)(1), share with the public utility that controls such facilities (and its

Market Monitoring Unit(s), if applicable):

(i) Transmission line ratings for each period for which transmission line ratings are calculated for such facilities (with updated ratings shared each time ratings are calculated); and

(ii) Written transmission line rating methodologies used to calculate the transmission line ratings for such facilities provided under subparagraph (i), above.

Additionally, 18 CFR 35.28(c) requires each public utility transmission provider to have on file with the Commission and adhere to the Commission's *pro forma* Open Access Transmission Tariff (OATT). In Order No. 881, the Commission added Attachment M of the Commission's *pro forma* OATT to require each jurisdictional transmission provider to maintain on the password-protected section of its OASIS page or on another password-protected website a database of transmission line ratings and transmission line rating methodologies. Such transmission line ratings and transmission line rating methodologies are to be calculated and provided by transmission owners. The database must include a full record of all transmission line ratings, both as used in real-time operations, and as used for all future periods for which transmission service is offered. Additionally, Attachment M of the Commission's *pro forma* OATT requires transmission providers, as the regulated entities, to share transmission line ratings and methodologies with any transmission provider(s) upon request and in a timely manner.

Type of Respondent: Transmission Owners.

Estimate of Annual Burden: [1] The Commission estimates the annual public reporting burden for the information collection as below:

A. Area of modification	B. Number of respondents	C. Annual estimated number of responses per respondent	D. Annual estimated number of responses (column B × column C)	E. Average burden hours & cost [2] per response	F. Total estimated burden hours & total estimated cost (Column D × Column E)
FERC–516H (Control No. 1902–0303)					
Transmission owners [3] (Year 1 and On-going).	289 (TOs)	1	289	176 hrs.; $16,192	50,864 hrs.; $4,679,488.

Comments: Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) 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.

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: December 1, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–26867 Filed 12–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL24–10–000]

Basin Electric Power Cooperative; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On December 1, 2023, the Commission issued an order in Docket No. EL24–10–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e, instituting an investigation to determine whether Basin Electric Power Cooperative's Rate Schedule A is unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. *Basin Electric Power Cooperative,* 185 FERC ¶ 61,163 (2023).

The refund effective date in Docket No. EL24–10–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL24–10–000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2022), within 21 days of the date of issuance of the order.

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 FERC at *FERCOnlineSupport@ferc.gov* or call

[1] ''Burden'' is the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, refer to 5 CFR 1320.3.

[2] The hourly cost (for salary plus benefits) uses the figures from the Bureau of Labor Statistics (BLS) for three positions involved in the reporting and recordkeeping requirements. These figures include salary (based on BLS data for May 2023, *http://bls.gov/oes/current/naics2_22.htm*) and benefits (based on BLS data issued March 19, 2022, *http://www.bls.gov/news.release/ecec.nr0.htm*) and are Manager (Code 11–0000 $106.33/hour), Electrical Engineer (Code 17–2071 $77.29/hour). The hourly cost for the reporting requirements ($91.81 = $92 rounded) is an average of the cost of a manager and engineer.

[3] Transmission owners update forecasts and ratings, and share transmission line ratings and facility ratings methodologies w/transmission providers and, if applicable, RTOs/ISOs & market monitors.

toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFile'' link at *http://www.ferc.gov.* In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The 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: December 1, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–26869 Filed 12–6–23; 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 Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: PR24–6–000.
Applicants: Hope Gas, Inc.
Description: Report Filing: HGI—2023 PREP Filing Supplemental Filing to be effective N/A.
Filed Date: 12/1/23.
Accession Number: 20231201–5170.
Comment Date: 5 p.m. ET 12/22/23.

Docket Numbers: PR24–18–000.
Applicants: Boston Gas Company.
Description: § 284.123 Rate Filing: Revised Statement of Operating Conditions to be effective 1/1/2024.
Filed Date: 11/30/23.
Accession Number: 20231130–5232.
Comment Date: 5 pm ET 12/21/23.

Docket Numbers: PR24–19–000.
Applicants: Louisville Gas and Electric Company.
Description: § 284.123(g) Rate Filing: Operating Statement Rate Change Exhibit A Statement of Rates to be effective 11/1/2023.
Filed Date: 12/1/23.
Accession Number: 20231201–5161.
Comment Date: 5 pm ET 12/22/23.
§ 284.123(g) Protest: 5 pm ET 1/30/24.

Docket Numbers: PR24–20–000.
Applicants: Intermountain Gas Company.
Description: § 284.123 Rate Filing: Statement of Operating Conditions Baseline to be effective 12/1/2023.
Filed Date: 12/1/23.
Accession Number: 20231201–5176.
Comment Date: 5 pm ET 12/22/23.

Docket Numbers: RP24–197–000.
Applicants: UGI Mt. Bethel Pipeline Company, LLC.
Description: Annual Report of Operational Purchases and Sales of UGI Mt. Bethel Pipeline, LLC.
Filed Date: 11/30/23.
Accession Number: 20231130–5154.
Comment Date: 5 pm ET 12/12/23.

Docket Numbers: RP24–198–000.
Applicants: Rockies Express Pipeline LLC.
Description: § 4(d) Rate Filing: REX 2023–11–30 Negotiated Rate Agreements to be effective 12/1/2023.
Filed Date: 11/30/23.
Accession Number: 20231130–5167.
Comment Date: 5 pm ET 12/12/23.

Docket Numbers: RP24–199–000.
Applicants: TransColorado Gas Transmission Company LLC.
Description: § 4(d) Rate Filing: TC Quarterly FL&U Update Nov. 2023 to be effective 1/1/2024.
Filed Date: 11/30/23.
Accession Number: 20231130–5175.
Comment Date: 5 pm ET 12/12/23.

Docket Numbers: RP24–200–000.
Applicants: Mojave Pipeline Company, L.L.C.
Description: § 4(d) Rate Filing: Annual Fuel and L&U Filing 2024 to be effective 1/1/2024.
Filed Date: 11/30/23.
Accession Number: 20231130–5192.
Comment Date: 5 pm ET 12/12/23.

Docket Numbers: RP24–202–000.
Applicants: Tennessee Gas Pipeline Company, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rate Agreements Filing (Koch_Lackawanna) to be effective 12/1/2023.
Filed Date: 11/30/23.
Accession Number: 20231130–5218.
Comment Date: 5 pm ET 12/12/23.

Docket Numbers: RP24–203–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Superseding Neg Rate Agmt (Texla 57490) to be effective 11/30/2023.
Filed Date: 11/30/23.
Accession Number: 20231130–5219.
Comment Date: 5 pm ET 12/12/23.

Docket Numbers: RP24–204–000.
Applicants: LA Storage, LLC.
Description: § 4(d) Rate Filing: Filing of Negotiated Rate I/W Agreements 11.30.23 to be effective 12/1/2023.
Filed Date: 11/30/23.
Accession Number: 20231130–5238.
Comment Date: 5 pm ET 12/12/23.

Docket Numbers: RP24–205–000.
Applicants: UGI Sunbury, LLC.
Description: Annual Report of Operational Purchases and Sales of UGI Sunbury, LLC.
Filed Date: 11/30/23.
Accession Number: 20231130–5251.
Comment Date: 5 pm ET 12/12/23.

Docket Numbers: RP24–206–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Non-Conforming Agreements Filing (ExxonMobil) to be effective 1/1/2024.
Filed Date: 11/30/23.
Accession Number: 20231130–5247.
Comment Date: 5 pm ET 12/12/23.

Docket Numbers: RP24–207–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Non-Conforming Agreements Update (APS 2023) to be effective 1/1/2024.
Filed Date: 11/30/23.
Accession Number: 20231130–5263.
Comment Date: 5 pm ET 12/12/23.

Docket Numbers: RP24–208–000.
Applicants: Southeast Supply Header, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—FPL to be effective 1/1/2024.
Filed Date: 12/1/23.
Accession Number: 20231201–5011.
Comment Date: 5 pm ET 12/13/23.

Docket Numbers: RP24–209–000.
Applicants: Equitrans, L.P.
Description: § 4(d) Rate Filing: Negotiated Rate Capacity Release Agreements—12/1/2023 to be effective 12/1/2023.
Filed Date: 12/1/23.
Accession Number: 20231201–5019.
Comment Date: 5 pm ET 12/13/23.

Docket Numbers: RP24–210–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—Various Releases eff 12–1–23 to be effective 12/1/2023.
Filed Date: 12/1/23.
Accession Number: 20231201–5057.
Comment Date: 5 pm ET 12/13/23.

Docket Numbers: RP24–211–000.
Applicants: NEXUS Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—Various Releases eff 12–1–2023 to be effective 12/1/2023.
Filed Date: 12/1/23.
Accession Number: 20231201–5058.
Comment Date: 5 pm ET 12/13/23.

Docket Numbers: RP24–212–000.
Applicants: Texas Eastern Transmission, LP.
Description: § 4(d) Rate Filing: Negotiated Rates—December 2023 Clean Up Filing eff 1–1–24 to be effective 1/1/2024.
Filed Date: 12/1/23.
Accession Number: 20231201–5059.
Comment Date: 5 pm ET 12/13/23.

Docket Numbers: RP24–213–000.
Applicants: MountainWest Pipeline, LLC.
Description: § 4(d) Rate Filing: FGRP Report for 2024 to be effective 1/1/2024.
Filed Date: 12/1/23.
Accession Number: 20231201–5062.
Comment Date: 5 pm ET 12/13/23.

Docket Numbers: RP24–214–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rate Agreement Update (Conoco Dec 4 2023) to be effective 12/4/2023.
Filed Date: 12/1/23.
Accession Number: 20231201–5073.
Comment Date: 5 pm ET 12/13/23.

Docket Numbers: RP24–215–000.
Applicants: Gas Transmission Northwest LLC.
Description: Compliance filing: Annual Fuel Charge Adjustment 2023 Report to be effective N/A.
Filed Date: 12/1/23.
Accession Number: 20231201–5077.
Comment Date: 5 pm ET 12/13/23.

Docket Numbers: RP24–216–000.
Applicants: Chandeleur Pipe Line, LLC.
Description: Compliance filing: Chandeleur FLLA Filing to be effective N/A.
Filed Date: 12/1/23.
Accession Number: 20231201–5106.
Comment Date: 5 pm ET 12/13/23.

Docket Numbers: RP24–217–000.
Applicants: Eastern Shore Natural Gas Company.
Description: § 4(d) Rate Filing: Capital Cost Surcharge #4 Eff. January 1, 2024 to be effective 1/1/2024.
Filed Date: 12/1/23.
Accession Number: 20231201–5114.
Comment Date: 5 pm ET 12/13/23.

Docket Numbers: RP24–218–000.
Applicants: Transwestern Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates Filing—Assignment XTO/EMOC to be effective 12/1/2023.
Filed Date: 12/1/23.
Accession Number: 20231201–5130.
Comment Date: 5 pm ET 12/13/23.

Docket Numbers: RP24–219–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Cap Rel Neg Rate Agmt (Osaka 46429 to ConocoPhillips 57588) to be effective 12/1/2023.
Filed Date: 12/1/23.
Accession Number: 20231201–5142.
Comment Date: 5 pm ET 12/13/23.

Docket Numbers: RP24–220–000.
Applicants: Rockies Express Pipeline LLC.
Description: § 4(d) Rate Filing: REX 2023–12–01 Negotiated Rate Agreements to be effective 12/2/2023.
Filed Date: 12/1/23.
Accession Number: 20231201–5145.
Comment Date: 5 pm ET 12/13/23.

Docket Numbers: RP24–221–000.
Applicants: NEXUS Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—DTE Electric 860002 eff 12–1–2023 to be effective 12/1/2023.
Filed Date: 12/1/23.
Accession Number: 20231201–5167.
Comment Date: 5 pm ET 12/13/23.

Docket Numbers: RP24–222–000.
Applicants: Cameron Interstate Pipeline, LLC.
Description: § 4(d) Rate Filing: Cameron Interstate Pipeline Adjustment of Fuel Retainage Per to be effective 1/1/2024.
Filed Date: 12/1/23.
Accession Number: 20231201–5191.
Comment Date: 5 pm ET 12/13/23.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP11–1591–000.
Applicants: Golden Pass Pipeline LLC.
Description: Refund Report: 2023 Penalty and Revenue Cost Report of Golden Pass Pipeline LLC to be effective N/A.
Filed Date: 12/1/23.
Accession Number: 20231201–5020.
Comment Date: 5 pm ET 12/13/23.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

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: December 1, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–26870 Filed 12–6–23; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1282; FR ID 188996]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility;

the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

DATES: Written PRA comments should be submitted on or before February 5, 2024. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

OMB Control No.: 3060–XXXX.

Title: Telemetry, Tracking and Command Earth Station Operators.

Form No: N/A.

Type of Review: Extension of an existing collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 4 respondents; 4 responses.

Estimated Time per Response: 12 hours.

Frequency of Response: On occasion reporting requirement and Third-party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The Commission has statutory authority for the information collection requirements under 47 U.S.C. 151, 152, 154(i), 154(j), 155(c), 201, 302, 303, 304, 307(e), 309, and 316.

Total Annual Burden: 48 hours.

Total Annual Cost: $2,200.

Needs and Uses: On March 3, 2020, the Commission released a Report and Order and Order of Proposed Modification titled, ''In the Matter of Expanding Flexible Use of the 3.7 to 4.2 GHz,'' GN Docket Number 18–122 (FCC 20–22). This rulemaking, which is under the purview of the Commission's Wireless Telecommunications Bureau, is hereinafter referred to as the 3.7 GHz Report and Order.

The Commission believes that C-band spectrum for terrestrial wireless uses will play a significant role in bringing next-generation services like 5G to the American public and assuring American leadership in the 5G ecosystem. The agency took action to make this valuable spectrum resource available for new terrestrial wireless uses as quickly as possible, while also preserving the continued operation of existing Fixed Satellite Services (FSS) available during and after the transition.

In the 3.7 GHz Report and Order, the Commission concluded that a public auction of the lower 280 megahertz of the C-band will best carry out our goals, and the agency will add a mobile allocation to the 3.7–4.0 GHz band so that next-generation services such as 5G can use the band. Relying on the Emerging Technologies framework, the Commission adopted a process to relocate FSS operations into the upper 200 megahertz of the band, while fully reimbursing existing operators for the costs of this relocation and offering accelerated relocation payments to encourage a speedy transition. The Commission also adopted service and technical rules for overlay licensees in the 280 megahertz of spectrum designated for transition to flexible use.

Among other information collection requirements in the 3.7 GHz Report and Order, the Commission has adopted several requirements, described in the text, related to the protection of TT&C earth stations and coordination with 3.7 GHz Service licensees. In a section of the 3.7 GHz Report and Order titled ''Adjacent Channel Protection Criteria'' the Commission sets out the following requirements:

Pursuant to paragraph 388 of the 3.7 GHz Report and Order, the Commission requires that the TT&C operators make available certain pertinent technical information about their systems upon request by licensees in the 3.7 GHz Service to ensure the protection of TT&C operations. In addition, paragraph 389 of the 3.7 GHz Report and Order includes the requirement that, in the event of a claim by a TT&C earth station operating in 4.0–4.2 GHz of harmful interference by a 3.7 GHZ operator, the earth station operator must demonstrate that that have installed a filter that complies with the mask requirement prescribed by the Commission. This requirement will facilitate an efficient and safe transition by requiring earth station operators to demonstrate their compliance with the mask requirements, thereby minimizing the risk of interference.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–26891 Filed 12–6–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

[Docket No. 23–13]

USL AUTO EXPORTING INC., Complainant v. EASY SHIPPING CORPORATION, Respondent; Notice of Filing of Complaint and Assignment

Served: December 4, 2023.

Notice is given that a complaint has been filed with the Federal Maritime Commission (the ''Commission'') by USL Auto Exporting Inc. (the ''Complainant'') against Easy Shipping Corporation (the ''Respondent''). Complainant states that the Commission has subject matter jurisdiction over the complaint and personal jurisdiction over the Respondent pursuant to the Shipping Act of 1984, as amended, 46 U.S.C. 40101 *et seq.*

Complainant is a North Carolina limited liability company with a principal place of business in Charlotte, North Carolina.

Complainant identifies Respondent as a corporation existing under the laws of the state of Illinois with a principal place of business in Calumet Park, Illinois.

Complainant alleges that Respondent violated 46 U.S.C. 44102(c) regarding a failure to establish, observe, and enforce just and reasonable practices relating to receiving, handling, storing, and delivering property. Complainant alleges these violations arose from a misdeclaration in the shipping instructions; a failure to file a declaration for a returned container; and a failure to pay assessed fees.

An answer to the complaint must be filed with the Commission within 25 days after the date of service.

The full text of the complaint can be found in the Commission's electronic Reading Room at *https://www2.fmc.gov/readingroom/proceeding/23-13/.* This proceeding has been assigned to the Office of Administrative Law Judges. The initial decision of the presiding judge shall be issued by December 4, 2024, and the final decision of the

Commission shall be issued by June 18, 2025.

Alanna Beck,

Federal Register Alternate Liaison Officer, Federal Maritime Commission.

[FR Doc. 2023–26904 Filed 12–6–23; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than January 8, 2024.

A. Federal Reserve Bank of San Francisco (Joseph Cuenco, Assistant Vice President, Formations & Transactions) 101 Market Street, San Francisco, California 94105. Comments can also be sent electronically to *sf.fisc.comments.applications@sf.frb.org:*

1. *PCB Financial, Inc., Costa Mesa, California;* to become a bank holding company by acquiring Northern California Bancorp, Inc., and thereby indirectly acquiring Monterey County Bank, both of Monterey, California.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–26911 Filed 12–6–23; 8:45 am]

BILLING CODE P

GULF COAST ECOSYSTEM RESTORATION COUNCIL

[Docket No: 111042023–1111–02]

Senior Executive Service Performance Review Board Membership

AGENCY: Gulf Coast Ecosystem Restoration Council (GCERC).

ACTION: Notice of Performance Review Board (PRB) appointments.

SUMMARY: This notice announces the members of the Senior Executive Service (SES) Performance Review Board. The PRB is comprised of a Chairperson and a mix of State representatives and career senior executives that meet annually to review and evaluate performance appraisal documents and provide a written recommendation to the Chairperson of the Council for final approval of each executive's performance rating, performance-based pay adjustment, and performance award.

DATES: The board membership is applicable beginning on 1/01/2023 and ending on 12/31/23.

FOR FURTHER INFORMATION CONTACT: Mary S. Walker, Executive Director, Gulf Coast Ecosystem Restoration Council, telephone 504–210–9982 or email *mary.walker@restorethegulf.gov.*

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 4314(c)(4), the persons named below have been selected to serve on the PRB:

Gulf Coast Ecosystem Restoration Council: Walker, Mary S., Executive Director, *Mary.Walker@restorethegulf.gov*, 504–210–9982

Department of Interior: Blanchard, Mary Josie, Deputy Director, Environmental Protection Compliance, *MaryJosie_Blanchard@ios.doi.gov*, 202–208–3406

State of Louisiana: Chatellier, Maury, Coastal Protection and Restoration Authority, DWH Oil Spill Program Administrator, *Maury.Chatellier@la.gov*, 225–342–6504

State of Mississippi: Wells, Chris, Executive Director, Mississippi Department of Environmental Quality, *cwells@mdeq.ms.gov*, 601–961–5545

Environmental Protection Agency: Wyatt, Marc, Director, Gulf of Mexico Division, *Wyatt.marc@epa.gov*, 228–679–5915

Keala J. Hughes,

Director of External Affairs & Tribal Relations, Gulf Coast Ecosystem Restoration Council.

[FR Doc. 2023–26909 Filed 12–6–23; 8:45 am]

BILLING CODE 6560–58–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

Pursuant to 5 U.S.C. 1009(d), 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, and the Determination of the Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. 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: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—RFA–OH–23–003, Panel A, Occupational Safety and Health Education and Research Centers (ERC).

Dates: February 26–27, 2024.

Times: 11 a.m.–5 p.m., EST.

Place: Video-Assisted Meeting.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Michael Goldcamp, Ph.D., Scientific Review Officer, Office of Extramural Programs, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, 1095 Willowdale Road, Morgantown, West Virginia 26505. Telephone: (304) 285–5951; Email: *MGoldcamp@cdc.gov.*

The Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and

Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2023–26843 Filed 12–6–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

Pursuant to 5 U.S.C. 1009(d), 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, and the Determination of the Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. 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: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—RFA–OH–23–003, Panel B, Occupational Safety and Health Education and Research Centers (ERC).

Dates: February 28–29, 2024.

Times: 11 a.m.–5 p.m., EST.

Place: Video-Assisted Meeting.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Michael Goldcamp, Ph.D., Scientific Review Officer, Office of Extramural Programs, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, 1095 Willowdale Road, Morgantown, West Virginia 26505. Telephone: (304) 285–5951; Email: *MGoldcamp@cdc.gov.*

The Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2023–26843 Filed 12–6–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3451–PN]

Medicare and Medicaid Programs; Application From the Joint Commission (TJC) for Initial Approval of Its Rural Health Clinic (RHC) Accreditation Program

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Notice with request for comment.

SUMMARY: This proposed notice acknowledges the receipt of an application from the Joint Commission (TJC) for initial recognition as a national accrediting organization (AO) for rural health clinics (RHCs) that wish to participate in the Medicare or Medicaid programs. The statute requires that within 60 days of receipt of an organization's complete application, the Centers for Medicare & Medicaid Services (CMS) publish a notice that identifies the national accrediting body making the request, describes the nature of the request, and provides at least a 30-day public comment period.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, by January 8, 2024.

ADDRESSES: In commenting, refer to file code CMS–3451–PN.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–3451–PN, P.O. Box 8013, Baltimore, MD 21244–8013.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–3451–PN, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Caecilia Blondiaux (410) 786–2190.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that website to view public comments. We will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the individual will take actions to harm the individual. We continue to encourage individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments.

I. Background

Under the Medicare program, eligible beneficiaries may receive covered services in a rural health clinic (RHC) provided certain requirements are met by the RHC. Section 1861(aa)(1) and (2) and 1905(l)(1) of the Social Security Act (the Act), establishes distinct criteria for facilities seeking designation as an RHC. Regulations concerning provider agreements are at 42 CFR part 489 and those pertaining to activities relating to the survey and certification of facilities are at 42 CFR part 488, subpart A. The regulations at 42 CFR part 491, subpart A specify the conditions that a RHC must meet to participate in the Medicare program, the scope of covered services, and the conditions for Medicare payment for RHCs are set forth at 42 CFR 405, subpart X.

Generally, to enter into an agreement, a RHC must first be certified by a State survey agency as complying with the conditions or requirements set forth in

part 491 of CMS regulations. Thereafter, the RHC is subject to regular surveys by a State survey agency to determine whether it continues to meet these requirements.

However, there is an alternative to surveys by State agencies. Section 1865(a)(1) of the Act provides that, if a provider entity demonstrates through accreditation by an approved national accrediting organization (AO) that all applicable Medicare conditions are met or exceeded, we will deem those provider entities as having met the requirements. Accreditation by an AO is voluntary and is not required for Medicare participation.

If an AO is recognized by the Secretary of Health and Human Services as having standards for accreditation that meet or exceed Medicare requirements, any provider entity accredited by the national accrediting body's approved program would be deemed to meet the Medicare conditions. A national AO applying for CMS approval of their accreditation program under 42 CFR part 488, subpart A must provide CMS with reasonable assurance that the AO requires the accredited provider entities to meet requirements that are at least as stringent as the Medicare conditions. Our regulations concerning the approval of accrediting organizations are set forth at § 488.5.

The Joint Commission (TJC) is requesting initial approval by CMS for its RHC program.

II. Approval of Deeming Organization

Section 1865(a)(2) of the Act and our regulations at § 488.5 require that our findings concerning review and approval of a national accrediting organization's requirements consider, among other factors, the applying accrediting organization's requirements for accreditation; survey procedures; resources for conducting required surveys; capacity to furnish information for use in enforcement activities; monitoring procedures for provider entities found not in compliance with the conditions or requirements; and ability to provide us with the necessary data for validation.

Section 1865(a)(3)(A) of the Act further requires that we publish, within 60 days of receipt of an organization's complete application, a notice identifying the national accrediting body making the request, describing the nature of the request, and providing at least a 30-day public comment period. We have 210 days from the receipt of a complete application to publish notice of approval or denial of the application.

The purpose of this proposed notice is to inform the public of TJC's request for initial approval for its RHC accreditation program. This notice also solicits public comment on whether TJC's requirements meet or exceed the Medicare conditions of participation (CoPs) for RHCs.

III. Evaluation of Deeming Authority Request

TJC submitted all the necessary materials to enable us to make a determination concerning its request for continued approval of its RHC accreditation program. This application was determined to be complete on October 27, 2023. Under section 1865(a)(2) of the Act and our regulations at § 488.5 (Application and re-application procedures for national accrediting organizations), our review and evaluation of TJC will be conducted in accordance with, but not necessarily limited to, the following factors:

- The equivalency of TJC's standards for RHCs as compared with CMS' RHC CoPs.
- TJC's survey process to determine the following:

++ The composition of the survey team, surveyor qualifications, and the ability of the organization to provide continuing surveyor training.

++ The comparability of TJC's processes to those of State agencies, including survey frequency, and the ability to investigate and respond appropriately to complaints against accredited RHCs.

++ TJC's processes and procedures for monitoring RHCs found out of compliance with TJC's program requirements. These monitoring procedures are used only when TJC identifies noncompliance. If noncompliance is identified through validation reviews or complaint surveys, the State survey agency monitors corrections as specified at § 488.9(c).

++ TJC's capacity to report deficiencies to the surveyed RHCs and respond to the RHC's plan of correction in a timely manner.

++ TJC's capacity to provide us with electronic data and reports necessary for effective validation and assessment of the organization's survey process.

++ The adequacy of TJC's staff and other resources, and its financial viability.

++ TJC's capacity to adequately fund required surveys.

++ TJC's policies with respect to whether surveys are announced or unannounced, to assure that surveys are unannounced.

++ TJC's policies and procedures to avoid conflicts of interest, including the appearance of conflicts of interest, involving individuals who conduct surveys or participate in accreditation decisions.

++ TJC's agreement to provide us with a copy of the most current accreditation survey together with any other information related to the survey as we may require (including corrective action plans).

IV. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping, or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

V. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Trenesha Fultz-Mimms, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Trenesha Fultz-Mimms,

Federal Register Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2023–26805 Filed 12–6–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–E–2136]

Determination of Regulatory Review Period for Purposes of Patent Extension; Truseltiq

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has

determined the regulatory review period for Truseltiq and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

DATES: Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect must submit either electronic or written comments and ask for a redetermination by February 5, 2024. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by June 4, 2024. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 5, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

Instructions: All submissions received must include the Docket No. FDA–2022–E–2136 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; TRUSELTIQ.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biologic product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product, Truseltiq (infigratinib) indicated for the treatment of adults with previously treated, unresectable locally advanced or metastatic cholangiocarcinoma with a fibroblast growth factor receptor 2

fusion or other rearrangement as detected by an FDA-approved test. This indication is approved under accelerated approval based on overall response rate and duration of response. Continued approval for this indication may be contingent upon verification and description of clinical benefit in confirmatory trial(s). Subsequent to this approval, the USPTO received a patent term restoration application for Truseltiq (U.S. Patent No. 8,552,002) from QED Therapeutics, Inc. (agent of Novartis AG), and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated January 18, 2023, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of Truseltiq represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for Truseltiq is 4,258 days. Of this time, 4,016 days occurred during the testing phase of the regulatory review period, while 242 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(i)) became effective:* October 2, 2009. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on October 2, 2009.

2. *The date the application was initially submitted with respect to the human drug product under section 505 of the FD&C Act:* September 29, 2020. FDA has verified the applicant's claim that the new drug application (NDA) for Truseltiq (NDA 214622) was initially submitted on September 29, 2020.

3. *The date the application was approved:* May 28, 2021. FDA has verified the applicant's claim that NDA 214622 was approved on May 28, 2021.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,516 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: December 1, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–26885 Filed 12–6–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2015–D–3539]

Interim Policy on Compounding Using Bulk Drug Substances Under Section 503B of the Federal Food, Drug, and Cosmetic Act; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''Interim Policy on Compounding Using Bulk Drug Substances Under section 503B of the Federal Food, Drug, and Cosmetic Act'' (draft guidance or 2023 503B Interim Policy Draft Guidance) to describe FDA's interim policy regarding the use of bulk drug substances in compounding by outsourcing facilities while FDA develops the list of bulk drug substances that outsourcing facilities can use in compounding under the applicable section of the Federal Food, Drug, and Cosmetic Act (FD&C Act). This draft guidance, when finalized, will replace the guidance for industry entitled, ''Interim Policy on Compounding Using Bulk Drug Substances Under section 503B of the Federal Food, Drug, and Cosmetic Act'' issued in January 2017 (2017 503B Interim Policy Guidance).

DATES: Submit either electronic or written comments on the draft guidance by January 8, 2024 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

Instructions: All submissions received must include the Docket No. FDA–

2015–D–3539 for ''Interim Policy on Compounding Using Bulk Drug Substances Under Section 503B of the Federal Food, Drug, and Cosmetic Act.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Rechelle Buford, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 240–402–0447.

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Interim Policy on Compounding Using Bulk Drug Substances Under Section 503B of the Federal Food, Drug, and Cosmetic Act.'' This draft guidance, when finalized, will replace the 2017 503B Interim Policy Guidance, available at *https://www.fda.gov/media/94402/download.*

Section 503B of the FD&C Act (21 U.S.C. 353b) describes the conditions that must be satisfied for human drug products compounded by an outsourcing facility to be exempt from the following three sections of the FD&C Act: (1) section 505 (21 U.S.C. 355) (concerning the approval of drugs under new drug applications or abbreviated new drug applications); (2) section 502(f)(1) (21 U.S.C. 352(f)(1) (concerning the labeling of drugs with adequate directions for use); and (3) section 582 (21 U.S.C. 360eee–1) (concerning drug supply chain security requirements). One of the conditions that must be met for a drug product compounded by an outsourcing facility to qualify for these exemptions is that the outsourcing facility does not compound a drug using a bulk drug substance unless: (1) the bulk drug substance appears on a list established by the Secretary of Health and Human Services identifying bulk drug substances for which there is a clinical need (the 503B bulks list) (see section 503B(a)(2)(A)(i)) or (2) the drug compounded from such bulk drug substances appears on the drug shortage list in effect under section 506E of the FD&C Act (21 U.S.C. 356e) at the time of compounding, distribution, and dispensing (see section 503B(a)(2)(A)(ii) of the FD&C Act).

This draft guidance, when finalized, will revise FDA's current interim policy with respect to categorization of certain substances nominated for inclusion on the 503B bulks list. The guidance, when finalized, would end the categorization of bulk drug substances into Categories 1, 2, or 3 for those bulk drug substances nominated on or after the date of publication of the final guidance.

The 2017 503B Interim Policy Guidance describes the conditions under which FDA does not intend to take action against an outsourcing facility for compounding a drug using certain bulk drug substances that are not eligible for use in compounding under section 503B because they do not appear on the 503B bulks list and that are not used to compound a drug that appears on the FDA drug shortage list at the time of compounding, distribution, and dispensing. One of those conditions is that the bulk drug substance appears in Category 1. If the 2023 503B Interim Policy Draft Guidance is finalized in its current form, a substance nominated on or after the date of publication of that final guidance would not be categorized and would not be within the scope of the policy for substances that appear in Category 1.[1] However, FDA would consider the substance for inclusion on the 503B bulks list in accordance with the process and clinical need standard established in the FD&C Act (see section 503B(a)(2)(A)(i) of the FD&C Act). Substances that already appear in Category 1 (including substances nominated with adequate supporting information prior to the date of publication of the final guidance) may continue to be eligible for the policy that applies to Category 1 substances, as described in the final guidance, until FDA makes a final determination whether they will be placed on the 503B bulks list in accordance with section 503B(a)(2)(A)(i) of the FD&C Act or unless the Agency removes the substances from Category 1 based on, for example, information about safety risks.

FDA encourages interested parties to focus their comments on the limited revisions to the interim policy included, for public comment, in the 2023 503B Interim Policy Draft Guidance.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on the ''Interim Policy on Compounding Using Bulk Drug Substances Under Section 503B of the Federal Food, Drug, and Cosmetic Act.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

[1] FDA recognizes that some compounders and other stakeholders may currently be in the process of compiling a nomination for the 503B bulks list for submission to the Agency. FDA intends to categorize nominations of bulk drug substances received prior to the date in which FDA announces the availability of the final guidance. FDA believes that this will provide a sufficient amount of time in which to submit nominations that are currently in progress.

II. Paperwork Reduction Act of 1995

FDA tentatively concludes that this draft guidance contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov*.

Dated: December 1, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–26845 Filed 12–6–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–D–3462]

Verification Systems Under the Drug Supply Chain Security Act for Certain Prescription Drugs; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance for industry entitled ''Verification Systems Under the Drug Supply Chain Security Act for Certain Prescription Drugs.'' The guidance addresses the verification systems that manufacturers, repackagers, wholesale distributors, and dispensers must have in place to comply with the Federal Food, Drug, and Cosmetic Act (FD&C Act), as amended by the Drug Supply Chain Security Act (DSCSA). Specifically, the guidance covers the statutory verification systems requirements that include the quarantine and investigation of a product determined to be suspect and the quarantine and disposition of a product determined to be illegitimate. The guidance also addresses the statutory requirement for notification to the Agency of a product that has been cleared by a manufacturer, repackager, wholesale distributor, or dispenser (also referred to as ''trading partners'') after a suspect product investigation because it is determined that the product is not an illegitimate product. Finally, the guidance addresses the statutory requirement for responding to requests for verification and processing saleable returns. The guidance finalizes the revised draft guidance ''Verification Systems Under the Drug Supply Chain Security Act for Certain Prescription Drugs,'' issued on March 10, 2022.

DATES: The announcement of the guidance is published in the **Federal Register** on December 7, 2023.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

Instructions: All submissions received must include the Docket No. FDA–2018–D–3462 for ''Verification Systems Under the Drug Supply Chain Security Act for Certain Prescription Drugs; Guidance for Industry; Availability.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002; or to Office of Communication, Outreach and Development, Center for

Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Sarah Venti, Office of Compliance, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 301–796–3130, *drugtrackandtrace@fda.hhs.gov;* or Anne Taylor, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled ''Verification Systems Under the Drug Supply Chain Security Act for Certain Prescription Drugs.'' The DSCSA (title II of Pub. L. 113–54) was signed into law on November 27, 2013. Section 202 of the DSCSA added section 582 to the FD&C Act (21 U.S.C. 360eee–1), which established the requirement that trading partners have systems in place to enable them to comply with certain verification obligations. This guidance provides recommendations for robust verification systems for the determination, quarantine, and investigation of suspect products, as well as the quarantine, notification, and disposition of illegitimate products. This guidance also addresses the manner in which FDA recommends that trading partners submit cleared product notifications (*i.e.,* notifications that a suspect product is not an illegitimate product), the statutory requirements for responding to requests for verification, and the statutory requirements for processing saleable returns.

FDA initially published the draft guidance ''Verification Systems Under the Drug Supply Chain Security Act for Certain Prescription Drugs'' on October 25, 2018 (83 FR 53880). Comments were received on the initial draft guidance and the Agency made revisions to the draft. This guidance finalizes the revised draft guidance entitled ''Verification Systems Under the Drug Supply Chain Security Act for Certain Prescription Drugs,'' issued on March 10, 2022 (87 FR 13738). FDA considered comments received on the revised draft guidance in finalizing this guidance. Changes from the revised draft to the final guidance include: (1) clarifying that dispensers need not provide transaction information for saleable return product; (2) clarifying that ''verification'' as defined in section 581 of the FD&C Act (21 U.S.C. 360eee) involves confirming that the product identifier affixed or imprinted upon a package or homogeneous case corresponds to the Standardized Numerical Identifier or lot number and expiration date assigned to the product by the manufacturer or repackager by more closely mirroring the statutory language; (3) further clarifying when the discussion is about the verification systems requirements in section 582 of the FD&C Act and when it is about the requirement to verify the product identifier; (4) clarifying FDA's understanding about the statutory requirement that manufacturers and repackagers respond to requests for verification within 24 hours or within other such reasonable time as determined by the Secretary of Health and Human Services; (5) clarifying that when a trading partner does not receive a timely response to a verification request, the product that is the subject of the request need not automatically be classified as suspect; and (6) clarifying that certain system attributes are suggested as best practices even though they are not specifically required under the DSCSA. In addition, editorial changes were made to improve clarity.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Verification Systems Under the Drug Supply Chain Security Act for Certain Prescription Drugs.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. The previously approved collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521). The collections of information pertaining to implementation of the Drug Supply Chain Security Act are approved in OMB control no. 0910–0806.

III. Electronic Access

Persons with access to the internet may obtain the guidance at *https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm, https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov.*

Dated: December 1, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–26846 Filed 12–6–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2015–D–3517]

Interim Policy on Compounding Using Bulk Drug Substances Under Section 503A of the Federal Food, Drug, and Cosmetic Act; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''Interim Policy on Compounding Using Bulk Drug Substances Under section 503A of the Federal Food, Drug, and Cosmetic Act'' (draft guidance or 2023 503A Interim Policy Draft Guidance) to describe FDA's interim policy regarding the use of bulk drug substances by human drug compounders that are not registered with FDA as outsourcing facilities while FDA develops the list of bulk drug substances that can be used in compounding under the applicable section of the Federal Food, Drug, and Cosmetic Act (FD&C Act). This draft guidance, when finalized, will replace the guidance for industry entitled, ''Interim Policy on Compounding Using Bulk Drug Substances under section 503A of the Federal Food, Drug, and Cosmetic Act'' issued in January 2017 (2017 503A Interim Policy Guidance).

DATES: Submit either electronic or written comments on the draft guidance by January 8, 2024 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

Instructions: All submissions received must include the Docket No. FDA–2015–D–3517 for "Interim Policy on Compounding Using Bulk Drug Substances Under Section 503A of the Federal Food, Drug, and Cosmetic Act." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Mariestela Buhay, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 5199, Silver Spring, MD 20993–0002, 301–796–7313.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled "Interim Policy on Compounding Using Bulk Drug Substances Under section 503A of the Federal Food, Drug, and Cosmetic Act." This draft guidance, when finalized, will replace the 2017 503A Interim Policy Guidance, available at *https://www.fda.gov/media/94398/download.* Section 503A of the FD&C Act (21 U.S.C. 353a) describes the conditions that must be satisfied for human drug products compounded by a licensed pharmacist in a State-licensed pharmacy or Federal facility, or by a licensed physician, to be exempt from the following three sections of the FD&C Act: (1) section 505 (21 U.S.C. 355) (concerning the approval of drugs under new drug applications or abbreviated new drug applications); (2) section 502(f)(1) (21 U.S.C. 352(f)(1)) (concerning the labeling of drugs with adequate directions for use); and (3) section 501(a)(2)(B) (21 U.S.C. 351(a)(2)(B)) (concerning current good manufacturing practice requirements). One of the conditions that must be met for a compounded drug product to qualify for these exemptions is that a licensed pharmacist or licensed physician compounds the drug product using bulk drug substances that (1) comply with the standards of an applicable United States Pharmacopeia (USP) or National Formulary (NF) monograph, if a monograph exists, and the USP chapters on pharmacy compounding; (2) if such a monograph does not exist, are drug substances that are components of drugs approved by the Secretary of the Department of Health and Human Services (Secretary); or (3) if such a monograph does not exist and the drug substance is not a component of a drug approved by the Secretary, appears on a list developed by the Secretary through regulations issued by the Secretary under subsection (c) of section 503A of the FD&C Act (the 503A bulks list). (See section 503A(b)(1)(A)(i) of the FD&C Act.)

This draft guidance, when finalized, will revise FDA's current interim policy with respect to categorization of certain substances nominated for inclusion on the 503A bulks list. The guidance, when finalized, will end the categorization of bulk drug substances into Categories 1, 2, or 3 for those bulk drug substances nominated on or after the date of publication of the final guidance.

The 2017 503A Interim Policy Guidance describes the conditions under which FDA does not intend to take action against a State-licensed pharmacy, Federal facility, or physician for compounding drug products using certain bulk drug substances that are not eligible for use in compounding under

section 503A because they are not the subject of an applicable USP or NF monograph, components of FDA-approved drug products, or on the 503A bulks list. One of those conditions is that the bulk drug substance appears in Category 1. If the 2023 503A Interim Policy Draft Guidance is finalized in its current form, a substance nominated on or after the date of publication of that final guidance would not be categorized and would not be within the scope of the policy for substances that appear in Category 1.[1] However, FDA would consider the substance for inclusion on the 503A bulks list in accordance with the process and criteria established in the FD&C Act and FDA regulations (see section 503A(b)(1)(A) of the FD&C Act and 21 CFR 216.23(c)). Substances that already appear in Category 1 (including substances nominated with adequate supporting information prior to the date of publication of the final guidance) may continue to be eligible for the policy that applies to Category 1 substances, as described in the final guidance, until FDA promulgates a final rule determining whether they will be placed on the 503A bulks list in accordance with section 503A(b)(1)(A)(i)(III) of the FD&C Act or unless the Agency removes the substances from Category 1 based on, for example, information about safety risks.

FDA encourages interested parties to focus their comments on the limited revisions to the interim policy included, for public comment, in the 2023 503A Interim Policy Draft Guidance.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Interim Policy on Compounding Using Bulk Drug Substances Under Section 503A of the Federal Food, Drug, and Cosmetic Act.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

FDA tentatively concludes that this draft guidance contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov.*

Dated: December 1, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–26886 Filed 12–6–23; 8:45 am]

BILLING CODE 4164–01–P

[1] FDA recognizes that some compounders and other stakeholders may currently be in the process of compiling a nomination for the 503A bulks list for submission to the Agency. FDA intends to categorize nominations of bulk drug substances received prior to the date in which FDA announces the availability of the final guidance. FDA believes that this will provide a sufficient amount of time in which to submit nominations that are currently in progress.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; Information Collection Request Title: The Alliance for Innovation on Maternal Health Biannual Survey, OMB No. 0915–xxxx—New

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR should be received no later than February 5, 2024.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N39, 5600 Fishers Lane, Rockville, Maryland 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Joella Roland, the HRSA Information Collection Clearance Officer, at (301) 443–3983.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the ICR title for reference.

Information Collection Request Title: The Alliance for Innovation on Maternal Health Biannual Survey, OMB No. 0915–xxxx—New.

Abstract: The Alliance for Innovation on Maternal Health (AIM) program is administered by HRSA and authorized by 42 U.S.C. 254c–21 (Public Health Service Act, title III section 330O), as added by the Consolidated Appropriations Act, 2022 (Pub. L. 117–103).

The AIM program supports the identification, development, implementation, and dissemination of maternal (patient) safety bundles to promote safe care for every U.S. birth and assist with addressing the complex problem of high maternal mortality and severe maternal morbidity rates within the U.S. The mission of AIM is to support best practices that make birth safer, improve the quality of maternal health care and outcomes, and save lives. Maternal patient safety bundles address topics commonly associated with health complications or risks related to prenatal, labor and delivery, and postpartum care.

The AIM program consists of two components: The AIM Capacity program and the AIM Technical Assistance (TA) Center. The AIM Capacity awards began in fiscal year 2023 and directly fund 28 States and jurisdictions (including U.S. Territories and the District of Columbia) to implement AIM maternal patient safety bundles. The second component, the AIM TA Center, is funded through a cooperative agreement to provide TA to all 50 States, the District of Columbia, jurisdictions, U.S. Territories, Tribal communities, and birthing facilities who participate in the AIM program. The TA Center builds data capacity for participating entities to track progress on bundle implementation and support improvement of data collection.

The funding amount for the AIM program was increased in fiscal year 2023, which allowed HRSA to directly fund States and Territories to support AIM bundle implementation. Previously, HRSA supported AIM through one cooperative agreement to develop maternal patient safety bundles, provide TA on bundle implementation, and enroll States and Territories in the program. The shift to directly fund States and jurisdictions for the work makes the collection of information about the reach of the program, participation by birthing facilities, and TA needs necessary. The AIM Biannual Survey will be administered to AIM State Teams (the State-or jurisdiction-level entity leading AIM implementation) twice a year in all States and jurisdictions enrolled in

AIM. Respondents will include AIM State Teams that receive HRSA funding through the AIM Capacity program, as well as AIM State Teams that do not receive HRSA funding to implement AIM, to gauge the full reach of the program.

Need and Proposed Use of the Information: The information will be used by the HRSA program team to understand and report on AIM program reach and potential growth regarding participating birthing facilities and patient safety bundles implemented, inform development of resources and types of TA offered, and develop program targets. In addition, information on the number of participating birthing facilities and patient safety bundles being implemented is shared on the HRSA and ACOG AIM websites. The biannual survey is the only place this information is collected.

Likely Respondents: Respondents are AIM State Teams in all States and jurisdictions enrolled in AIM, including AIM Capacity award recipients and AIM State Teams that do not receive direct funding from HRSA.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

Total Estimated Annualized Burden Hours:

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
AIM Biannual Survey	52	1 per survey; 2 surveys per year	104	1	104
Total	52	1 per survey; 2 surveys per year	104	1	104

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–26902 Filed 12–6–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Center for Advancing Translational Sciences Advisory Council, January 18, 2024, 11:00 a.m. to January 19, 2024, 6:00 p.m., National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892 which was published in the **Federal Register** on November 03, 2023, FR Doc. 2023–24224, 88 FR 75295.

This notice is being amended to change the meeting date from January 18, 2024, to January 19, 2024. The meeting times and location remain the same as stated above. This meeting is partially closed to the public.

Dated: December 4, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–26903 Filed 12–6–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0013]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Application for Travel Document

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration (USCIS) invites the general public and other Federal agencies to comment upon this proposed extension of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until February 5, 2024.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0013 in the body of the letter, the agency name and Docket ID USCIS–2007–0045. Comments must be submitted in English, or an English translation must be provided. Submit comments via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2007–0045.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions, or additional information by visiting the

Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2007–0045 in the search box. Comments must be submitted in English, or an English translation must be provided. All submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Travel Document.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form I–131; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Certain individuals, principally lawful permanent residents, conditional permanent residents, refugees, asylees, applicants for adjustment of status, noncitizens with pending Temporary Protected Status (TPS) applications and granted TPS, eligible recipients of Deferred Action for Childhood Arrivals (DACA), noncitizens inside the United States seeking an Advance Parole Document, noncitizens outside the United States seeking a Parole Document, previously paroled noncitizens inside the United States who are seeking a new period of parole, and CNMI long-term residents seeking Advance Permission to Travel to allow them to travel to the United States and lawfully enter or reenter the United States. U.S. citizens and lawful permanent residents will no longer utilize Form I–131 to request an initial grant of parole for their eligible family members under the Cuban Family Reunification Parole (CFRP) or Haitian Family Reunification Parole (HFRP) processes.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–131 (paper) is 976,639 and the estimated hour burden per response is 3.1 hours; the estimated total number of respondents for the information collection Form I–131 (online) is 30,205 and the estimated hour burden per response is 2 hours; the estimated total number of respondents for biometrics processing is 49,615 and the estimated hour burden per response is 1.17 hours; the estimated total number of respondents for passport-style photos is 16,600 and the estimated hour burden per response is 0.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 3,146,040 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $296,028,540.

Dated: December 1, 2023.

Samantha L Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–26803 Filed 12–6–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–IA–2023–0232; FXIA16710900000–234–FF09A30000]

Foreign Endangered Species; Receipt of Permit Application

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit application; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on an application to conduct certain activities with foreign species that are listed as endangered under the Endangered Species Act (ESA). With some exceptions, the ESA prohibits activities with listed species unless Federal authorization is issued that allows such activities. The ESA also requires that we invite public comment before issuing permits for any activity otherwise prohibited by the ESA with respect to any endangered species.

DATES: We must receive comments by January 8, 2024.

ADDRESSES:

Obtaining Documents: The application, application supporting materials, and any comments and other materials that we receive will be available for public inspection at *https://www.regulations.gov* in Docket No. FWS–HQ–IA–2023–0232.

Submitting Comments: When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. You may submit comments by one of the following methods:

- *Internet: https://www.regulations.gov.* Search for and submit comments on Docket No. FWS–HQ–IA–2023–0232.
- *U.S. mail:* Public Comments Processing, Attn: Docket No. FWS–HQ–IA–2023–0232; U.S. Fish and Wildlife Service Headquarters, MS: PRB/3W; 5275 Leesburg Pike, Falls Church, VA 22041–3803.

For more information, see Public Comment Procedures under **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, by phone at 703–358–2185 or via email at *DMAFR@fws.gov.*Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make

international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I comment on submitted applications?

We invite the public and local, State, Tribal, and Federal agencies to comment on this application. Before issuing the requested permit, we will take into consideration any information that we receive during the public comment period.

You may submit your comments and materials by one of the methods in **ADDRESSES**. We will not consider comments sent by email or to an address not in **ADDRESSES**. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**).

When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. Provide sufficient information to allow us to authenticate any scientific or commercial data you include. The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) those that include citations to, and analyses of, the applicable laws and regulations.

B. May I review comments submitted by others?

You may view and comment on others' public comments at *https://www.regulations.gov* unless our allowing so would violate the Privacy Act (5 U.S.C. 552a) or Freedom of Information Act (5 U.S.C. 552).

C. Who will see my comments?

If you submit a comment at *https://www.regulations.gov,* your entire comment, including any personal identifying information, will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, such as your address, phone number, or email address, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Moreover, all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(c) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), we invite public comments on permit applications before final action is taken. With some exceptions, the ESA prohibits certain activities with listed species unless Federal authorization is issued that allows such activities. Permits issued under section 10(a)(1)(A) of the ESA allow otherwise prohibited activities for scientific purposes or to enhance the propagation or survival of the affected species. Service regulations regarding prohibited activities with endangered species, captive-bred wildlife registrations, and permits for any activity otherwise prohibited by the ESA with respect to any endangered species are available in title 50 of the Code of Federal Regulations in part 17.

III. Permit Application

We invite comments on the following application.

Applicant: Colossal Biosciences, Inc., Austin, TX; Permit No. PER5525559

The applicant requests authorization to import biological specimens from captive-born animals of all species listed under the ESA originating from various foreign facilities, for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

IV. Next Steps

After the comment period closes, we will make decisions regarding permit issuance. If we issue permits to the applicant listed in this notice, we will publish a notice in the **Federal Register**. You may locate the notice announcing the permit issuance by searching *https://www.regulations.gov* for the permit number listed above in this document. For example, to find information about the potential issuance of Permit No. 12345A, you would go to regulations.gov and search for ''12345A''.

V. Authority

We issue this notice under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and its implementing regulations.

Brenda Tapia,

Supervisory Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2023–26851 Filed 12–6–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–CR– NPS0036832; PPWOCRADI0, PCU00RP14.R50000 (222); OMB Control Number 1024–0037]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Archeology Permit Applications and Reports

AGENCY: National Park Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the National Park Service (NPS) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before January 8, 2024.

ADDRESSES: Written comments and suggestions on the information collection requirements should be submitted by the date specified above in **DATES** to *http://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to the NPS Information Collection Clearance Officer (ADIR–ICCO), 13461 Sunrise Valley Drive, (MS 244) Reston, VA 20192 (mail); or *phadrea_ponds@nps.gov* (email). Please reference OMB Control Number 1024–0037 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Karen Mudar, Archeologist, Washington Support Office Archeology Program at *karen_mudar@nps.gov* (email); or at 202–354–2103 (telephone). Please reference OMB Control Number 1024–0037 in the subject line of your comments. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point of contact in the United States. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 et seq) and 5 CFR 1320.8(d)(1), we

provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on June 23, 2023 (88 FR 41126). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility.

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used.

(3) Ways to enhance the quality, utility, and clarity of the information to be collected.

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: Section 4 of the Archeological Resources Protection Act (ARPA) of 1979 (16 U.S.C. 470cc), and section 3 of the Antiquities Act (AA) of 1906 (54 U.S.C. 320302), authorize any individual or institution to apply to Federal land managing agencies to scientifically excavate or remove archeological resources from public or Indian lands. A permit is required for any archeological investigation by non-NPS personnel occurring on parklands, regardless of whether or not these investigations are linked to regulatory compliance. Archeological investigations that require permits include excavation, shovel-testing, coring, pedestrian survey (with and without removal of artifacts), underwater archeology, photogrammetry, and rock art documentation. Individuals, academic and scientific institutions, museums, and businesses that propose to conduct archeological field investigations on parklands must first obtain a permit before the project may begin. To apply for a permit, applicants submit Form DI–1926 ''Application for Permit for Archeological Investigations.'' Applicants are required to submit the following information:

- Statement of Work
- Statement of Applicant's Capabilities
- Statement of Applicant's Past Performance
- Curriculum vitae for Principal Investigator(s) and Project Director(s)
- Written consent by State or tribal authorities to undertake the activity on State or tribal lands that are managed by the NPS, if required by the State or tribe
- Curation Authorization
- Detailed Schedule of All Project Activities

Persons receiving a permit must also use DI Form 1926a to submit preliminary, annual, and final reports.

Title of Collection: Archeology Permit Applications and Reports.

OMB Control Number: 1024–0037.

Form Number: Form DI–1926 and 1926a.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Individuals or organizations wishing to excavate or remove archeological resources from public or Indian lands.

Total Estimated Number of Annual Respondents: 180.

Total Estimated Number of Annual Responses: 180.

Estimated Completion Time per Response: Varies; up to 8 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 1,306.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Phadrea Ponds,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2023–26863 Filed 12–6–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRSS–EQD–SSB–NPS0036754; PPAKWEARS2, PPMPRLE1Z.LS0000 (200); OMB Control Number 1024–0262]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Community Harvest Assessments for Alaskan National Parks, Preserves, and Monuments

AGENCY: National Park Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the National Park Service (NPS) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before January 8, 2024.

ADDRESSES: Written comments and suggestions on the information collection requirements should be submitted by the date specified above in **DATES** to *http://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to the NPS Information Collection Clearance Officer (ADIR–ICCO), 13461 Sunrise Valley Drive, (MS 244) Reston, VA 20192, VA 20191 (mail); or *phadrea_ponds@nps.gov* (email). Please reference OMB Control Number 1024–0262 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Nicole Braem, Cultural Anthropologist, Bering Land Bridge National Preserve, Nome, AK 99762; or at *nicole_braem@nps.gov* (email); or 907–443–6107 (telephone). Please reference OMB Control Number 1024–0262 in the subject line of your comments. Individuals in the United

States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point of contact in the United States. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 et seq) and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on February 22, 2023, (88 FR 10934). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility.

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used.

(3) Ways to enhance the quality, utility, and clarity of the information to be collected.

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: Under the provisions of the Alaska National Interest Lands Conservation Act (ANILCA), qualified rural residents are provided the opportunity to harvest fish, wildlife, and other subsistence resources in national parks, preserves, and monuments in Alaska. The NPS is seeking an extension to continue surveying Alaska residents who customarily and traditionally engage in subsistence activities within NPS units.

The collection includes the following Alaskan National Parks, Preserves, and Monuments: (1) Aniakchak National Monument (ANIA), (2) Bering Land Bridge National Preserve (BELA), (3) Cape Krusenstern National Monument (CAKR), (4) Gates of the Arctic National Park and Preserve (GAAR), (5) Kobuk Valley National Park (KOVA), (6) Noatak National Preserve (NOAT), (7) Wrangell-St. Elias National Park and Preserve (WRST), and (9) Yukon-Charley Rivers National Preserve (YUCH). This survey is conducted through in-person interviews. A facilitator collects information about harvests, uses, and sharing of subsistence resources. Search and harvest areas are also mapped over the course of the interview. The information from this collection will be used by the NPS, the Federal Subsistence Board, the State of Alaska, and local/regional advisory councils in making recommendations and informing decisions regarding seasons and harvest limits of fish, wildlife, and plants in the region which communities have customarily and traditionally used.

With this renewal, we are clarifying questions in the Food Security Section of the survey about harvesting Salmon for food, and Black and Brown Bear for both food and fur. Both are legal subsistence uses of the resource.

Title of Collection: Community Harvest Assessments for Alaskan National Parks, Preserves, and Monuments.

OMB Control Number: 1024–0262.

Form Number: None.

Total Estimated Number of Annual Respondents: 2,359.

Total Estimated Number of Annual Responses: 2,359.

Estimated Completion Time per Response: Varies from 10 minutes (initial contact) to 1 hour (in-person interviews).

Total Estimated Number of Annual Burden Hours: 1,972 hours.

Type of Review: Extension of a currently approved collection.

Respondent's Obligation: Voluntary.

Frequency of Collection: One-time.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Phadrea Ponds,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2023–26864 Filed 12–6–23; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

Summary of Commission Practice Relating to Administrative Protective Orders

AGENCY: International Trade Commission.

ACTION: Summary of Commission practice relating to administrative protective orders.

SUMMARY: Since February 1991, the U.S. International Trade Commission (''Commission'') has published in the **Federal Register** reports on the status of its practice with respect to breaches of its administrative protective orders (''APOs'') under title VII of the Tariff Act of 1930 in response to a direction contained in the Conference Report to the Customs and Trade Act of 1990. Over time, the Commission has added to its report discussions of APO breaches in Commission proceedings other than under title VII and violations of the Commission's rules, including the rule on bracketing business proprietary information (the ''24-hour rule'') under title 19 of the Code of Federal Regulations. This notice provides a summary of APO breach investigations completed during fiscal year 2023. This summary addresses APO breach investigations related to proceedings under both title VII and section 337 of the Tariff Act of 1930. The Commission intends for this summary to inform representatives of parties to Commission proceedings of the specific types of APO breaches before the Commission and the corresponding types of actions that the Commission has taken.

FOR FURTHER INFORMATION CONTACT: David Goldfine, Office of the General

Counsel, U.S. International Trade Commission, telephone (202) 708–5452. Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at (202) 205–1810. General information concerning the Commission is available on its website at *https://www.usitc.gov.*

SUPPLEMENTARY INFORMATION: Statutory authorities for Commission investigations provide for the release of business proprietary information (''BPI'') or confidential business information (''CBI'') to certain authorized representatives in accordance with requirements set forth in the Commission's Rules of Practice and Procedure. Such statutory and regulatory authorities include: 19 U.S.C. 1677f; 19 CFR 207.7; 19 U.S.C. 1337(n); 19 CFR 210.5, 210.34; 19 U.S.C. 2252(i); 19 CFR 206.17; 19 U.S.C. 4572(f); 19 CFR 208.22; 19 U.S.C. 1516a(g)(7)(A); and 19 CFR 207.100–207.120. The discussion below describes APO breach investigations that the Commission completed during fiscal year 2023, including descriptions of actions taken in response to any breaches.

Since 1991, the Commission has published annually a summary of its actions in response to violations of Commission APOs and rule violations. *See* 87 FR 69331 (Nov. 18, 2022); 86 FR 71916 (Dec. 20, 2021); 85 FR 7589 (Feb. 10, 2020); 83 FR 42140 (Aug. 20, 2018); 83 FR 17843 (Apr. 24, 2018); 82 FR 29322 (June 28, 2017); 81 FR 17200 (Mar. 28, 2016); 80 FR 1664 (Jan. 13, 2015); 78 FR 79481 (Dec. 30, 2013); 77 FR 76518 (Dec. 28, 2012); 76 FR 78945 (Dec. 20, 2011); 75 FR 66127 (Oct. 27, 2010); 74 FR 54071 (Oct. 21, 2009); 73 FR 51843 (Sept. 5, 2008); 72 FR 50119 (Aug. 30, 2007); 71 FR 39355 (July 12, 2006); 70 FR 42382 (July 22, 2005); 69 FR 29972 (May 26, 2004); 68 FR 28256 (May 23, 2003); 67 FR 39425 (June 7, 2002); 66 FR 27685 (May 18, 2001); 65 FR 30434 (May 11, 2000); 64 FR 23355 (Apr. 30, 1999); 63 FR 25064 (May 6, 1998); 62 FR 13164 (Mar. 19, 1997); 61 FR 21203 (May 9, 1996); 60 FR 24880 (May 10, 1995); 59 FR 16834 (Apr. 8, 1994); 58 FR 21991 (Apr. 26, 1993); 57 FR 12335 (Apr. 9, 1992); and 56 FR 4846 (Feb. 6, 1991). This report does not provide an exhaustive list of conduct that will be deemed to be a breach of the Commission's APOs. The Commission considers APO breach investigations on a case-by-case basis.

As part of the Commission's efforts to educate practitioners about the Commission's current APO practice, the Secretary to the Commission (''Secretary'') issued in January 2022 a sixth edition of *An Introduction to Administrative Protective Order Practice in Import Injury Investigations* (Pub. No. 5280). This document is available on the Commission's website at *http://www.usitc.gov.*

I. In General

A. Antidumping and Countervailing Duty Investigations

The current APO application form for antidumping and countervailing duty investigations, which the Commission revised in May 2020, requires an APO applicant to agree to:

(1) Not divulge any of the BPI disclosed under this APO or otherwise obtained in this investigation and not otherwise available to him or her, to any person other than—

(i) Personnel of the Commission concerned with the investigation,

(ii) The person or agency from whom the BPI was obtained,

(iii) A person whose application for disclosure of BPI under this APO has been granted by the Secretary, and

(iv) Other persons, such as paralegals and clerical staff, who (a) are employed or supervised by and under the direction and control of the authorized applicant or another authorized applicant in the same firm whose application has been granted; (b) have a need thereof in connection with the investigation; (c) are not involved in competitive decision making for an interested party which is a party to the investigation; and (d) have signed the acknowledgment for clerical personnel in the form attached hereto (the authorized applicant shall also sign such acknowledgment and will be deemed responsible for such persons' compliance with this APO);

(2) Use such BPI solely for the purposes of the above-captioned Commission investigation or for U.S. judicial or review pursuant to the North American Free Trade Agreement the determination resulting from such investigation of such Commission investigation;

(3) Not consult with any person not described in paragraph (1) concerning BPI disclosed under this APO or otherwise obtained in this investigation without first having received the written consent of the Secretary and the party or the representative of the party from whom such BPI was obtained;

(4) Whenever materials (*e.g.,* documents, computer disks or similar media) containing such BPI are not being used, store such material in a locked file cabinet, vault, safe, or other suitable container (N.B.: [S]torage of BPI on so-called hard disk computer media or similar media is to be avoided, because mere erasure of data from such media may not irrecoverably destroy the BPI and may result in violation of paragraph C of this APO);

(5) Serve all materials containing BPI disclosed under this APO as directed by the Secretary and pursuant to section 207.7(f) of the Commission's rules;

(6) Transmit each document containing BPI disclosed under this APO:

(i) With a cover sheet identifying the document as containing BPI,

(ii) With all BPI enclosed in brackets and each page warning that the document contains BPI,

(iii) If the document is to be filed by a deadline, with each page marked ''Bracketing of BPI not final for one business day after date of filing,'' and

(iv) Within two envelopes, the inner one sealed and marked ''Business Proprietary Information—To be opened only by [name of recipient]'', and the outer one sealed and not marked as containing BPI;

(7) Comply with the provision of this APO and section 207.7 of the Commission's rules

(i) Make true and accurate representations in the authorized applicant's application and promptly notify the Secretary of any changes that occur after the submission of the application and that affect the representations made in the application (*e.g.*[,] change in personnel assigned to the investigation),

(ii) Report promptly and confirm in writing to the Secretary any possible breach of this APO, and

(iii) Acknowledge that breach of this APO may subject the authorized applicant and other persons to such sanctions or other actions as the Commission deems appropriate, including the administrative sanctions and actions set out in this APO.

The APO form for antidumping and countervailing duty investigations also provides for the return or destruction of the BPI obtained under the APO on the order of the Secretary, at the conclusion of the investigation, or at the completion of judicial review. The BPI disclosed to an authorized applicant under an APO during the preliminary phase of the investigation generally may remain in the applicant's possession during the final phase of the investigation.

The APO further provides that breach of an APO may subject an applicant to:

(1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven years following publication of a

determination that the order has been breached;

(2) Referral to the United States Attorney;

(3) In the case of an attorney, accountant, or other professional, referral to the ethics panel of the appropriate professional association;

(4) Such other administrative sanctions as the Commission determines to be appropriate, including public release of, or striking from the record any information or briefs submitted by, or on behalf of, such person or the party he represents; denial of further access to business proprietary information in the current or any future investigations before the Commission, and issuance of a public or private letter of reprimand; and

(5) Such other actions, including but not limited to, a warning letter, as the Commission determines to be appropriate.

APOs issued in cross-border long-haul trucking (''LHT'') investigations, conducted under the United States-Mexico-Canada Agreement (''USMCA'') Implementation Act, 19 U.S.C. 4571–4574 (19 U.S.C. 4501 note), and safeguard investigations, conducted under the statutory authorities listed in 19 CFR 206.1 and 206.31, contain similar (though not identical) provisions.

B. Section 337 Investigations

APOs in section 337 investigations differ from those in title VII investigations: There is no set form like the title VII APO application, and provisions of individual APOs may differ depending on the investigation and the presiding administrative law judge. However, in practice, the provisions are often similar in scope and applied quite similarly. Any person seeking access to CBI during a section 337 investigation (including, for example, outside counsel for parties to the investigation and technical experts and their staff who are employed for the purposes of the investigation) is required to read the APO, file a letter with the Secretary indicating agreement to be bound by the terms of the APO, agree not to reveal CBI to anyone other than another person permitted access by the APO, and agree to utilize the CBI solely for the purposes of that investigation.

In general, an APO in a section 337 investigation will define what kind of information is CBI and direct how CBI is to be designated and protected. The APO will state which persons may have access to CBI and which of those persons must sign onto the APO. The APO will provide instructions on how CBI is to be maintained and protected by labeling documents and filing transcripts under seal. It will provide protections for the suppliers of CBI by notifying them of a Freedom of Information Act request for the CBI and providing a procedure for the supplier to seek to prevent the release of the information. There are provisions for disputing the designation of CBI and a procedure for resolving such disputes. Under the APO, suppliers of CBI are given the opportunity to object to the release of the CBI to a proposed expert. The APO requires a person who discloses CBI, other than in a manner authorized by the APO, to provide all pertinent facts to the supplier of the CBI and to the administrative law judge and to make every effort to prevent further disclosure. Under Commission practice, if the underlying investigation is before the Commission at the time of the alleged breach or if the underlying investigation has been terminated, a person who discloses CBI, other than in a manner authorized by the APO, should report the disclosure to the Secretary. *See* 19 CFR 210.25, 210.34(c). Upon final termination of an investigation, the APO requires all signatories to the APO to either return to the suppliers or, with the written consent of the CBI supplier, destroy the originals and all copies of the CBI obtained during the investigation.

The Commission's regulations provide for the imposition of certain sanctions if a person subject to the APO violates its restrictions. The Commission keeps the names of the persons being investigated for violating an APO confidential unless the sanction imposed is a public letter of reprimand. 19 CFR 210.34(c)(1). The possible sanctions are:

(1) An official reprimand by the Commission.

(2) Disqualification from or limitation of further participation in a pending investigation.

(3) Temporary or permanent disqualification from practicing in any capacity before the Commission pursuant to 19 CFR 201.15(a).

(4) Referral of the facts underlying the violation to the appropriate licensing authority in the jurisdiction in which the individual is licensed to practice.

(5) Making adverse inferences and rulings against a party involved in the violation of the APO or such other action that may be appropriate. 19 CFR 210.34(c)(3).

Commission employees are not signatories to the Commission's APOs and do not obtain access to BPI or CBI through APO procedures. Consequently, they are not subject to the requirements of the APO with respect to the handling of BPI and CBI. However, Commission employees are subject to strict statutory and regulatory constraints concerning BPI and CBI, and they face potentially severe penalties for noncompliance. *See* 18 U.S.C. 1905; title 5, U.S. Code; and Commission personnel policies implementing the statutes. Although the Privacy Act (5 U.S.C. 552a) limits the Commission's authority to disclose any personnel action against agency employees, this should not lead the public to conclude that no such actions have been taken.

II. Investigations of Alleged APO Breaches

The Commission conducts APO breach investigations for potential breaches that occur in title VII, safeguard, and LHT investigations, as well as for potential breaches in section 337 investigations that are before the Commission or have been terminated.[1] Administrative law judges handle potential APO breaches in section 337 investigations when the breach occurred and is discovered while the underlying investigation is before the administrative law judge. The Commission may review any decision that the administrative law judge makes on sanctions in accordance with Commission regulations. *See* 19 CFR 210.25, 210.34(c).

For Commission APO breach investigations, upon finding evidence of an APO breach or receiving information that there is reason to believe that one has occurred, the Secretary notifies relevant Commission offices that the Secretary has opened an APO breach file and that the Commission has commenced an APO breach investigation. The Commission then notifies the alleged breaching parties of the alleged breach and provides them with the voluntary option to proceed under a one- or two-step investigatory process. Under the two-step process, which was the Commission's historic practice, the Commission determines first whether a breach has occurred and, if so, who is responsible for it. This is done after the alleged breaching parties have been provided an opportunity to present their views on the matter. The breach investigation may conclude after this first step if: (1) the Commission

[1] Procedures for investigations to determine whether a prohibited act, such as a breach, has occurred and for imposing sanctions for violation of the provisions of a protective order issued during a North American Free Trade Agreement or USMCA panel or committee proceedings are set out in 19 CFR 207.100–207.120. The Commission's Office of Unfair Import Investigations conducts the initial inquiry in these proceedings.

determines that no breach occurred and issues a letter so stating; or (2) the Commission finds that a breach occurred but concludes that no further action is warranted and issues a warning letter. If the Commission determines that a breach occurred that warrants further action, the Commission will then determine what sanction, if any, to impose. Before making this determination, the Commission provides the breaching parties with an opportunity to present their views on the appropriate sanction and any mitigating circumstances. The Commission can decide as part of either the first or second step to issue a warning letter. A warning letter is not a sanction, but the Commission will consider a warning letter as part of a subsequent APO breach investigation.

The Commission recognizes that the two-step process can result in duplicative work for the alleged breaching party and Commission staff in some APO breach investigations. For example, parties who self-report their own breach often address mitigating circumstances and sanctions in their initial response to the Commission's letter of inquiry on the breach. But, under the Commission's two-step process, they must await a Commission decision on breach and then submit again their views on mitigating circumstances and sanctions. To streamline this process and accelerate processing times, the Commission offers alleged breaching parties the option to voluntarily elect a one-step APO breach investigation process. Under this process, the Commission will determine simultaneously whether a breach occurred and, if so, the appropriate sanction to impose, if any. Under either process, the alleged breaching party has the opportunity to submit affidavits reciting the facts concerning the alleged breach and mitigating factors pertaining to the appropriate response if a breach is found.

Sanctions for APO violations serve three basic interests: (a) preserving the confidence of submitters of BPI/CBI that the Commission is a reliable protector of BPI/CBI; (b) disciplining breachers; and (c) deterring future violations. As the Conference Report to the Omnibus Trade and Competitiveness Act of 1988 observed: ''[T]he effective enforcement of limited disclosure under [APO] depends in part on the extent to which private parties have confidence that there are effective sanctions against violation.'' H.R. Conf. Rep. 100–576, at 623 (1988).

The Commission has worked to develop consistent jurisprudence, not only in determining whether a breach has occurred, but also in selecting an appropriate response. In determining the appropriate response, the Commission generally considers mitigating factors such as the unintentional nature of the breach, the lack of prior breaches committed by the breaching party, the corrective measures taken by the breaching party, and the promptness with which the breaching party reported the violation to the Commission. The Commission also considers aggravating circumstances, especially whether persons not authorized under the APO had access to and viewed the BPI/CBI. The Commission considers whether there have been prior breaches by the same person or persons in other investigations and whether there have been multiple breaches by the same person or persons in the same investigation.

The Commission's rules permit an economist or consultant to obtain access to BPI/CBI under the APO in a title VII, safeguard, or LHT investigation if the economist or consultant is under the direction and control of an attorney under the APO, or if the economist or consultant appears regularly before the Commission and represents an interested party who is a party to the investigation. *See* 19 CFR 207.7(a)(3)(i)(B) and (C); 19 CFR 206.17(a)(3)(i)(B) and (C); and 19 CFR 208.22(a)(3)(i)(B) and (C). Economists and consultants who obtain access to BPI/CBI under the APO under the direction and control of an attorney nonetheless remain individually responsible for complying with the APO. In appropriate circumstances, for example, an economist under the direction and control of an attorney may be held responsible for a breach of the APO by failing to redact APO information from a document that is subsequently filed with the Commission and served as a public document, or for retaining BPI/CBI without consent of the submitter after the termination of an investigation. This is so even though the Commission may also hold the attorney exercising direction or control over the economist or consultant responsible for the APO breach. In section 337 investigations, technical experts and their staff who are employed for the purposes of the investigation are required to sign onto the APO and agree to comply with its provisions.

The records of Commission investigations of alleged APO breaches in antidumping and countervailing duty cases, section 337 investigations, safeguard investigations, and LHT investigations are not publicly available and are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552. *See, e.g.,* 19 U.S.C. 1677f(g); 19 U.S.C. 1333(h); 19 CFR 210.34(c).

The two types of breaches most frequently investigated by the Commission involve: (1) the APO's prohibition on the dissemination or exposure of BPI or CBI to unauthorized persons; and (2) the APO's requirement that the materials received under the APO be returned or destroyed and that a certificate be filed with the Commission indicating what actions were taken after the termination of the investigation or any subsequent appeals of the Commission's determination. The dissemination of BPI/CBI usually occurs as the result of failure to delete BPI/CBI from public versions of documents filed with the Commission or transmission of proprietary versions of documents to unauthorized recipients. Other breaches have included the failure to bracket properly BPI/CBI in proprietary documents filed with the Commission, the failure to report immediately known or suspected violations of an APO, and the failure to adequately supervise non-lawyers in the handling of BPI/CBI.

Occasionally, the Commission conducts APO breach investigations that involve members of a law firm or consultants working with a firm who were granted access to APO materials by the firm although they were not APO signatories. In many of these cases, the firm and the person using the BPI/CBI mistakenly believed an APO application had been filed for that person. The Commission has determined in all of these cases that the person who was a non-signatory, and therefore did not agree to be bound by the APO, could not be found to have breached the APO. However, under Commission rule 201.15 (19 CFR 201.15), the Commission may take action against these persons for good cause shown. In all cases in which the Commission has taken such action, it decided that the non-signatory appeared regularly before the Commission, was aware of the requirements and limitations related to APO access, and should have verified their APO status before obtaining access to and using the BPI/CBI. The Commission notes that section 201.15 may also be available to issue sanctions to attorneys or agents in different factual circumstances in which they did not technically breach the APO, but their action or inaction did not demonstrate diligent care of the APO materials, even though they appeared regularly before the Commission and were aware of the importance that the Commission places on the proper care of APO materials.

The Commission has held routinely that the disclosure of BPI/CBI through

recoverable metadata or hidden text constitutes a breach of the APO even when the BPI/CBI is not immediately visible without further manipulation of the document. In such cases, breaching parties have transmitted documents that appear to be public documents in which the parties have removed or redacted all BPI/CBI. However, further inspection of the document reveals that confidential information is actually retrievable by manipulating codes in software or through the recovery of hidden text or metadata. In such instances, the Commission has found that the electronic transmission of a public document with BPI/CBI in a recoverable form was a breach of the APO.

The Commission has cautioned counsel to ensure that each authorized applicant files with the Commission within 60 days of the completion of an import injury investigation or at the conclusion of judicial or binational review of the Commission's determination, a certificate stating that, to the signatory's knowledge and belief, all copies of BPI/CBI have been returned or destroyed, and no copies of such materials have been made available to any person to whom disclosure was not specifically authorized. This requirement applies to each attorney, consultant, or expert in a firm who has access to BPI/CBI. One firm-wide certificate is insufficient.

Attorneys who are signatories to the APO in a section 337 investigation should inform the administrative law judge and the Secretary if there are any changes to the information that was provided in the application for access to the CBI. This is similar to the requirement to update an applicant's information in title VII investigations.

In addition, attorneys who are signatories to the APO in a section 337 investigation should send a notice to the Commission if they stop participating in the investigation or the subsequent appeal of the Commission's determination. The notice should inform the Commission about the disposition of CBI obtained under the APO that was in their possession, or the Commission could hold them responsible for any failure of their former firm to return or destroy the CBI in an appropriate manner.

III. Specific APO Breach Investigations

Case 1. The Commission determined that an attorney breached the APO issued in a section 337 investigation when the attorney prepared, filed in EDIS, and served a public version of a confidential document that contained unredacted CBI.

After filing the public version in EDIS and serving it on opposing counsel, the attorney received notification from opposing counsel that the document contained unredacted CBI. The attorney immediately contacted the Commission, and the Office of the Secretary removed the document from public view five hours after it had been posted. The attorney filed a corrected public version that redacted all CBI, but unauthorized individuals had accessed the public version with unredacted CBI while it was posted publicly. Although the attorney argued to the Commission that the information at issue was not CBI, the Commission found that the attorney had not provided evidence sufficient to demonstrate that the CBI was available publicly at the time of the breach.

In determining whether to issue a sanction for the breach, the Commission considered the following mitigating factors: (1) the breach was unintentional and inadvertent; (2) after being notified of the breach, the attorney took prompt action to remedy the breach and prevent further dissemination of CBI; (3) the attorney self-reported the breach to the Commission; (4) the attorney's law firm implemented new procedures to prevent similar breaches in the future; and (5) the attorney had not previously breached an APO in the two-year period preceding the date of this breach. The Commission also considered the following aggravating factors: (1) the attorney did not discover the breach; and (2) unauthorized individuals had access to and presumably viewed the CBI.

The Commission determined to issue a private letter of reprimand to the attorney.

Case 2. The Commission determined that an attorney breached the APO issued in a section 337 investigation when the attorney prepared and filed in EDIS a public version of a confidential document that contained unredacted CBI.

The public version that the attorney filed contained no redactions. Eleven days after the public version was posted publicly to EDIS, opposing counsel reported to the Commission that the document contained CBI. The Secretary immediately removed the document from public view, and the attorney filed a corrected public version that redacted all CBI. However, multiple unauthorized individuals had accessed the public version with unredacted CBI while it was posted publicly. Although the attorney argued to the Commission that the information at issue was not CBI, the Commission found that the attorney had not provided evidence sufficient to demonstrate that the CBI was available publicly at the time of the breach.

In determining whether to issue a sanction for the breach, the Commission considered the following mitigating factors: (1) the breach was unintentional and inadvertent; and (2) the attorney had not previously breached an APO in the two-year period preceding the date of this breach. The Commission also considered the following aggravating factors: (1) the attorney did not discover the breach; (2) the public version was posted publicly to EDIS for twelve days; and (3) unauthorized individuals had access to and presumably viewed the CBI.

The Commission determined to issue a private letter of reprimand to the attorney.

Case 3. The Commission determined that a law firm breached the APO issued in a section 337 investigation when it improperly retained documents containing CBI past the investigation's termination date. The Commission also determined that a second breach occurred when a non-APO-signatory attorney at the law firm accessed an improperly retained document containing CBI, used that document as a template in an unrelated section 337 investigation, and in doing so inadvertently disclosed CBI to counsel in the unrelated investigation.

The law firm discovered both the improper retention and the unauthorized use approximately a year and a half after the underlying section 337 investigation had terminated. The law firm immediately reported the events to the then-presiding administrative law judge in the underlying section 337 investigation, and it then confirmed both destruction of the document by the unauthorized recipient in the unrelated section 337 investigation and that it did not possess any other CBI from the terminated underlying section 337 investigation. Despite the law firm's confirmation that it had destroyed all of the improperly retained CBI, the law firm discovered about five years later that it still retained documents from the underlying section 337 investigation in a misnamed and archived electronic folder that was inaccessible absent special circumstances. The law firm quarantined the folder to prevent further access by law firm personnel, notified the Commission accordingly, and implemented new safeguards to prevent future inadvertent retention of CBI.

In determining whether to issue a sanction for the breach, the Commission considered the following mitigating factors: (1) both breaches were inadvertent and unintentional; (2) the

law firm discovered its own breaches; and (3) after discovering the breaches, the law firm took prompt corrective action to investigate the breaches and prevent further dissemination of CBI; (4) the law firm promptly self-reported the unauthorized retention, access, and use of CBI; (5) for the breach involving the improper retention of CBI, the CBI remained otherwise protected by being stored on an internal archive that was inaccessible absent special circumstances; and (6) the law firm implemented new safeguarding procedures to prevent against similar breaches in the future. The Commission also considered the following aggravating factors: (1) one breach resulted in unauthorized individuals accessing and viewing the CBI; (2) the law firm violated the APO in two different ways, by improperly retaining CBI and by exposing CBI to an unauthorized party; and (3) the law firm committed multiple breaches during the relevant two-year time period, including a breach in another APO breach investigation. The Commission also noted that the law firm had failed to properly dispose of the CBI for several years after discovering the first breach.

The Commission issued a private letter of reprimand to the law firm for the two breaches because none of the individuals responsible for the breaches remained at the law firm at the time the Commission issued the sanction. The Commission further required the remaining APO signatories at the law firm to submit affidavits confirming the destruction of all CBI from the underlying investigation and confirming that the law firm had not improperly retained CBI from any other section 337 investigation.

Case 4. The Commission determined that two attorneys from different law firms that were co-counsel for a party in a section 337 investigation each separately breached the APO by emailing drafts of a brief that contained CBI acquired under the APO to an unauthorized recipient, who then shared the CBI with additional unauthorized individuals.

The first breach occurred when an attorney from one of the two law firms emailed a draft brief containing unredacted CBI to a group that included an APO non-signatory. The second breach occurred shortly thereafter that same day when an attorney from the other law firm sent a reply email to the same group copied on the first email with another draft that also contained unredacted CBI. Both breaching emails included among the recipients the attorney who was not authorized to receive the CBI and five attorneys from both co-counsel law firms that were signatories to the APO. The non-APO signatory attorney then forwarded the drafts to additional attorneys that were not APO signatories. One of the law firms discovered the breaches 20 days after the breaching emails were sent to the unauthorized recipients. The breaching parties sought to confirm destruction of the documents at issue the morning after discovering the CBI disclosure, and they reported the breaches to the Commission two days later.

In determining whether to issue a sanction for the breach, the Commission considered the following mitigating factors: (1) the breach was inadvertent and unintentional; (2) one of the breaching parties discovered the breach; (3) after discovering the breach, the breaching parties took prompt action to remedy the breach and prevent further dissemination of CBI; (4) the breaching parties promptly self-reported the breach to the Commission; and (5) the attorneys involved had not previously breached an APO in the two-year period preceding the dates of these breaches. The Commission also considered the following aggravating factors: (1) unauthorized individuals had access to and viewed the BPI; and (2) the breaching parties violated the APO on two occasions.

The Commission issued private letters of reprimand to both attorneys who emailed the documents containing unredacted CBI. The Commission also issued warning letters to the five APO signatories who were copied on the breaching emails but failed to identify the breaches. As APO signatories and recipients of the email transmitting unredacted CBI, they had an opportunity to immediately discover that one of the recipients on the group email with the draft brief containing unredacted CBI was not an APO signatory and to prevent the second breach from occurring. The Commission found that warning letters for these five attorneys were appropriate because early detection of the first breach could have prevented the second breach, and it would have prevented the unauthorized recipient from further disseminating CBI to additional unauthorized individuals.

Case 5. The Commission determined that four attorneys at a law firm breached the APO issued in a section 337 investigation when the law firm publicly filed in EDIS and served on its clients a document that contained unredacted CBI.

Although all four attorneys worked on the document, only three of the four attorneys reviewed the final version for CBI. After those three attorneys reviewed the document and determined that it did not contain CBI, one of the attorneys publicly filed the document in EDIS and another served the document on the firm's clients, who were not authorized under the APO to view CBI. Six days later, opposing counsel notified one of the attorneys that the document contained unredacted CBI. After receiving this notice, the attorney immediately contacted the Commission to request that the document be removed from public view, contacted the Office of Unfair Import Investigations to notify them of the issue, and contacted the clients who had received the document to request that they destroy it. In their submissions to the Commission about this breach, the attorneys confirmed to the Commission that they had received responses (and confirmations of destruction) from all of the clients who had received the unredacted document.

In determining whether to issue a sanction for the breach, the Commission considered the following mitigating factors: (1) the breach was inadvertent and unintentional; (2) after being notified of the breach, the law firm took prompt action to remedy the breach and prevent further dissemination of CBI; (3) the firm promptly self-reported the breach to the Commission; and (4) the attorneys had not previously breached an APO in the two-year period preceding the date of this breach. The Commission also considered the following aggravating factors: (1) the responsible attorneys did not discover the breach; and (2) unauthorized individuals had access to and presumably viewed the CBI.

The Commission determined to issue private letters of reprimand to the three attorneys who reviewed the final version of the document. The Commission determined to issue a warning letter to the fourth attorney who worked on the document but did not review the final version before it was filed or served. The Commission found that the fourth attorney contributed to the breach but was not directly responsible for the exposure of CBI to unauthorized individuals.

Case 6. The Commission determined that a law firm breached the APO issued in a section 337 investigation when it filed on EDIS a public version of a brief that contained unredacted CBI, including language that a confidential Commission document treated as CBI.

Two supervisory attorneys and one associate attorney from the law firm were each responsible for drafting, reviewing, and redacting the public version of the brief. A fourth attorney,

who served as lead counsel in the underlying investigation, was involved in drafting and reviewing the brief and signed the brief when it was filed. The fourth attorney relied on both supervisory attorneys and the associate attorney for redacting the brief for CBI. The law firms representing the parties to the underlying section 337 investigation agreed to exchange briefs that they had each redacted for their own clients' CBI. Following that procedure, the breaching law firm reviewed the public version of its brief for only its own client's CBI, despite knowing that it had included CBI obtained under the APO that a confidential Commission document treated as CBI. The law firm sought confirmation from opposing counsel that the draft did not contain CBI from opposing counsel's client, and opposing counsel signed off on the draft under the mistaken belief that it did not contain its client's CBI. However, the brief, as filed on EDIS, did contain CBI from opposing counsel's client that the law firm had obtained under the APO. Although the law firm had relied on opposing counsel's representation that the draft brief did not contain their clients' CBI, the law firm ultimately was responsible for the breach by deciding to include the unredacted CBI in the brief and for exposing it to unauthorized persons by filing the public version of the brief on EDIS. Opposing counsel discovered the breach and notified the law firm and the Commission. The original public version of the brief was on EDIS for two days before the breaching law firm filed a corrected public version of the brief (which it did immediately upon being notified of the breach).

In determining whether to issue a sanction for the breach, the Commission considered the following mitigating factors: (1) the breach was inadvertent and unintentional; (2) the law firm took prompt corrective measures upon learning of the alleged breach by filing a corrected public version of the brief; and (3) the parties involved had not previously breached an APO in the two-year period preceding this breach. The Commission also considered the following aggravating factors: (1) the breach resulted in exposure of CBI to unauthorized individuals; and (2) the law firm did not discover its own breach.

The Commission issued private letters of reprimand to the two supervisory attorneys and the associate attorney for their role in the breach. The Commission also issued a warning letter to the lead counsel, who failed to provide proper protection of CBI, but who was not directly responsible for the disclosure of the CBI.

Case 7. The Commission determined that two partners and one senior counsel at a law firm breached the APO issued in a section 337 investigation in three different ways. First, the Commission determined that they breached the APO when they accessed and used CBI from the investigation in related federal district court litigation before finalizing a cross-use agreement covering such use. Second, the Commission determined that they breached the APO when, before finalizing the cross-use agreement, they provided CBI to an associate attorney who was not subscribed to the APO in the terminated section 337 investigation. Finally, the Commission determined that they breached the APO by publicly filing a CBI exhibit from the terminated section 337 investigation in the district court's electronic case-filing system.

Following the termination of the underlying section 337 investigation, the law firm began discussions with opposing counsel to formulate a cross-use agreement that would allow the parties to retain and use certain CBI from the section 337 investigation in related federal district court litigation. In its submissions to the Commission on this matter, the law firm indicated that it had restricted internal access to the CBI until the agreement was finalized with opposing counsel. However, four months before the agreement was finalized, the partners and senior counsel used CBI from the section 337 investigation in preparing a filing for the district court litigation and attached a confidential exhibit from the section 337 investigation to it. The partners and senior counsel also provided CBI from the section 337 investigation to an associate attorney who had not worked on the underlying section 337 investigation and was not authorized under the APO to access or view CBI from it. The associate had no previous experience with section 337 investigations or with Commission APO practice.

Because the cross-use agreement was not yet in place at the time that the law firm was preparing the filing at issue in this investigation, the law firm sought approval from opposing counsel to use the confidential exhibit and the CBI within it, but opposing counsel denied this request. Following this denial, the senior counsel, who was the primary drafter of the filing, reviewed the document to remove all references to CBI and instructed the associate to remove the confidential exhibit from it. One of the partners, who was lead counsel for the district court litigation, reviewed the final version of the revised filing and also instructed the associate to remove the exhibit and correct the labeling of the remaining exhibits. The associate instructed administrative staff to remove the confidential exhibit and to replace the confidential exhibit on the exhibit list with a public exhibit. When staff sent a revised exhibit list and revised set of exhibits, the associate checked the exhibit list to confirm that staff had made the required adjustments, but the associate did not check the public or confidential sets of exhibits to ensure that the confidential exhibit had been removed. The partner and senior counsel also did not check the exhibits. The associate then instructed staff to submit the filing and its exhibits to the district court's case-filing system, which they did. After receiving notification of the filing, one of the partners asked the associate to confirm that the firm had not filed any of the confidential exhibits publicly. The associate confirmed that the confidential exhibits were not accessible through the district court's electronic case-filing system but did not check the public exhibits.

The morning after the law firm filed the document and exhibits, opposing counsel notified the law firm that the filing included a confidential exhibit that was available publicly on the district court's electronic case-filing system. In this notification, opposing counsel reiterated to the law firm that it did not approve of the law firm's use of the confidential exhibit as part of the filing. The law firm immediately contacted the district court to request that the court remove the filing, which it did that same day. In its submissions to the Commission on this matter, the law firm indicated that it put in place stricter procedures for the retention and storage of CBI from terminated investigations that are subject to potential cross-use agreements to ensure that such agreements are finalized and in place before anyone accesses or uses the CBI.

In determining whether to issue a sanction for the breach, the Commission considered the following mitigating factors: (1) the public exposure of the CBI was inadvertent and unintentional; (2) after being notified of the exposure, the law firm took prompt action to remedy the breach and prevent further dissemination of CBI; (3) the firm self-reported the use and exposure of CBI to the Commission; (4) the law firm implemented new procedures to prevent against similar breaches in the future; and (5) the attorneys had not previously breached an APO in the two-year period

preceding the date of these breaches. The Commission also considered the following aggravating factors: (1) the law firm's use of the CBI and its provision to an associate were not inadvertent; (2) unauthorized individuals had access to and presumably viewed the CBI; (3) the law firm violated the APO in three different ways; (4) the law firm did not discover the public exposure of the CBI; and (5) the law firm failed to follow its own procedures by accessing and using CBI to which the firm had restricted access pending the completion of the cross-use agreement.

The Commission also considered the law firm's argument that its use of the exhibit and its provision of CBI to the associate attorney was consistent with 28 U.S.C. 1659(b), which provides for the transfer and admissibility of the Commission record in federal district court litigation under certain circumstances. However, the Commission determined that the exhibit at issue was not a part of the Commission record, as defined under 19 CFR 210.38(a), and thus, it was not within the scope of section 1659(b). In addition, the Commission noted that the application of section 1659(b) would not mitigate the public exposure of the CBI.

The Commission determined to issue private letters of reprimand to the partner who served as lead counsel and to the senior counsel. The Commission determined that they were both part of the decisions to use the CBI in the filing, to provide it to the associate attorney, and to delegate the removal of the exhibit to the associate, who did not have any previous experience with section 337 investigations and Commission APO practice. The Commission determined to issue a warning letter to the second partner, who worked on the filing and was aware of the associate's access to the CBI, but was not involved with the finalization of the document or the failed process to remove the confidential exhibit.

The Commission found that good cause existed to issue a warning letter to the associate under 19 CFR 201.15(a). The associate was not a signatory to the APO in the underlying section 337 investigation and did not have previous Commission APO experience, and thus the Commission determined that the issuance of a sanction would be inappropriate. However, the associate had several years of experience as an attorney, was aware that the exhibit was confidential, and had received specific instructions to remove the confidential exhibit from the filing. The associate was also directly responsible for the public exposure of CBI.

Case 8. The Commission determined that an attorney at a law firm breached the APO issued in a section 337 investigation when the law firm publicly filed in EDIS and served to its clients a confidential document that the attorney had prepared.

Although the document contained unredacted CBI, the attorney did not place confidential headers on the document when he was preparing it to be filed. As a result, after the attorney finalized the document, a paralegal filed the document publicly on EDIS, and the law firm's client, who was not on the APO, was provided with a copy of the document. After the document was posted to EDIS, opposing counsel notified the attorney that the document contained CBI, and the paralegal, at the attorney's direction, contacted the Office of the Secretary to request that the document be removed from public view. In addition, the attorney contacted the client who had received the document and requested that the client destroy it. The attorney refiled the document as confidential, but multiple unauthorized individuals had accessed the document while it was available publicly on EDIS.

In determining whether to issue a sanction for the breach, the Commission considered the following mitigating factors: (1) the breach was unintentional and inadvertent; (2) the attorney self-reported the breach to the Commission; (3) after being notified of the breach, the attorney took prompt action to remedy the breach and prevent further dissemination of CBI; and (4) the attorney had not previously breached an APO in the two-year period preceding the date of this breach. The Commission also considered the following aggravating factors: (1) the attorney did not discover the breach; and (2) unauthorized individuals had access to and presumably viewed the CBI.

The Commission determined to issue a private letter of reprimand to the attorney. The Commission determined not to hold the paralegal who filed the document or any other individuals at the law firm responsible for the breach. The attorney was the only person involved in the preparation of the document for filing, and the breach occurred because the attorney failed to apply CBI headers.

Case 9. The Commission determined that an attorney breached the APO in a section 337 investigation by transmitting to unauthorized individuals a link to a document that contained unredacted CBI obtained under the APO.

The attorney discovered the breach eight days after sending the link when he received a question from one of the unauthorized recipients who had gained unauthorized access. Upon learning of the breach, the attorney immediately deactivated the link and confirmed that unauthorized recipients had destroyed the document and would refrain from using any CBI that they may have viewed. The attorney also immediately reported the breach to the opposing counsel and, two days later, reported the breach to the Commission.

In determining whether to issue a sanction for the breach, the Commission considered mitigating factors, including that: (1) the breach was inadvertent and unintentional; (2) the law firm discovered its own breach; (3) the law firm promptly self-reported the breach; (4) after discovering the breach, the law firm took prompt action to remedy the breach and prevent further dissemination of CBI; (5) the law firm implemented new procedures to prevent against similar breaches in the future; and (6) the attorney had not previously breached an APO in the two-year period preceding the date of this breach. The Commission also considered the aggravating factor that unauthorized persons had access to and presumably viewed CBI.

The Commission issued a private letter of reprimand to the attorney.

By order of the Commission.

Issued: December 1, 2023.

Sharon Bellamy,

Supervisory Hearings and Information Officer.

[FR Doc. 2023–26806 Filed 12–6–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–23–058]

Sunshine Act Meetings

Agency Holding the Meeting: United States International Trade Commission.

TIME AND DATE: December 14, 2023 at 11:00 a.m.

PLACE: Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agendas for future meetings: none.
2. Minutes.
3. Ratification List.
4. Commission vote on Inv. Nos. 701–TA–583 and 731–TA–1381 (Review)(Cast Iron Soil Pipe Fittings from China). The Commission currently is scheduled to complete and file its determinations and views of the Commission on December 21, 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: December 5, 2023.

Sharon Bellamy,

Supervisory Hearings and Information Officer.

[FR Doc. 2023–26967 Filed 12–5–23; 4:15 pm]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Koch Foods Incorporated; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the Northern District of Illinois, Eastern Division, in *United States* v. *Koch Foods Incorporated,* Civil Action No. 23–15813. On November 9, 2023, the United States filed a Complaint alleging that Koch Foods Incorporated (''Koch''), one of the largest poultry processors in the United States, unlawfully requires independent chicken farmers to pay Koch an exit fee if the farmers switch from working with Koch to working with one of its rivals. Koch's practices are alleged to violate section 202(a) of the Packers and Stockyards Act and section 1 of the Sherman Act.

The proposed Final Judgment, filed at the same time as the Complaint, requires Koch to refrain from including a termination payment obligation in any farmer contracts and from taking any steps to collect any termination payments for the next seven years. It also requires Koch to repay all termination payments it has received from farmers, and to reimburse farmers for legal costs they incurred in responding to Koch's efforts to collect termination payments.

Koch is required to certify that it has given the required notices to farmers, made the required payments and reimbursements within 120 days of entry of the Final Judgment, and submitted any disputed claims for payment or reimbursement to a referee selected by the Division, whose decision will be final. Koch will provide an annual certification that it continues to comply with provisions of the proposed Final Judgment for its duration of seven years, unless it is terminated earlier by agreement with the Division and a determination by the Court that termination is in the public interest. The proposed Final Judgment also imposes other cooperation and reporting requirements.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's website at *http://www.justice.gov/atr* and at the Office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's website, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments should be submitted in English and directed to Chief, Civil Conduct Task Force, Antitrust Division, Department of Justice, 450 Fifth Street NW, Suite 8600, Washington, DC 20530 (email address: *ATRJudgmentCompliance@usdoj.gov*).

Suzanne Morris,

Deputy Director of Civil Enforcement Operations, Antitrust Division.

United States District Court for the Northern District of Illinois Eastern Division

United States of America, 450 Fifth Street NW, Washington, DC 20530, Plaintiff, v. *Koch Foods Incorporated, 1300 W Higgins Road, Suite 100, Park Ridge, IL 60068,* Defendant.

Case No. 1:23–cv–15813

Judge John F. Kness

Complaint

Raising chickens is a bet-the-farm proposition. Many chicken farmers must borrow hundreds of thousands of dollars to finance the construction of chicken houses—huge structures that hold over 50,000 chickens each. A farmer is largely beholden to a poultry processor, which owns the chicks, feed, antibiotics, and other inputs for raising chickens. Without a loan from the bank, there is no farm; without a contract with a processor, there is no loan; and without the processor's fair dealing, the farm may fail.

To secure better working conditions or pay, a chicken farmer's only recourse often is switching processors. Even in the best of circumstances, competition for farmers' chicken growing services is uncertain because switching processors can be a costly, risky, and difficult endeavor. But Koch Foods, a leading poultry processor, has suppressed competition even further by imposing exit penalties on its chicken farmers who want to switch to a competitor. Koch's conduct deprives farmers of the benefits of competition and lowers their compensation. Koch's exit penalties are an unfair practice under section 202(a) of the Packers and Stockyards Act and violate section 1 of the Sherman Act. These practices should be enjoined.

I. Introduction

1. A chicken farmer's success depends on a processor. A farmer must invest hundreds of thousands of dollars to build chicken houses to a processor's specifications. A bank will loan money for the construction only if a processor has agreed to offer the farmer a contract; the bank often sees the farmer's contract before the farmer. After obtaining a loan and building the houses, the farmer generally has no practical alternative but to accept the contract terms for growing chickens offered by the processor.

2. Once built, chickens houses cannot be relocated or readily repurposed. If the processor provides insufficient flocks, poor quality chicks, or substandard feed, the farmer may not earn enough to meet the terms of the loan—and can literally lose the farm.

3. Broiler chicken farmers, commonly called ''growers,'' generally can contract only with a processor operating a processing facility close enough to transport chickens and feed cost-effectively.[1] Few growers have more than three other processors close enough to contract for their growing services. And when the grower wants to switch processors, alternative processors may not need new growers.

4. For these reasons, processors have substantial leverage over contract growers. Where it exists, competition among processors for chicken growers can sometimes increase their compensation and motivate a processor to provide better terms to farmers. Growers' ability to switch processors

[1] Most chicken farmers raise ''broilers,'' the chickens that are slaughtered and processed for people to consume. Other chicken farmers raise breeder hens or pullets (chicks). In at least some cases, Koch imposed its exit fees on breeder-hen and pullet farmers as well as broiler farmers.

provides some check, even if a limited one.

5. Beginning in 2014, Koch Foods—one of the five largest chicken processors in the United States—introduced an exit penalty in its grower contracts to insulate itself from competition. If a farmer switches from Koch to a different processor within 10 years (later extended to 15 years) of contracting with Koch, the farmer must pay a penalty. Depending on the size of the farm, the penalty amount can range from $24,000 to $56,000 or, for one facility's farmers, up to hundreds of thousands of dollars. Such penalties exceed 50 to 100 percent of many farmers' annual income given farmers' limited take-home pay after deducting operating expenses.

6. The goal of Koch's exit penalty is clear: Koch wants to make it more difficult for its growers to switch to another processor. Koch claims that the exit penalty was meant to compensate Koch Foods for the real impact growers leaving has on Koch. But that is just another way of saying that, without the exit penalty, Koch would have to pay farmers competitive rates to keep them from switching to one of Koch's competitors.

7. Koch has enforced its exit penalty to prevent its chicken farmers from leaving. Koch has sued or threatened to sue at least 14 farmers who wanted to switch to a competing processor. Other farmers, faced with the exit penalty and threat of litigation, have declined better opportunities with other processors and returned to Koch.

8. The exit penalty is an ''unfair . . . practice or device'' under the Packers and Stockyards Act, 7 U.S.C. 192(a), because growers cannot reasonably avoid the penalty provision, its existence and enforcement substantially harm growers, and any countervailing benefit to growers does not outweigh the harm.

9. In addition, under Packers and Stockyards Act regulations, 9 CFR 201.100(h)(2), a broiler farmer has the right to terminate its poultry growing arrangement in writing with at least 90 days' prior notice. By unreasonably burdening farmers' right to terminate their production contracts, the Koch exit penalty provision violates this regulation.

10. The exit penalty has harmed competition, and therefore suppressed compensation, for growers. Koch has a sufficient share of the relevant markets for the penalty to foreclose competition; its purpose for imposing and enforcing the penalty is to prevent or limit competition; and the penalty has prevented growers from accepting better terms. The exit penalty therefore unreasonably restrains trade in violation of section 1 of the Sherman Act.

11. The Department of Justice brings this action on behalf of the United States and the U.S. Department of Agriculture to enjoin Koch's unlawful exit penalty practices.

II. Factual Allegations

A. Koch Uses Independent Farmers To Raise Its Broiler Chickens

12. Koch Foods is the fifth largest broiler chicken processor in the United States, with $4.7 billion in sales in 2022. Koch is a privately held company, whose CEO owns 99 percent of its shares.

13. Like most other broiler chicken processors, Koch is vertically integrated. This means the company controls most steps in the production of chicken meat, from hatching chicks to slaughtering and packaging broiler chickens to be consumed in homes, restaurants, and other venues. One important exception, however, is that Koch (like other major processors) pays independent farmers to raise its broiler chickens for delivery to Koch's processing plants. By outsourcing chicken growing, Koch shifts the substantial cost, capital requirements, and risk to small poultry farmers. Farmers who build chicken houses to raise chickens for Koch bear the risks of their investment, including risks of weather damage, such as tornados or floods. Outsourcing chicken growing also allows Koch to avoid the burden and costs associated with employing farmers.

14. Koch, like other processors, provides chicks and feed to its broiler farmers and pays farmers only for the service of growing chickens. To reduce transportation costs for feed and chickens, and to limit injury or death to chickens during transport, most processors contract with farmers located near each processing complex.

15. Once broiler chickens reach their target weight, Koch collects and trucks them to a processing plant, where Koch slaughters and packs them for distribution. A farmer providing broiler services for Koch gets paid only when a flock is brought to slaughter. The farmer's pay depends on the weight of the broiler chickens collected from the farmer, the farmer's ''feed-conversion ratio'' (that is, the weight of feed consumed by broiler chickens to their full-grown weight) relative to other local Koch-contracted farmers, and various other adjustments for items such as for fuel costs, litter control, and pest control.

16. Koch operates eight poultry processing complexes: two in Tennessee (Morristown and Chattanooga), four in Alabama (Ashland, Montgomery, Collinsville and Gadsden), one in Georgia (Pine Mountain Valley), and one in Mississippi (Morton).

17. Each of Koch's eight complexes enters into contracts with independent farmers to provide growing services. In total, more than 800 farmers grow broiler chickens for Koch. The duration of Koch's contractual commitment does not usually exceed five years. Many of these farmers operate small family farms. Koch does not allow broiler farmers in any way to own, maintain or care for any competitor's birds of any kind *anywhere*—even on property that is not used to grow chickens for Koch.

B. Broiler Houses Are Large, Debt-Financed Capital Investments

18. To operate at a scale sufficient to grow broilers for a major processor like Koch, a contract farmer typically needs two to four modern broiler houses. These houses are large: Koch specifies that new broiler houses should generally be 66 feet wide by 600 feet long, nearly the length of two football fields.

19. Each modern broiler house costs approximately $500,000 to build. Most farmers must take out loans to fund 90 percent or more of this cost. Many chicken farmers operate as small, highly leveraged family farms, and bank debt repayment is their largest expense.

20. Koch typically provides a prospective farmer with the required specifications for the houses and a simple pro forma cash-flow statement, or ''payback analysis,'' showing the farmer's projected total gross pay before debt service and other operating expenses. Koch then notifies a local lender, either by a commitment letter or through informal means, that Koch considers the prospective farmer acceptable and that Koch is prepared to place flocks with the farmer upon the completion of the broiler housing.

21. A lender will generally evaluate the farmer's projected cash flow based on the standard-form Koch contract, with the understanding that Koch will require the farmer to sign the contract without amendment after the houses are built. The lender generally conditions a loan for new-house construction on a farmer's willingness to execute the Koch standard contract ''as is'' once the new broiler houses are ready to receive their first flocks. Most loans for broiler houses span 10 or 15 years, while some are longer. As a practical matter, Koch offers contracts to farmers on a ''take-it-or-leave-it'' basis, and a prospective

farmer typically has no opportunity to negotiate the compensation terms of a Koch contract.

22. Under its grower contracts, Koch determines a farmer's compensation for a flock after it arrives at a Koch processing plant and is weighed. Before disbursing payment, however, Koch deducts a farmer's loan payment, which it remits directly to the lender, as required by the farmer's loan agreement.

23. Koch wields enormous leverage over the farmers who grow its broiler chickens. Indebted farmers generally need at least six flocks each year to stay current on their broiler-house loans, yet Koch decides the number of flocks to allot to each farmer. If Koch elects not to renew a farmer's contract, or merely reduces the number of flocks placed per year, many farmers would be unable to make their loan repayments. Koch also controls other factors that can significantly affect farmer compensation, such as the number and quality of chicks provided, the type of feed, the timing of when flocks are collected, the use of antibiotics, and various payment adjustments.

24. The only realistic way for farmers to repay their loans for newly constructed broiler houses is by growing broiler chickens. Once built, broiler houses cannot be relocated, and farmers can raise chickens only for processors that are both nearby and willing to accept new farmers. Farmers know that their farm is just one among many nearby, and none is an irreplaceable supplier of broiler services for Koch or any other processor.

C. Koch Introduces the Exit Penalty To Stifle Competition

25. Almost all Koch-contracted farmers reside near enough to the complex of at least one other processor to raise broilers for that processor, so there is potential competition for their broiler growing services.

26. In 2014, Koch introduced the exit penalty provision into its grower contracts—a new policy designed to weaken competition between Koch and other processors for broiler farmers' services by stymieing its farmers' ability to switch to Koch's competitors.

27. Part of a farmer's compensation is a per-flock payment that Koch calls a ''New House Incentive.'' If the farmer switches to one of Koch's competitors in the next 10 years, the grower must pay an exit penalty:

If [farmer] elects to terminate the Poultry Production Agreement during the ten (10) year time period applicable to this NEW HOUSE INCENTIVE AGREEMENT, then [farmer] shall refund Company, within 90 days of its notice of termination to Company, any payments made by Company within the preceding 12 months under this NEW HOUSE INCENTIVE AGREEMENT, and no additional amounts shall be owed by Company under this NEW HOUSE INCENTIVE AGREEMENT.

28. The fixed per-flock payment is roughly $2,000 per modern (''Class A'') house. For an average farm of two or four houses, each of which receives six or seven flocks a year, the exit penalty over a year would be $24,000 to $56,000. This obligation to ''refund . . . any payments'' made by Koch under the ''new house incentive'' agreement ''for the preceding 12 months'' means that the exit penalty represents for most farmers *at least half*—and for some farmers *up to 100 percent or more*—of their annual take-home income after paying bank debt and operating costs.

29. The exit penalty implemented at Koch's complex in Montgomery, Alabama is even more burdensome. Koch charges Montgomery-area farmers an exit penalty equal to the ''new house incentive'' paid in *all years* prior to termination, rather than the amount paid in the preceding 12 months:

If [farmer] elects to terminate the Production Agreement at any time prior during the ten (10) year time period applicable to the NEW HOUSE INCENTIVE, then [farmer] shall refund to COMPANY, within ninety (90) days of its notice of termination to COMPANY, all payments received under this NEW HOUSE INCENTIVE AGREEMENT.

Under this provision, a farmer with, say, four houses who received new house incentive payments for seven years would likely have to pay over $300,000 to switch from Koch to a competing processor.

30. As the percentage of Koch broiler farmers with qualifying houses has steadily increased, more farmers have become subject to the exit penalty. For example, by the end of 2017, the farmers providing more than half of the total square footage of broiler housing for Koch's Gadsden, Alabama complex were subject to the exit penalty.

31. Koch also includes exit penalties in at least some of its contracts with breeder-hen farmers and pullet farmers.

32. In rolling out the ''new house incentive,'' Koch has sought out prospective farmers who are young, financially insecure, less familiar with the growing business, and short on collateral—making them more inclined to accept 90 or 100 percent financing from lenders. Koch understands that, for these prospective farmers, the decision to build new houses is based largely on the potential cash flow. Koch generally shows prospective farmers a ''payback analysis'' predicated on raising 6.5 flocks each year (that is, alternating between six and seven flocks per year), though Koch is not obligated by its contracts to deliver that many flocks.

33. Once the new houses are built, however, Koch can choose to deliver fewer than six flocks or deliver flocks that are smaller than Koch has projected. Many broiler-house loans are structured to be repaid through six flock settlements in a year; a farmer who receives fewer than six flocks frequently incurs negative cash flow and the prospect of default.

34. Koch has failed to inform some farmers of the exit penalty until the farmer has signed a loan for the new housing with the bank, drawn down the loan, and completed the construction of the new broiler houses. Koch's typical sample payback analysis is a pro forma cash flow statement that does not mention the exit penalty.

35. When a farmer finally has the opportunity to sign the lengthy broiler-services contract, the exit penalty is non-negotiable, and farmers have little choice but to accept Koch's terms given their impending loan payments. As a practical matter, it is impossible for farmers to choose not to work for Koch without defaulting on their bank loans.

36. Prospective farmers must trust Koch to provide reasonable contract terms when the farmer eventually receives (and signs) the Koch broiler production contract.

37. Even if farmers did receive proper notice and understood the exit penalty provision, the exit penalty would still serve as an unreasonable burden on switching.

38. The so-called ''new house incentive'' and concomitant exit penalty originally only applied for the first 10 years that the chicken farmer stayed with Koch. Within the past two years, however, Koch's new contracts extend the supplemental payments and exit penalty for the first 15 years that the farmer stays with Koch. Koch has also extended the supplemental payments and exit penalty to 15 years for at least some farmers who were subject to the original 10-year exit penalty obligation.

39. Koch's exit penalty makes it harder for farmers to switch from Koch to competing processors. As a result, Koch need not compete as vigorously to retain farmers as it would absent the exit penalty. In effect, the exit penalty functions as a non-compete clause that curtails farmers' ability to switch to competitors that might offer greater compensation or otherwise superior contract terms.

D. No Legitimate Purpose Justifies the Exit Penalty

40. Although Koch adopted the exit penalty as part of its ''new house incentive'' program, Koch does not advance any funds to farmers to build new houses as part of the program. Instead, Koch expects farmers to pay for new houses by taking out their own loans on their own credit. Nor does the exit penalty serve to recoup costs that Koch has expended on special training for farmers or to protect Koch against the risk that any trade secrets or special know-how might be shared with another processor if a farmer stopped growing for Koch.

41. The ''new house incentive'' program has been profitable to Koch from the very first flock even without any exit penalty. With each flock, Koch saves money on feed from the improved quality of new broiler housing. These savings far exceed the ''new house incentive'' payments to farmers.

42. Before adopting the ''new house incentive'' in 2014, Koch senior executives verified that ''[t]he incentive will pay for itself with better performance,'' without any exit penalty. A senior employee in the Koch finance department provided Koch executives with a detailed analysis showing that only a slight improvement in the feed conversion ratio would allow Koch to break even on its ''new house incentive'' payments. Koch's executives responded that the program ''would seem to be a no brainer,'' especially considering that the ''improvement should be a lot higher than that.''

43. Koch analyses in 2016 and 2017 confirmed that the ''new house incentive'' has paid for itself many times over without any exit penalty. The analyses showed that new houses provided cost savings to Koch more than seven times greater than the extra payments that Koch paid to farmers. In each year since Koch implemented the ''new house incentive,'' Koch has saved millions of dollars. For example, by the end of 2016, less than two years after first imposing the exit penalty in its contracts, Koch determined that it had already enjoyed cost savings of many times the amount that it had paid to farmers as ''new house incentives.''

E. Koch Enforces Its Exit Penalty When Farmers Seek To Switch to Competing Processors and Sues Farmers Who Do Not Pay

44. Koch actively enforces its exit penalty to deter farmers from switching to competing processors. Koch has demanded exit penalties from at least 14 farmers—including 13 from broiler chicken farmers and one from a breeder farmer—and filed nearly a dozen lawsuits over the past three years against farmers who attempted to switch processors. Some farmers returned to Koch rather than face litigation, while others declined to pursue a switch because the exit penalty would be too onerous.

45. Since at least May 2020, Koch has sent letters demanding the exit penalty from farmers who gave notice of their intention to switch to another processor.

46. In November 2020, Koch began suing farmers to collect the exit penalty. Koch sued one married couple for a total of $95,040; another farmer for $55,440; and yet another for $27,720. Since November 2020, Koch has demanded comparable exit penalties from at least nine other farmers. Some of these farmers returned to Koch rather than pay the exit penalty or bear the costs of litigation.

47. One farmer who had earned less than $4,000 in ''new house incentive'' payments received a demand from Koch for seven times the amount actually due under the exit penalty provision. The farmer managed to pay a lesser amount only after litigating the issue.

48. For all of these farmers, the exit penalty was substantial compared to their earnings after deducting loan payments and other costs of operating their farms.

49. Koch's highly visible efforts to collect its exit penalties have deterred farmers who might otherwise avail themselves of competition between Koch and other processors to obtain better compensation for themselves and their families. Koch's exit penalty is unfair and unreasonably harms competition for broiler farmer growing services.

III. Relevant Markets and Market Power

50. The relevant markets are the purchases of broiler growing services in the locations encompassing each Koch poultry processing facility and the rival processors with which it competes.

A. The Market for the Purchase of Broiler Growing Services

51. The purchase of broiler growing services by chicken processors is a relevant product market under the Sherman Act.

52. Broiler farmers own the facilities required to raise broiler chickens, which are typically financed by loans made directly to the farmers. Broiler farmers use houses designed specifically for growing broiler chickens that cannot be repurposed for other agricultural operations without significant cost.

53. Broiler farmers take financial risk and invest their labor and capital in building and operating a specialized farming service. Broiler farmers cannot switch to producing other agricultural products in sufficient numbers to render unprofitable a small but significant decrease in price (compensation) by a hypothetical monopsonist. Nor would farmers likely abandon their investments and credit obligations to take up alternate employment.

54. To become growers, farmers must borrow considerable amounts of money and invest time building chicken houses.

B. The Relevant Geographic Markets Are the Areas Around the Locations of Each Koch Poultry Processing Facility and Its Rival Processors

55. Processors require sufficient growers to supply their processing complexes. Processors typically pay for the chickens' transportation, feed, veterinary care, and collection. The cost and risk of transporting feed and chickens limit the area in which processors can contract with broiler farmers. The geographic radius within which a processor can economically contract with farmers for chicken growing services constitutes its ''draw area.''

56. Although there may be some processor-specific requirements, top-quality chicken housing that satisfies one processor's requirements is often acceptable to other processors in the area. Farmers with top-quality housing may be able to improve their compensation by switching processors, depending on competitive conditions in the relevant market. A processor competes with a Koch complex for chicken growing services if the draw area of one or more of its complexes overlaps significantly with Koch's draw area.

57. For each Koch complex that competes with one or more rival processors, the relevant geographic market is the area around the Koch complex and its set of competing processors. Koch contracts with a significant share of the broiler farmers within the geographic market of each Koch complex.

C. Koch Has Market Power in Each Relevant Market

58. Koch contracts with a significant share of the broiler farmers who contract to deliver broiler growing services to processors within the draw area of each Koch complex.

59. Most Koch farmers have a few alternative processors with which to contract. Nearly all Koch farmers are within the draw area of at least one competitor's complex. Over 80 percent of Koch farmers are located within the draw areas of the complexes of at least two of Koch's competitors. More than half of the farmers who provide their services to Koch are located within the draw areas of the complexes of three or more of Koch's competitors.

60. Each Koch complex competes with one or more rival processors to sign up farmers who deliver growing services within their overlapping draw areas. But the Koch exit penalty artificially raises the cost to farmers to switch from Koch to a competitor. Because Koch contracts with a significant share of the farmers under contract with processors in each complex's geographic market, these switching costs significantly lessen competition in those markets.

61. Koch's market share and ability to impose and enforce the termination penalty clause establish that Koch has market power in the relevant markets.

IV. Jurisdiction, Venue, and Commerce

62. The United States brings this action pursuant to section 404(a) of the Packers and Stockyards Act, 7 U.S.C. 224, upon the referral by the Secretary of the United States Department of Agriculture, and under section 1 of the Sherman Act, 15 U.S.C. 1, to protect the farmers of the United States and to restore competition in the market for broiler growing services.

63. Koch is a privately held corporation headquartered in Park Ridge, Illinois, with live poultry operations in Alabama, Georgia, Mississippi, and Tennessee. Koch complexes enter into broiler services contracts with farmers located in multiple states, and Koch's chicken products are sold to customers in many states. Koch is engaged in interstate commerce and activities that substantially affect interstate commerce.

64. The Court has subject matter jurisdiction under 28 U.S.C. 1331, 1337, and 1345, as well as 7 U.S.C. 224, to prevent and restrain Koch from violating section 202(a) of the Packers and Stockyards Act.

65. The Court has subject matter jurisdiction under 28 U.S.C. 1331, 1337, and 1345 as well as section 4 of the Sherman Act, 15 U.S.C. 4, to prevent and restrain Koch from violating section 1 of the Sherman Act, 15 U.S.C. 1.

66. The Court has personal jurisdiction over Koch under section 12 of the Clayton Act, 15 U.S.C. 22.

67. Venue is proper in this judicial district under section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1391(b)–(c), because Koch transacted business, was found, and resided in this district; a substantial part of the events giving rise to the United States' claim arose in this district; and a substantial portion of the affected interstate trade and commerce described herein has been carried out in this district.

V. Violations Alleged

Count I

(Violation of Section 202(a) of the Packers and Stockyards Act)

68. The United States repeats and realleges paragraphs 1 through 67 as if fully set forth herein.

69. Koch, with its subsidiaries, is a ''live poultry dealer'' under 7 U.S.C. 182(10), because it is engaged in the business of obtaining live poultry under a poultry growing arrangement for the purpose of slaughtering and processing poultry.

70. Koch's contracts with chicken farmers concern ''live poultry'' under 7 U.S.C. 182(6), 192, because the contracts pertain to the raising of chickens for slaughter.

71. Koch's exit penalty is an ''unfair . . . practice or device,'' in violation of section 202(a) of the Packers and Stockyards Act, 7 U.S.C. 192(a). First, farmers cannot reasonably avoid the exit penalty. Lenders' anticipated cash flow analyses are based on the assumption that farmers' compensation for each flock will include the ''new house incentive.'' Koch makes the exit penalty a condition of receiving the ''new house incentive.'' Farmers are required to accept the exit penalty as part of the Koch contract. Koch sometimes even fails to disclose the exit penalty before the farmer takes out a loan to build new broiler houses.

72. Second, the exit penalty substantially harms farmers by curtailing their ability to switch and, accordingly, pursue better wages and working conditions. Once built, chicken houses cannot be repurposed without significant expense, and the out-of-pocket cost of paying the exit penalty is prohibitive for most farmers. The prospect of paying Koch at least 50 percent (and, for some, 100 percent or more) of the farmer's annual take-home pay restrains the farmer from switching to a Koch competitor, even when the competing processor offers higher compensation or otherwise better contract terms. Koch's illegal conduct has imposed substantial costs on farmers seeking to switch processors and deprived farmers of the benefits of competition for their services.

73. Third, any purported benefit to Koch from the exit penalty does not outweigh the harm inflicted on farmers. The exit penalty does not recoup any upfront capital expenditure by Koch; farmers bear all the financial and operational risk of building new broiler houses. The efficiencies derived from new housing make Koch's ''new house incentive'' payments to farmers profitable for Koch from the very first flock. The exit fee thus simply insulates Koch from competition with other processors for farmers' services.

74. Koch's unfair and deceptive practices are ongoing and likely to continue and recur unless the Court grants the requested relief.

Count II

(Violation of Section 202(a) of the Packers and Stockyards Act and 9 CFR 201.100(h)(2))

75. The United States repeats and realleges paragraphs 1 through 74 as if fully set forth herein.

76. Pursuant to 9 CFR 201.100(h)(2), chicken farmers have the right to terminate their poultry growing arrangement with at least 90 days' prior written notice.

77. The Koch exit penalty provision unreasonably burdens farmers' right under 9 CFR 201.100(h)(2) to terminate the Koch production contract.

78. Koch's illegal conduct has imposed substantial costs on farmers seeking to switch and deprived farmers of the benefits of competition for their services.

79. Koch's conduct will likely continue and recur unless this Court grants the requested relief.

Count III

(Violation of Section 1 of the Sherman Act)

80. The United States repeats and realleges paragraphs 1 through 79 as if fully set forth herein.

81. The exit penalty provisions in Koch's contracts with farmers had the purpose and likely effect of unreasonably restraining interstate trade and commerce in the relevant markets, within the meaning of section 1 of the Sherman Act, 15 U.S.C. 1.

82. Koch's illegal conduct has imposed substantial costs on farmers seeking to switch and deprived farmers

of the benefits of competition for their services, including their compensation. Koch's illegal conduct has also reduced competition in the market for broiler services, which likely undercuts other processors' ability to hire and the compensation of farmers who do not contract with Koch.

83. Koch's conduct will likely continue and recur unless this Court grants the requested relief.

Requested Relief

The United States requests that this Court:

a. adjudge that the Koch exit penalty provision in its contracts with farmers is an unfair and deceptive practice or device in violation of section 202(a) of the Packers and Stockyards Act, 7 U.S.C. 192(a);

b. adjudge that the Koch exit penalty provision in its contracts with farmers is an unfair and deceptive practice or device in that it unreasonably burdens the right of farmers to terminate their ''poultry growing arrangement'' with Koch on 90-days' notice, in violation of 9 CFR 201.100(h);

c. adjudge that the Koch exit penalty provision in its contracts with farmers unreasonably restrains trade and commerce and therefore is unlawful under section 1 of the Sherman Act, 15 U.S.C. 1;

d. permanently enjoin and restrain Koch from demanding payment of the exit penalty or otherwise enforcing the exit penalty provision;

e. enjoin Koch from including any exit penalty or substantially similar provision in its agreements with farmers;

f. require that Koch promptly give notice to all farmers with Koch contracts that contain an exit penalty provision that the exit penalty provision is unenforceable and void;

g. require Koch to take such internal measures as are necessary to ensure compliance with any injunction;

h. grant equitable monetary relief by refunding to all affected farmers any funds collected by Koch pursuant to the exit penalty provision, including any funds collected in a settlement or other resolution of a claim by Koch seeking to enforce the exit penalty provision, and all attorneys' fees and costs incurred in defending against Koch's collection efforts;

i. grant any other relief as required by the nature of this case and as is just and proper to prevent the recurrence of the alleged violation and to reverse its anticompetitive effects; and

j. award the United States the costs of this action and any other relief that the Court may deem just and proper.

Dated: November 9, 2023.

Respectfully submitted,

For Plaintiff United States of America

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/s/ ____________________
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/s/ ____________________
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/s/ ____________________
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/s/ ____________________
Miriam R. Vishio,
Deputy Director of Civil Enforcement.

/s/ ____________________
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/s/ ____________________
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United States District Court for the Northern District of Illinois Eastern Division

United States of America, 450 Fifth Street NW, Washington, DC 20530, Plaintiff, v. *Koch Foods Incorporated, 1300 W Higgins Road, Suite 100, Park Ridge, IL 60068,* Defendant.

Case No. 1:23–cv–15813
Judge John F. Kness

Proposed Final Judgment

Whereas, Plaintiff, the United States of America, filed its Complaint on November 9, 2023, alleging that Defendant Koch Foods Incorporated violated section 1 of the Sherman Act, 15 U.S.C. 1, and section 202(a) of the Packers and Stockyards Act, 7 U.S.C. 192(a);

And whereas, the United States and Defendant have consented to the entry of this Final Judgment without the taking of testimony, without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party relating to any issue of fact or law;

And whereas, Defendant agrees to undertake certain actions and refrain from certain conduct for the purpose of resolving the claims alleged in the Complaint;

And whereas, Defendant agrees that the relief required by this Final Judgment can and will be made and that Defendant will not later raise a claim of hardship or difficulty as grounds for asking the Court to modify any provision of this Final Judgment.

Now therefore, it is ordered, adjudged, and decreed:

I. Jurisdiction

The Court has jurisdiction over Defendant and the subject matter of this action. The Complaint states claims upon which relief may be granted against Defendant under sections 202(a) and 404 of the Packers and Stockyards Act, 7 U.S.C. 192(a), 224, and section 1 of the Sherman Act, 15 U.S.C. 1.

II. Definitions

As used in this Final Judgment:

A. The ''Antitrust Division'' means the Antitrust Division of the United States Department of Justice.

B. ''Defendant'' and ''Koch'' mean Defendant Koch Foods Incorporated, an Illinois corporation with its headquarters in Park Ridge, Illinois, its successors, assigns, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and its and their owners, operators, directors, officers, managers, agents, representatives, and employees.

C. ''Dispute Resolution Process'' means the process that is the sole means for Koch to dispute a Request for Payment in whole or in part. To invoke the Dispute Resolution Process, within 14 calendar days of receipt of the disputed Request for Payment, Koch must: (i) notify the Independent Poultry Grower of the dispute, (ii) explain the basis for Koch's dispute to the Independent Poultry Grower in writing, and (iii) submit the dispute to the Antitrust Division in writing, attaching a copy of Koch's written notification to the Independent Poultry Grower. If Koch fulfills these requirements, the Antitrust Division will in its sole discretion identify three proposed independent referees, each of whom must be a licensed attorney, to resolve the dispute, give the Independent Poultry Grower and Koch five business days to strike one proposed referee each, and, at the conclusion of that five-day period, either name the remaining proposed referee as the referee or, if more than one of the proposed referees

have not been struck, select the referee from among the remaining proposed referees. Koch will bear all fees and costs of the referee regardless of the outcome of the Dispute Resolution Process. The referee will determine whether a hearing is required to resolve the dispute. Koch must provide the Antitrust Division with all documents and information related to the referee proceeding, including any submissions to or communications with the referee, and the Antitrust Division will have the right to attend hearings, if any, in the referee proceeding and to access any transcripts or recordings of such hearings. If the referee so requests, Koch agrees to waive any applicable confidentiality protections for documents, information, and other material Koch provided to the Antitrust Division in connection with the investigation or litigation of this action, whether directly or through a products-of-discovery Civil Investigative Demand to another party in litigation with Defendant, solely for the purpose of allowing the Antitrust Division to share information with the referee. The referee's decision must be final, binding on Koch and Independent Poultry Grower, and enforceable by the Antitrust Division or the Independent Poultry Grower through this Court's contempt power under this Final Judgment. Any objection or challenge to or appeal of the referee's decision may be made only in this case and must be subject to the procedures and standards of review set forth in Federal Rule of Civil Procedure 53(f), except that all factual findings must be reviewed only for clear error. In such case, the making of this Final Judgment must be without prejudice to either the Independent Poultry Grower or Koch in any dispute over any Request for Payment. *Provided, however,* that the Independent Poultry Grower may opt out of the referee proceeding at any time prior to a determination of the dispute by the referee.

D. ''Including'' means including, but not limited to.

E. ''Independent Poultry Grower'' means any Person who has entered into a Live Poultry Agreement, including a poultry grower within the meaning of section 2(a)(8) of the Packers and Stockyards Act, 7 U.S.C. 182(8).

F. ''Live Poultry Agreement'' means any formal or informal agreement or understanding, and any amendment, addendum or renewal of any such agreement or understanding, for the services of an Independent Poultry Grower who raises, grows, or cares for live chickens (including pullets, breeder chickens, by-product chickens, and broilers), including under a poultry growing arrangement within the meaning of section 2(a)(9) of the Packers and Stockyards Act, 7 U.S.C. 182(9).

G. ''Loan Agreement'' means an agreement in which the Defendant pays a sum of money to or on behalf of an Independent Poultry Grower where the agreement (i) has an original term of five years or less and has not been extended prior to acceleration of the loan by a Termination, (ii) provides that the loan will be forgiven or repaid pro rata annually or more frequently during the original term, with only the outstanding balance of the original loan accelerated and payable upon Termination, (iii) does not impose additional charges for prepayment or Termination, such as a prepayment penalty; (iv) does not provide for the payment of interest on the loan, (v) is for the purpose of facilitating the construction or improvement of one or more poultry houses and/or ancillary facilities, including the purchase of related real estate and/or the purchase and installation of related equipment, and where the value of the poultry houses and/or ancillary facilities, including any related real estate and/or related equipment, is projected, at the time of the agreement, to meet or exceed the amount of any payment due as a result of the Independent Poultry Grower initiating a Termination of a Live Poultry Agreement with Defendant, and (vi) does not violate the antitrust laws or the Packers and Stockyards Act.

H. ''Person'' means any natural person, corporation, firm, company, sole proprietorship, partnership, joint venture, association, institution, governmental unit, or other legal entity.

I. ''Poultry Processor'' means any person engaged in the business of obtaining live poultry by purchase or under a Live Poultry Agreement, including a live poultry dealer within the meaning of section 2(a)(10) of the Packers and Stockyards Act, 7 U.S.C. 182(10).

J. ''PSD'' means the Packers and Stockyards Division of the Agricultural Marketing Service, United States Department of Agriculture (''USDA'') and, in the future, any agency within USDA that becomes responsible for live poultry matters under the Packers and Stockyards Act that are currently the responsibility of PSD.

K. ''Recoverable Legal Costs'' means all costs that an Independent Poultry Grower has paid or incurred for legal services or court costs in connection with any effort by Defendant to collect a Termination Payment or enforce a Termination Payment Obligation. *Provided, however,* that Recoverable Legal Costs do not include any costs that were advanced, paid, or reimbursed for an Independent Poultry Grower by or on behalf of a Poultry Processor, or its agent, representative, or affiliate.

L. ''Request for Payment'' means a written statement, affirmed under penalty of perjury, from an Independent Poultry Grower that (i) requests payment of any Termination Payment or Recoverable Legal Costs and states that none of the requested amount was advanced, paid, or reimbursed by or on behalf of a Poultry Processor, or its agent, representative, or affiliate; and (ii) attaches invoices or other documents that demonstrate the requested payment amounts were incurred.

M. ''Termination'' means termination, cancellation, non-renewal, or expiration and subsequent non-replacement of a Live Poultry Agreement.

N. ''Termination Payment'' means anything of value (including money, goods, or services) that an Independent Poultry Grower is required to pay or provide to Defendant or any other person as a result of a Termination. *Provided, however,* that Termination Payments do not include: (a) the return or relinquishment of possession of personal property owned by Defendant such as chickens, medicines, and feed, or any payment of damages, if otherwise permitted under the Live Poultry Agreement, to Defendant based on the Independent Poultry Grower's conversion, abandonment, or destruction of, or actual or imminent harm to, personal property owned by Defendant, or (b) payments under a Loan Agreement.

O. ''Termination Payment Obligation'' means any obligation or commitment of an Independent Poultry Grower to make a Termination Payment.[2]

III. Applicability

This Final Judgment applies to Defendant and all other persons in active concert or participation with Defendant who receive actual notice of this Final Judgment.

IV. Prohibited Conduct

Defendant must not:

[2] For example and without limitation, a Termination Payment Obligation includes any provision in a Live Poultry Agreement in substantially the following form:

If [Independent Poultry Grower] elects to terminate the [Live Poultry Agreement] during the . . . [time period applicable to this New House Incentive Agreement/New House Payment Period], then [Independent Poultry Grower] shall refund Company, within ninety (90) days of its notice of termination to Company, [any/all] payments made by Company [during the previous 12 months] under this . . . . New House [Incentive/Payment] Agreement . . . .

A. Demand, request, collect, or accept any Termination Payment;

B. Take any steps, including through litigation or the threat of litigation, to demand, request, collect, or accept any Termination Payment or to enforce any Termination Payment Obligation;

C. Include a Termination Payment Obligation in any Live Poultry Agreement; or

D. Directly or indirectly, including through any third party, engage in, encourage, or support any retaliation against, or any intimidation or harassment of, any Independent Poultry Grower who is or was a party or witness to any dispute or litigation relating to a Termination Payment or Termination Payment Obligation or who cooperates or has cooperated with PSD or the Antitrust Division with respect to any investigation of Defendant's conduct relating to Termination Payments or Termination Payment Obligations.

V. Required Conduct

A. Within 30 calendar days of entry of this Final Judgment, Defendant must:

1. Repay all Termination Payments that Defendant has received and has identified to PSD and the Antitrust Division as of the date of entry of this Final Judgment;

2. Send a written notice, in the form attached as Appendix 1 by regular U.S. mail in an envelope marked from Defendant and with the notice conspicuously on the front, ''LEGAL MAIL—IMPORTANT NOTICE'' in no less than 26 point type, and, for each Independent Poultry Grower for whom Defendant has an email address, by email with the subject line ''IMPORTANT LEGAL NOTICE FROM KOCH FOODS, INC.,'' to the last known postal and email addresses of each Independent Poultry Grower providing services to Defendant under a Live Poultry Agreement that contains a Termination Payment Obligation; and

3. Send a written notice, in the form attached as Appendix 2 by regular U.S. mail in an envelope marked from Defendant and with the notice conspicuously on the front, ''LEGAL MAIL—IMPORTANT NOTICE'' in no less than 26 point type, and, for each Independent Poultry Grower for whom Defendant has an email address, by email with the subject line ''IMPORTANT LEGAL NOTICE FROM KOCH FOODS, INC.,'' to the last known postal and email addresses of each Independent Poultry Grower who formerly provided services to Defendant under a Live Poultry Agreement that contained a Termination Payment Obligation.

B. Within 120 calendar days of entry of this Final Judgment, Defendant must:

1. Repay all Termination Payments not already repaid pursuant to V.A.1 and pay all Recoverable Legal Costs for which Defendant has received a Request for Payment, except those Termination Payments and Recoverable Legal Costs that are subject to the Dispute Resolution Process and not yet resolved; and

2. Provide a report to PSD and the Antitrust Division, affirmed under penalty of perjury by the CEO, COO, CFO, or other senior Koch officer, that:

(i) Sets forth (a) the name and address of each Independent Poultry Grower who submitted a Request for Payment and the date the request was submitted, (b) the dollar amount(s) requested in each such Request for Payment, listing separately amounts requested, if any, for Termination Payments and for Recoverable Legal Costs, and (c) the dollar amount(s) paid to each Independent Poultry Grower to whom Defendant made any payment pursuant to this Final Judgment, listing separately the amounts paid, if any, for Termination Payments and for Recoverable Legal Costs;

(ii) Sets forth, for any Independent Poultry Grower for whom the amount in the Request for Payment in (2)(i)(b) is greater than the amount paid in (2)(i)(c): (a) an explanation of any discrepancies between the amounts requested and the amounts paid, (b) the date Koch provided notice of a dispute to the Request for Payment, if any, (c) an explanation of any Requests for Payment rejected by Koch, (d) the total amounts of Termination Payments and Recoverable Legal Costs that Defendant has paid, and (e) an explanation of the status of any unresolved claim or dispute relating to a Request for Payment, including the date of any upcoming Dispute Resolution Process proceeding; and

(iii) Certifies that all other requirements of this Final Judgment have been completed by Defendant.

C. Inform PSD and the Antitrust Division within 30 calendar days of the final resolution of each outstanding claim or dispute identified pursuant to Paragraph V.B.2(ii).

D. Certify in writing to PSD and the Antitrust Division annually on the anniversary date of the entry of this Final Judgment that Defendant is in compliance with the provisions of this Final Judgment, and the status of each outstanding claim or dispute, if any, relating to a Request for Payment.

E. Within 14 calendar days of learning of any violation or potential violation of any of the provisions of this Final Judgment, Defendant must:

1. Promptly take appropriate action to restore compliance with this Final Judgment; and

2. Provide PSD and the Antitrust Division with a statement describing the violation or potential violation and any steps Defendant has taken to address the violation or potential violation.

F. Defendant must maintain all documents relating to any Dispute Resolution Process or any violation or potential violation of this Final Judgment for the duration of this Final Judgment and must provide all such non-privileged documents to PSD and the Antitrust Division upon request. At the request of either PSD or the Antitrust Division, Defendant must within 30 calendar days of receiving the request furnish to PSD and the Antitrust Division a log of all documents maintained pursuant to this Paragraph V.F, that identifies any such documents for which Defendant claims protection under the attorney-client privilege, the attorney work product doctrine, or any other privilege.

G. PSD and the Antitrust Division, in their sole discretion, may extend each of the time periods set forth in Paragraphs V.A through V.C for a total of up to an additional 120 calendar days. If Defendant seeks an extension, it must make that request to the Antitrust Division in writing at least seven calendar days prior to the expiration of the operable time period.

VI. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment or of related orders in this case or of determining whether this Final Judgment should be modified or vacated, upon written request of an authorized representative of PSD or the Antitrust Division, and upon reasonable notice to Defendant, Defendant must permit, from time to time and subject to legally recognized privileges, authorized representatives, including agents retained by PSD or the Antitrust Division:

1. to have access during Defendant's office hours to inspect and copy, or at the option of the requesting agency, to require Defendant to provide electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendant relating to compliance with any requirements of this Final Judgment; and

2. to interview, either informally or on the record, Defendant's officers, employees, or agents relating to compliance with any requirements of

this Final Judgment. Each interviewee may, at their option and without coercion, have any counsel of their choosing present. The interviews must be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendant.

B. Upon the written request of an authorized representative of PSD or the Antitrust Division, Defendant must submit written reports or respond to written interrogatories, under oath if requested, relating to compliance with any requirements of this Final Judgment.

VII. Public Disclosure

A. No information or documents obtained pursuant to any provision in this Final Judgment may be divulged by USDA or the Antitrust Division to any person other than an authorized representative of the executive branch of the United States, except in the course of any Dispute Resolution Process or any legal proceedings to which the United States is a party, including grand-jury proceedings, for the purpose of securing compliance with this Final Judgment, for law enforcement purposes, or as otherwise required by law.

B. In the event of a request by a third party to the Antitrust Division pursuant to the Freedom of Information Act, 5 U.S.C. 552, for disclosure of information obtained pursuant to any provision of this Final Judgment, the Antitrust Division will act in accordance with that statute, and the Department of Justice regulations at 28 CFR part 16, including the provision on confidential commercial information, at 28 CFR 16.7. When submitting information to the Antitrust Division, Defendant should designate the confidential commercial information portions of all applicable documents and information under 28 CFR 16.7. Designations of confidentiality expire 10 years after submission, ''unless the submitter requests and provides justification for a longer designation period.'' *See* 28 CFR 16.7(b).

C. In the event of a request by a third party to USDA pursuant to the Freedom of Information Act, 5 U.S.C. 552, for disclosure of information obtained pursuant to any provision of this Final Judgment, USDA will act in accordance with that statute, and USDA regulations at 7 CFR part 1, subpart A, including the provision on confidential commercial information, at 7 CFR 1.8. When submitting information to USDA in connection with the Final Judgment or related orders in this case, Defendant should designate the confidential commercial information portions of all applicable documents and information under 7 CFR 1.8. Designations of confidentiality expire 10 years after submission, ''unless the submitter requests and provides justification for a longer designation period.'' *See* 7 CFR 1.8(c).

D. If at the time that Defendant furnishes information or documents to USDA or the Antitrust Division pursuant to any provision of this Final Judgment, Defendant represents and identifies in writing information or documents for which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendant marks each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,'' USDA or the Antitrust Division must give Defendant 10 calendar days' notice before divulging the material in any legal proceeding (other than a grand jury proceeding).

VIII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

IX. Enforcement of Final Judgment

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Defendant agrees that in a civil contempt action, a motion to show cause, or a similar action brought by the United States relating to an alleged violation of this Final Judgment, the United States may establish a violation of this Final Judgment and the appropriateness of a remedy therefor by a preponderance of the evidence, and Defendant waives any argument that a different standard of proof should apply.

B. This Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws, to restore the competition the United States alleges was harmed by the challenged conduct, and to end an unfair practice or device in the market for the purchase of the services of Independent Poultry Growers the United States alleges was caused by Defendant's inclusion of Termination Payment Obligations in its Live Poultry Agreements. Defendant agrees that it may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive and fairness principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In an enforcement proceeding in which the Court finds that Defendant has violated this Final Judgment, the United States may apply to the Court for an extension of this Final Judgment, together with other relief that may be appropriate. In connection with a successful effort by the United States to enforce this Final Judgment against Defendant, whether litigated or resolved before litigation, Defendant agrees to reimburse the United States for the fees and expenses of its attorneys, as well as all other costs including experts' fees, incurred in connection with that effort to enforce this Final Judgment, including in the investigation of the potential violation.

D. For a period of four years following the expiration of this Final Judgment, if the United States has evidence that Defendant violated this Final Judgment before it expired, the United States may file an action against that Defendant in this Court requesting that the Court order: (1) Defendant to comply with the terms of this Final Judgment for an additional term of at least four years following the filing of the enforcement action; (2) all appropriate contempt remedies; (3) additional relief needed to ensure the Defendant complies with the terms of this Final Judgment; and (4) fees or expenses as called for by this section IX.

X. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment will expire seven years from the date of its entry, except that after three years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and Defendant that continuation of this Final Judgment is no longer necessary or in the public interest.

XI. Reservation of Rights

This Final Judgment terminates only the claims stated in the Complaint against Defendant. This Final Judgment does not in any way affect any other charges or claims that may be filed by the United States. For the avoidance of doubt, the Antitrust Division and the PSD retain all rights to investigate and prosecute, including under the antitrust

laws or the Packers and Stockyards Act, any conduct, practice or device that (1) does not arise from a Termination Payment or Termination Payment Obligation, or (2) is an aspect of any ranked performance pay compensation (sometimes described as ''tournament'') system.

XII. Notice

For purposes of this Final Judgment, any notice or other communication required to be filed with or provided to the United States or the Antitrust Division must be sent to the addresses set forth below (or such other addresses as the United States may specify in writing to Defendant):

Chief, Civil Conduct Task Force, U.S. Department of Justice, Antitrust Division, 450 Fifth Street, Washington, DC 20530, *ATRJudgmentCompliance@usdoj.gov;* and the

PSD, Regional Director, Packers and Stockyards Division—Eastern Regional Office, United States Department of Agriculture, AMS FTPP, 75 Ted Turner Drive SW, Suite 230, Atlanta, GA 30303.

XIII. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including by making available to the public copies of this Final Judgment and the Competitive Impact Statement, public comments thereon, and any response to comments by the United States. Based upon the record before the Court, which includes the Competitive Impact Statement and, if applicable, any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: ____________, 2023.

[Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16]

____

United States District Judge

Appendix 1

[Koch letterhead]

[Name and address of sender (Koch's Chief Operating Officer)]

[Date of actual mailing and email distribution]

[Name, mailing address, and email of addressee]

Re: Department of Justice's Settlement with Koch Foods, Inc.

Dear [name of Independent Poultry Grower]:

The United States Department of Justice has reached a settlement with Koch Foods that may affect you. Under the agreement, Koch Foods is prohibited from trying to require you to pay a termination payment if you choose to switch to another poultry processor. Also, you may be entitled to compensation if you paid any out-of-pocket expenses as a result of Koch attempting to require a termination payment from you for trying to switch to another poultry processor. Please read this letter carefully to learn more about your rights under the settlement.

The Lawsuit

The Department of Justice sued Koch Foods for seeking to recover payments from growers who tried to switch to other poultry processors. In the lawsuit, the Department of Justice alleged that Koch violated the federal antitrust laws and the Packers and Stockyards Act by requiring growers who tried to switch to another processor to pay back a portion of their new house incentive payments. Koch sued or threatened to sue several growers who did not pay back incentive payments sought by Koch. To resolve the dispute, the Department of Justice entered into a court-approved settlement with Koch. You can find the Department of Justice's complaint and the Court's Order approving the settlement here: [link to the Complaint and Final Judgment]. The Court's Order requires Koch to distribute this notice to growers like yourself.

Koch Cannot Require You To Pay a Termination Payment for Switching to Another Poultry Processor

The Court's Order prohibits Koch from requiring you to pay a termination payment when switching to another poultry processor. For example, Koch cannot enforce any provision like the following in a poultry production contract:

If [Independent Poultry Grower] elects to terminate the [Live Poultry Agreement] during the . . . [time period applicable to this New House Incentive Agreement/New House Payment Period], then [Independent Poultry Grower] shall refund Company, within ninety (90) days of its notice of termination to Company, [any/all] payments made by Company [during the previous 12 months] under this . . . . New House [Incentive/Payment] Agreement . . . .

You are receiving this notice because you likely have a similar provision in your contract with Koch. Koch also will not include any termination payment obligation in any future poultry contract with you. The Court's Order does not apply to loans Koch provides to a grower, as long as the loan had an original term of five years or less (no extensions), is being forgiven in equal amounts during that original term, and meets certain other conditions specified in the Court's Order.

To be clear, this settlement does not prevent Koch from paying you a new house incentive or any other bonus. Instead, it prevents Koch from trying to recover any of those payments if you terminate your contract with Koch.

Koch Must Reimburse Out-of-Pocket Costs

You may be entitled to reimbursement by Koch if you paid any out-of-pocket costs as a result of Koch trying to require you to pay a termination payment when switching to another processor or for threatening to require you to pay a termination payment if you switched to another processor. These reimbursable expenses include (1) any new house incentive payments that you paid back to Koch when you switched to another processor or (2) attorneys' fees or court costs that you paid as a result of Koch suing or threatening to sue you for switching without paying the termination payment. If you did not pay any out-of-pocket expenses as a result of Koch attempting to require a termination payment from you when you switched processors or if another poultry processor reimbursed you for those expenses, you cannot make a claim and should not return the attached Request for Payment form.

How To Submit a Request for Payment

To qualify for reimbursement, you must submit a request for payment to Koch that (i) lists the relevant payments you have made (termination payments or recoverable legal costs), (ii) attaches documentation such as invoices that demonstrate you made the payments, (iii) confirms that the payments were not made or reimbursed by or on behalf of another poultry company, and (iv) swears that your claim is accurate under the penalty of perjury. A suggested Request for Payment form you can use is attached to this notice. You must submit your request for payment and attached documentation to Koch by email at [Koch email address] or by U.S. mail at [mailing address] no later than [60 days from date of notice].

What happens after a claim is submitted?

If Koch does not dispute your request, it will pay your request on or before [stated date that is 120 days after the date of entry of the Final Judgment]. If Koch disputes your request, Koch must notify you within 14 days of receiving your request, explain the basis for the dispute, and submit the dispute to the Department of Justice. The Department of Justice will select an independent referee to resolve the dispute and will contact you, giving you the opportunity to participate in or opt out of the referee proceeding if you prefer. You will not be charged any fee related to this dispute—Koch will bear all fees and costs of the referee.

* * * * *

The Court's Order itself, rather than the brief description provided in this letter, controls your rights and Koch's obligations. If you have any questions about the Court's Order or how it affects you, please contact me or the Civil Conduct Task Force, U.S. Department of Justice, Antitrust Division, at *ATRJudgmentCompliance@usdoj.gov.*

Sincerely,

[Sender name, Koch Foods, Inc.]

Request for Payment

Return this form to Koch Foods Inc. by email at [email address] or U.S. mail at [mailing address] NO LATER THAN [stated date that is 60 days from date of notice].

SUBMIT THIS FORM ONLY IF YOU INTEND TO FILE A CLAIM FOR PAYMENT

Pursuant to the Final Judgment dated [date of entry of Final Judgment] in the matter of *United States* v. *Koch Foods, Inc.* (N.D. Ill.),

I am entitled to payment by Koch Foods, Inc. for the following amounts:

$____________ for a Termination Payment

(Please attach invoices or other documents that demonstrate that you incurred the requested payment amount; if you incurred no Termination Payment, leave blank or enter ''zero''.)

$____________ for Recoverable Legal Costs

(Please attach invoices or other documents that demonstrate that you incurred the requested payment amount; if you incurred no Recoverable Legal Costs, leave blank or enter ''zero''.)

(PLEASE READ AND CHECK BOX BELOW)

☐ I confirm that I have incurred or paid all requested amounts as reflected on the attached invoices or other documents and that none of the requested amounts was paid or reimbursed by or on behalf of a Poultry Processor.

I, ____________, under penalty of perjury, do hereby certify that the foregoing information is true and correct.

____
Signature

____
Email address (required)

____
Date

Appendix 2

[Koch letterhead]
[Name and address of sender (Koch's Chief Operating Officer)]
[Date of actual mailing and email distribution]
[Name, mailing address, and email of addressee]

Re: Department of Justice's Settlement with Koch Foods, Inc.

Dear [name of Independent Poultry Grower]:

The United States Department of Justice has reached a settlement with Koch Foods that may affect you. Under the agreement, you may be entitled to compensation if you paid any out-of-pocket expenses as a result of Koch attempting to require a termination payment from you for trying to switch to another poultry processor. Please read this letter carefully to learn more about your rights under the settlement.

The Lawsuit

The Department of Justice sued Koch Foods for seeking to recover payments from growers who tried to switch to other poultry processors. In the lawsuit, the Department of Justice alleged that Koch violated the federal antitrust laws and the Packers and Stockyards Act by requiring growers who tried to switch to another processor to pay back a portion of their new house incentive payments. Koch sued or threatened to sue several growers who did not pay back incentive payments sought by Koch. To resolve the dispute, the Department of Justice entered into a court-approved settlement with Koch. You can find the Department of Justice's complaint and the Court's Order approving the settlement here: [link to the Complaint and Final Judgment]. The Court's Order requires Koch to distribute this notice to former Koch growers like yourself.

Koch Must Reimburse Out-of-Pocket Expenses

Although you are no longer a Koch grower, you are receiving this letter because your contract with Koch likely had a provision similar to the following:

If [Independent Poultry Grower] elects to terminate the [Live Poultry Agreement] during the . . . [time period applicable to this New House Incentive Agreement/New House Payment Period], then [Independent Poultry Grower] shall refund Company, within ninety (90) days of its notice of termination to Company, [any/all] payments made by Company [during the previous 12 months] under this . . . . New House [Incentive/Payment] Agreement . . . .

You may be entitled to reimbursement by Koch if you paid any out-of-pocket costs as a result of Koch trying to require you to pay a termination payment when switching to another processor or for threatening to require you to pay a termination payment if you switched to another processor. These reimbursable expenses include (1) any new house incentive payments that you paid back to Koch when you switched to another processor or (2) attorneys' fees or court costs that you paid as a result of Koch suing or threatening to sue you for switching without paying the termination payment. If you did not pay any out-of-pocket expenses as a result of Koch trying to require you to pay a termination payment when you switched processors or if another poultry processor reimbursed you for those expenses, you cannot make a claim and should not return the attached Request for Payment form.

The Court's Order does not apply to repayment of any loans Koch provided to growers as long as the loan had an original term of five years or less (no extensions), was forgiven in equal amounts during that original term, and met certain other conditions specified in the Court's Order.

How To Submit a Request for Payment

To qualify for reimbursement, you must submit a request for payment to Koch that (i) lists the relevant payments you have made (termination payments or recoverable legal costs), (ii) attaches documentation such as invoices that demonstrate you made the payments, (iii) confirms that the payments were not made or reimbursed by or on behalf of another poultry company, and (iv) swears that your claim is accurate under the penalty of perjury. A suggested Request for Payment form you can use is attached to this notice. You must submit your request for payment and attached documentation to Koch by email at [Koch email address] or by U.S. mail at [mailing address] no later than [60 days from date of notice].

What happens after a claim is submitted?

If Koch does not dispute your request, it will pay your request on or before [stated date that is 120 days after the date of entry of the Final Judgment]. If Koch disputes your request, Koch must notify you within 14 days of receiving your request, explain the basis for the dispute, and submit the dispute to the Department of Justice. The Department of Justice will select an independent referee to resolve the dispute and will contact you, giving you the opportunity to participate in or opt out of the referee proceeding if you prefer. You will not be charged any fee related to this dispute—Koch will bear all fees and costs of the referee.

Additional Information About the Order

Besides obligating Koch to repay certain expenses as described above, the Court's Order prohibits Koch from penalizing growers for trying to switch processors.

* * * * *

The Court's Order itself, rather than the brief description provided in this letter, controls your rights and Koch's obligations. If you have any questions about the Court's Order or how it affects you, please contact me or the Civil Conduct Task Force, U.S. Department of Justice, Antitrust Division, at *ATRJudgmentCompliance@usdoj.gov*.

Sincerely,
[Sender name, Koch Foods, Inc.]

Request for Payment

Return this form to Koch Foods Inc. by email at [email address] or U.S. mail at [mailing address] NO LATER THAN [stated date that is 60 days from date of notice].

SUBMIT THIS FORM ONLY IF YOU INTEND TO FILE A CLAIM FOR PAYMENT

Pursuant to the Final Judgment dated [date of entry of Final Judgment] in the matter of *United States* v. *Koch Foods, Inc.* (N.D. Ill.), I am entitled to payment by Koch Foods, Inc. for the following amounts:

$____________ for a Termination Payment

(Please attach invoices or other documents that demonstrate that you incurred the requested payment amount; if you incurred no Termination Payment, leave blank or enter ''zero''.)

$____________ for Recoverable Legal Costs

(Please attach invoices or other documents that demonstrate that you incurred the requested payment amount; if you incurred no Recoverable Legal Costs, leave blank or enter ''zero''.)

(PLEASE READ AND CHECK BOX BELOW)

☐ I confirm that I have incurred or paid all requested amounts as reflected on the attached invoices or other documents and that none of the requested amounts was paid or reimbursed by or on behalf of a Poultry Processor.

I, ____________, under penalty of perjury, do hereby certify that the foregoing information is true and correct.

____
Signature

____
Email address (required)

____
Date

United States District Court for the Northern District of Illinois Eastern Division

United States of America, 450 Fifth Street NW, Washington, DC 20530, Plaintiff, v. *Koch Foods Incorporated, 1300 W Higgins Road, Suite 100, Park Ridge, IL 60068, Defendant.*

Case No. 1:23–cv–15813

Judge John F. Kness

Competitive Impact Statement

In accordance with the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) (the ''Tunney Act''), the United States of America files this Competitive Impact Statement related to the proposed Final Judgment as to Defendant Koch Foods Incorporated (''Koch'' or ''Defendant'').

I. Nature and Purpose of the Proceeding

On November 9, 2023, the United States filed a civil complaint against Koch. Koch contracts with independent chicken farmers, generally known as ''growers,'' [3] to breed and care for Koch's chickens until they are ready for slaughter and processing. The Complaint alleges that, since 2014, Koch contracts require many of its growers to pay Koch an exit penalty if they terminate their contracts with Koch and switch to another processor.[4] Since at least 2018, Koch has sought to enforce this exit penalty provision through threatened or actual litigation against growers who try to switch. Koch's conduct has deterred growers from leaving Koch and switching to its competitors. The Complaint alleges Koch's exit penalty and efforts to enforce the exit penalties are unlawful practices under section 202(a) of the Packers and Stockyards Act, 7 U.S.C. 192(a), and section 1 of the Sherman Act, 15 U.S.C. 1.

Count One of the Complaint alleges that, by including the exit penalty provision in its contracts and taking steps to enforce it, Koch has violated section 202(a) of the Packers and Stockyards Act, 7 U.S.C. 192(a), which prohibits unfair and deceptive practices by ''live poultry dealers'' such as Koch. Growers are required to accept the exit penalty provision as part of the standard Koch contract and cannot reasonably avoid it. Koch sometimes fails to disclose the exit penalty provision before a grower takes out a loan to build new broiler houses to grow chickens for Koch. The existence and enforcement of the exit penalty provision are practices that unfairly harm growers, and no countervailing benefit exists for these practices.

Count Two of the Complaint alleges that Koch violates section 202(a) of the Packers and Stockyards Act, 7 U.S.C. 192(a), by imposing the exit penalty provision because it unfairly burdens growers' rights under 9 CFR 201.100(h)(2) to terminate their production contracts on 90 days' prior notice to Koch.

Count Three of the Complaint alleges that, by including the exit penalty provision in its production contracts with growers, Koch unreasonably restrains interstate trade and commerce in violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. 1. Koch's illegal conduct reduces competition in the market for the purchase of growers' services, imposes unreasonable costs on growers who might otherwise switch poultry processors, and deprives growers of the benefits of competition for their services. The exit penalty provision has prevented growers from accepting better compensation from Koch competitors.

Along with the Complaint, the United States filed a proposed Final Judgment and a Stipulation and Order (''Stipulation and Order'') to remedy the unfair and anticompetitive effects resulting from the harmful conduct alleged in the Complaint. The Final Judgment is subject to review under the Tunney Act only to the extent that it resolves the Sherman Act claim because the Packers and Stockyards Act is not an ''antitrust law[],'' as defined in 15 U.S.C. 12(a). *See* 15 U.S.C. 16(b) (mandating the Tunney Act's procedures only for ''civil proceeding[s] brought by or on behalf of the United States under the *antitrust laws*'' (emphasis added)).

Under the proposed Final Judgment, which is explained more fully below, Koch must cease all efforts to collect exit penalties, return all exit penalties, repay all affected growers their ''Recoverable Legal Costs'' (as defined in the proposed Final Judgment), notify all former or current Koch growers whose production contract contained an exit penalty that the provision is of no further force or effect, and refrain from including an exit penalty provision in any chicken production contracts for the term of the decree.

While the proposed Final Judgment is pending before the Court, Koch must cease all efforts to collect exit penalties and refrain from including an exit penalty provision in any future chicken production contracts. The terms of the Stipulation and Order require Koch to abide by and comply with the provisions of the proposed Final Judgment until it is entered by the Court or until the time for all appeals of any Court ruling declining entry of the proposed Final Judgment has expired.

The United States and Koch have stipulated that the proposed Final Judgment may be entered after compliance with the Tunney Act. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and punish violations thereof.

II. Description of Events Giving Rise to the Alleged Sherman Act Violation

A. The Defendant and the Growers

Koch is the fifth largest poultry processor in the United States. Like other processors, Koch contracts with growers to raise its broiler chickens for delivery to Koch's processing plants. To operate at a scale sufficient to grow broilers for a major processor like Koch, a poultry farmer typically needs two to four modern broiler houses, with a construction cost of approximately $500,000 per house. The growers thus bear the risks of their investment, including risks of weather damage, such as tornadoes. By outsourcing chicken growing, Koch shifts the substantial cost, capital requirements, and risk to small poultry farmers. Outsourcing chicken growing also allows Koch to avoid the burden and costs associated with employing the growers who care for the chickens.

Koch operates eight poultry processing complexes. Each of Koch's eight complexes has contracts with approximately 100 growers to provide growing services. In total, Koch has more than 800 growers under contract. Most of these growers operate as small, highly leveraged family farms, and bank debt repayment is their largest expense.

The only realistic way for most growers to repay their loans for newly constructed broiler houses is by growing broiler chickens. Once built, broiler houses cannot be relocated, and farmers can raise chickens only for processors that are both nearby and willing to accept new farmers. Growers know that their farm is just one among many, and none is an irreplaceable supplier of growing services for Koch or any other processor.

In deciding whether to approve the grower's loan, a lender will generally evaluate a grower's projected cash flow based on the standard-form Koch contract. The lender expects that Koch will require the farmer to sign the contract without amendment after the chicken houses are built. The lender generally conditions a loan for new-

[3] Most farmers who contract their services to Koch raise ''broilers,'' the chickens that are slaughtered and processed for people to consume. Some farmers raise Koch's breeder hens or pullets (chicks). This Competitive Impact Statement and the Final Judgment use the term ''growers'' to refer to all chicken farmers raising broilers, breeders, or pullets for Koch.

[4] Although the termination provisions by their terms applied to all qualifying growers who terminated their contract with Koch, as a matter of practice, Koch enforced the provision only against growers who intended to switch to another processor.

house construction on a farmer's willingness to execute the Koch standard contract ''as is'' once the new broiler houses are ready to receive their first flocks. Most loans for broiler houses span 10 or 15 years, while some are longer. As a practical matter, Koch offers contracts to growers on a ''take-it-or-leave-it'' basis, and a prospective grower typically has no opportunity to negotiate the compensation terms of a Koch contract.

Koch wields enormous leverage over the farmers who grow its broiler chickens. These indebted growers generally need at least six flocks each year to stay current on their broiler-house loans, yet Koch decides the number of flocks to allot to each farmer. If Koch elected not to renew a grower's contract, or merely reduced the number of flocks placed per year, many growers would be unable to make their loan repayments. Koch also controls other factors that can significantly affect the compensation of growers, such as the number and quality of chicks provided, the type of feed, the timing of when flocks are collected, the use of antibiotics, and various payment adjustments.

B. The Anticompetitive Effects of the Koch Exit Penalty Provision

Count Three of the Complaint, which charges the Sherman Act violation, alleges that the Koch exit penalty and Koch's efforts to enforce it through threatened or filed litigation against growers result in anticompetitive effects in the market for the purchase of farmers' growing services.

Processors typically own the chicks they place with growers under production contracts, and pay for the chickens' transportation, feed, veterinary care, and collection. The cost and risk of transporting feed and chickens limit the area in which processors can contract with growers. The geographic radius within which a processor can economically contract with farmers for chicken growing services constitutes its ''draw area.''

Although there may be some processor-specific requirements, top-quality chicken housing that satisfies one processor's requirements can be acceptable to other processors in the area. Growers with top-quality housing may be able to improve their compensation by switching from Koch to another processor, depending on the competitive conditions in the relevant market. Another processor competes with a Koch complex for chicken growing services if the draw area of one or more of its complexes overlaps significantly with the draw area of that Koch complex.

For each Koch complex that competes with one or more rival processors, the relevant geographic market is an area around the Koch complex and its set of competing processors. Koch contracts with a significant share of the growers working for processors within the geographic market of each Koch complex.

Nearly all growers contracting with Koch are also within the draw area of at least one competitor's complex and therefore can benefit from competition for their services. Over 80 percent of growers working for Koch are located within the draw areas of the complexes of at least two of Koch's competitors. More than half of the growers who provide their services to Koch are located within the draw areas of the complexes of three or more of Koch's competitors.

Each Koch complex competes with one or more rival processors to sign up growers within their overlapping draw areas. But the Koch exit penalty provision artificially restrains growers from switching from Koch to a competitor. Because Koch contracts with a significant share of the growers under contract with processors in each complex's geographic market, these switching restraints significantly lessen competition in those markets.

Koch's highly visible efforts to collect its exit penalties have deterred growers who might otherwise avail themselves of competition between Koch and other processors to obtain better compensation for themselves and their families. Koch's exit penalty unreasonably harms competition for growers' services.

III. Explanation of the Proposed Final Judgment

The relief required by the proposed Final Judgment will remedy the loss of competition alleged in Count Three. Under the proposed judgment, Koch must eliminate the exit penalty provision from Koch's current contracts and omit it from future contracts. Further, Koch must repay all exit penalties that it has collected and to reimburse all Recoverable Legal Costs that growers have incurred as a result of Koch's threatened or filed litigation. The proposed judgment requires Koch to refrain from collecting any exit penalty, taking any steps to collect any exit penalty, or including an exit penalty in its chicken production contracts. It also prohibits Koch from engaging in any retaliation, intimidation, or harassment of any grower who was involved in any exit penalty dispute or who cooperated with the United States Department of Justice or the United States Department of Agriculture in their investigations of Koch's exit penalties.

Sections IV and V of the proposed Final Judgment require Koch to:

a. Inform all growers with contracts that contain an exit penalty provision that the provision is unenforceable.

b. Repay exit penalties collected from growers.

c. Notify all growers whose production agreements contain or contained an exit penalty provision that they may make a claim for repayment of any exit penalties not already repaid by Koch and for reimbursement of any Recoverable Legal Costs by submitting to Koch a request for payment. The form of notices to current and former growers are attached to the proposed Final Judgment as Appendix 1 and Appendix 2, respectively.

d. Repay all growers' undisputed requests for payment within 120 days of entry of the proposed Final Judgment.

e. Commence a dispute resolution process set forth in the proposed Final Judgment within 14 days of receipt of any request for payment that Koch disputes. Under this process, the Antitrust Division will select a referee, whose decision will be final, binding on Koch and the grower or former grower, and enforceable by the Antitrust Division or the grower through this Court's contempt power under the proposed Final Judgment.

f. Refrain from accepting the payment of any exit penalty, taking any steps to collect any exit penalty, or including an exit penalty provision in any production agreement with a grower.

g. Refrain from engaging in any retaliation, intimidation, or harassment of any grower who was involved in any exit penalty dispute or who cooperated with the United States Department of Justice or the United States Department of Agriculture in their investigations related to the subject matter of this action.

h. Meet certain reporting obligations to the United States Department of Justice and the United States Department of Agriculture, including an annual certification that Koch is in compliance with the proposed Final Judgment.

For any loans Koch makes to growers, the acceleration of such a loan upon the termination of a grower's production agreement constitutes a prohibited exit penalty under the proposed Final Judgment unless the loan terms conform to specific criteria set forth in the definition of ''Loan Agreement'' (Paragraph II.G). In particular, a loan

agreement permitted under the proposed Final Judgment must:

- Have an original term of five years or less and not have been extended prior to acceleration of the loan by a Termination;
- Provide that the loan will be forgiven or repaid pro rata annually or more frequently during the original term, with only the outstanding balance of the original loan accelerated and payable upon termination;
- Not impose additional charges for prepayment or termination, such as a prepayment penalty;
- Not provide for the payment of interest on the loan;
- Be for the purpose of facilitating the construction or improvement of one or more poultry houses and/or ancillary facilities, including the purchase of related real estate and/or the purchase and installation of related equipment, and where the value of the poultry houses and/or ancillary facilities, including any related real estate and/or related equipment, is projected, at the time of the agreement, to meet or exceed the amount of any payment due as a result of the grower initiating a termination of a production agreement with Koch; and
- Not violate the antitrust laws or the Packers and Stockyards Act.

The proposed Final Judgment also contains provisions designed to promote compliance with and make enforcement of the proposed Final Judgment as effective as possible. In order to determine and secure compliance with the proposed Final Judgment and related orders such as the Stipulation and Order, and to determine whether the proposed Final Judgment should be modified or vacated, Paragraph VI.A of the proposed Final Judgment provides that, upon written request and with reasonable notice, from time to time and subject to legally recognized privileges, Koch must permit authorized representatives or agents of the Packers and Stockyards Division of the USDA (the ''PSD'') or the Antitrust Division of the United States Department of Justice:

1. to have access during Koch's office hours to inspect and copy, or at the option of the requesting agency, to require Koch to provide electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Koch relating to compliance with any requirements of the proposed Final Judgment; and
2. to interview, either informally or on the record, Koch's officers, employees, or agents relating to compliance with any requirements of the proposed Final Judgment. Each interviewee may, at their option and without coercion, have any counsel of their choosing present. The interviews must be subject to the reasonable convenience of the interviewee and without restraint or interference by Koch.

Paragraph VI.B of the proposed Final Judgment provides that upon the written request of an authorized representative of the PSD or the Antitrust Division, Koch must submit written reports or respond to written interrogatories, under oath if requested, relating to any matters contained in the proposed Final Judgment.

Paragraph IX.A provides that the United States retains and reserves all rights to enforce the provisions of the proposed Final Judgment, including the right to seek an order of contempt from the Court. Koch agrees that in a civil contempt action, a motion to show cause, or a similar action brought by the United States relating to an alleged violation of the proposed Final Judgment, the United States may establish a violation of the proposed Final Judgment and the appropriateness of a remedy by a preponderance of the evidence, and Koch waives any argument that a different standard of proof should apply.

As a further reservation of rights, Section XI of the proposed Final Judgment provides that the proposed Final Judgment terminates only the claims expressly stated in the Complaint against Koch and does not in any way affect any other charges or claims that may be filed by the United States. For the avoidance of doubt, Section XI further provides that the Antitrust Division and the PSD retain all rights to investigate and prosecute, including under the antitrust laws or the Packers and Stockyards Act, any conduct, practice or device that: (1) does not arise from an exit penalty or exit penalty provision, or (2) is an aspect of any ranked performance pay compensation (sometimes described as ''tournament'') system.

Paragraph IX.B of the proposed Final Judgment provides that the proposed Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws, to restore the competition the United States alleges was harmed by the challenged conduct, and to end an unfair practice or device in the market for the purchase of growers' services caused by Koch's inclusion of exit penalty provisions in its production agreements. Defendant agrees that it may be held in contempt of, and that the Court may enforce, any provision of the proposed Final Judgment that, as interpreted by the Court in light of these procompetitive and fairness principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of the proposed Final Judgment should not be construed against either party as the drafter.

Paragraph IX.C provides that, in an enforcement proceeding in which the Court finds that Koch has violated the proposed Final Judgment, the United States may apply to the Court for an extension of the proposed Final Judgment, together with other relief that may be appropriate. In connection with a successful effort by the United States to enforce the proposed Final Judgment against Koch, whether litigated or resolved before litigation, Koch agrees to reimburse the United States for the fees and expenses of its attorneys, as well as all other costs including experts' fees, incurred in connection with that effort to investigate the potential violation and enforce the proposed Final Judgment.

Paragraph IX.D provides that, for a period of four years following the expiration of the proposed Final Judgment, if the United States has evidence that Koch violated the proposed Final Judgment before it expired, the United States may file an action against Koch in this Court requesting that the Court order: (1) Defendant to comply with the terms of the proposed Final Judgment for an additional term of at least four years following the filing of the enforcement action; (2) all appropriate contempt remedies; (3) additional relief needed to ensure Koch complies with the terms of the proposed Final Judgment; and (4) fees or expenses as called for by Section IX of the proposed Final Judgment.

Finally, Section X of the proposed Final Judgment provides that, unless this Court grants an extension, the proposed Final Judgment will expire seven years from the date of its entry, except that after three years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Koch that continuation of the Final Judgment is no longer necessary or in the public interest.

IV. Remedies Available to Potential Private Plaintiffs

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment neither impairs nor

assists the bringing of any private antitrust damage action. Under the provisions of section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Koch.

Section 308 of the Packers and Stockyards Act, 7 U.S.C. 209, provides that any person subject to the Act who violates any provisions of the Act (or of any order of the Secretary of Agriculture relating to the Act) related to the purchase or handling of poultry or any poultry growing arrangement (among other violations) may be liable to persons injured as a result of those violations for the full amount of damages sustained as a consequence, and such injured persons may bring suit in federal court or may complain to the Secretary of Agriculture.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and Koch have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the Tunney Act, provided that the United States has not withdrawn its consent. The Tunney Act conditions entry of the Final Judgment's resolution of the Sherman Act claim upon the Court's determination that the proposed Final Judgment with respect to the Sherman Act claim is in the public interest.

The Tunney Act provides a period of at least 60 days preceding the effective date of a proposed final judgment that resolves a Sherman Act claim during which time any person may submit to the United States written comments regarding the proposed final judgment. Any person who wishes to comment on the proposed final judgment should do so within 60 days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or within 60 days of the first date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, the comments and the United States' responses will be published in the **Federal Register** unless the Court agrees that the United States instead may publish them on the United States Department of Justice, Antitrust Division's internet website.

Written comments should be submitted in English to: Daniel S. Guarnera, Chief, Civil Conduct Task Force, Antitrust Division, United States Department of Justice, 450 Fifth St. NW, Suite 8600, Washington, DC 20530, *ATRJudgmentCompliance@usdoj.gov.*

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Koch. The United States could have commenced contested litigation and brought the case to trial, seeking relief including a declaration that the exit penalty provisions in the growers' production agreements with Koch were neither enforceable nor effective, an injunction requiring Koch to give appropriate notices to current and former growers, and monetary relief to repay growers from whom Koch has collected exit penalties and to reimburse growers for Recoverable Legal Costs as a consequence of Koch's collection efforts. The United States is satisfied, however, that the relief required by the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition in the market for the purchase of poultry growing services. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation against Koch but avoids the time, expense, and uncertainty of a full trial on the merits.

VII. Standard of Review Under the Tunney Act for the Proposed Final Judgment

Under the Clayton Act and Tunney Act, proposed final judgments, or ''consent decrees,'' that resolve antitrust claims brought by the United States are subject to a 60-day comment period, after which the Court must determine whether entry of a proposed final judgment with respect to those antitrust claims ''is in the public interest.'' 15 U.S.C. 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States* v. *U.S. Airways Grp., Inc.,* 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the ''court's inquiry is limited'' in Tunney Act settlements); *United States* v. *InBev N.V./S.A.,* No. 08–1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a proposed Final Judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable'').

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the Tunney Act, a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's Complaint, whether a proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by a proposed Final Judgment, a court may not ''make de novo determination of facts and issues.'' *United States* v. *W. Elec. Co.,* 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Instead, ''[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General.'' *W. Elec. Co.,* 993

F.2d at 1577 (quotation marks omitted). ''The court should also bear in mind the flexibility of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is the one that will best serve society, but only to confirm that the resulting settlement is within the reaches of the public interest.'' *Microsoft,* 56 F.3d at 1460 (quotation marks omitted); *see also United States* v. *Deutsche Telekom AG,* No. 19–2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would ''have enormous practical consequences for the government's ability to negotiate future settlements,'' contrary to congressional intent. *Microsoft,* 56 F.3d at 1456. ''The Tunney Act was not intended to create a disincentive to the use of the consent decree.'' *Id.*

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g., Microsoft,* 56 F.3d at 1461 (recognizing courts should give ''due respect to the Justice Department's . . . view of the nature of its case''); *United States* v. *Iron Mountain, Inc.,* 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) (''In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' (internal citations omitted)); *United States* v. *Republic Servs., Inc.,* 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting ''the deferential review to which the government's proposed remedy is accorded''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (''A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case.''). The ultimate question is whether ''the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.' '' *Microsoft,* 56 F.3d at 1461 (quoting *W. Elec. Co.,* 900 F.2d at 309).

Moreover, the Court's role under the Tunney Act is limited to reviewing the remedy in relationship to the antitrust violations that the United States has alleged in its Complaint, and the Tunney Act does not authorize the Court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *see also U.S. Airways,* 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged.''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60.

In its 2004 amendments to the Tunney Act, Congress made clear its intent to preserve the practical benefits of using judgments proposed by the United States in antitrust enforcement, Public Law 108–237 § 221, and added the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2); *see also U.S. Airways,* 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). ''A court can make its public interest determination based on the competitive impact statement and response to public comments alone.'' *U.S. Airways,* 38 F. Supp. 3d at 76 (*citing Enova Corp.,* 107 F. Supp. 2d at 17).

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the Tunney Act that were considered by the United States in formulating the proposed Final Judgment.

Dated: November 17, 2023.

Respectfully submitted,

For Plaintiff, United States of America

Jack G. Lerner,

U.S. Department of Justice Antitrust Division, Civil Conduct Task Force, 450 Fifth Street NW, Suite 8600, Washington, DC 20530, Tel: 202–227–9295, Fax: 202–616–2441, Email: jack.lerner@usdoj.gov.

[FR Doc. 2023–26794 Filed 12–6–23; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Modification To Consent Decree Under the Clean Water Act

On December 3, 2023, the Department of Justice lodged with the United States District Court for the Eastern District of Tennessee in the lawsuit entitled *United States and the State of Tennessee* v. *The City of Chattanooga,* Civil Action No. 1:12–cv–00245, a proposed modification to the existing Consent Decree.

The United States, on behalf of the U.S. Environmental Protection Agency (''EPA''), and the State of Tennessee filed this lawsuit on July 17, 2012, under the Clean Water Act and Tennessee State law alleging violations with respect to the City of Chattanooga's publicly owned treatment works. A Consent Decree resolving these claims was entered by the Court on April 24, 2014. The proposed modification to the Consent Decree extends certain deadlines to achieve compliance with the Consent Decree while adding significant remedial projects that the city must complete in the next five years. The cost of the additional required projects is estimated to be $185 million.

The publication of this notice opens a period for public comment on the proposed modification to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States and the State of Tennessee* v. *The City of Chattanooga,* D.J. Ref. No. 90–5–1–1–10145. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department website: *https://*

www.justice.gov/enrd/consent-decrees. We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $40.25 (25 cents per page reproduction cost), payable to the United States Treasury.

Lori Jonas,

Assistant Section Chief, Environmental Enforcement Section, Environment & Natural Resources Division.

[FR Doc. 2023–26889 Filed 12–6–23; 8:45 am]

BILLING CODE 4410–15–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2024–006]

Advisory Committee on the Records of Congress; Meeting

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: We are announcing an upcoming meeting of the Advisory Committee on the Records of Congress in accordance with the Federal Advisory Committee Act. The committee advises NARA on the full range of programs, policies, and plans for the Center for Legislative Archives in the Office of Legislative Archives, Presidential Libraries, and Museum Services (LPM).

DATES: The meeting will be on December 11, 2023, from 10:15 a.m. to 12 p.m. EST.

FOR FURTHER INFORMATION CONTACT: James Wyatt, National Archives, Center for Legislative Archives, by email at *James.Wyatt@nara.gov* or by phone at 202–357–5016.

SUPPLEMENTARY INFORMATION: This virtual meeting is open to the public in accordance with the Federal Advisory Committee Act (5 U.S.C. app 2) and implementing regulations.

Meeting Information

Meeting link: https://senate.webex.com/senate/j.php?MTID=m38e2fe7a06180f990a755cfa41ede3c3.

Meeting number: 2762 958 2435.

Meeting password: SrM6Gavpw87.

Join from a video or application: Dial *27629582435@senate.webex.com.*

You can also dial 207.182.190.20 and enter your meeting number.

Join by phone: +1 202–228–0808 US Senate Webex, +1 855–428–0808 US Senate Webex (Toll Free).

Access code: 27629582435.

Global call-in numbers: https://senate.webex.com/senate/globalcallin.php?MTID=mcf8e47615656e2926077acf6cd6ff1d5.

Agenda

1. Opening Remarks—Ann Berry, Secretary of the Senate
2. Recognition of Co-Chair—Kevin McCumber, Acting Clerk of the House
3. Recognition of the Archivist of the United States—Colleen Shogan
4. Approval of the Minutes of the Last Meeting
5. Senate Archivist's Report—Karen Paul
6. House Archivist's Report—Heather Bourk
7. Center for Legislative Archives Report—Richard Hunt
8. Advisory Committee on the Records of Congress Seventh Report—Karen Paul
9. New Business
10. Adjournment

Tasha Ford,

Committee Management Officer.

[FR Doc. 2023–26849 Filed 12–6–23; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL CREDIT UNION ADMINISTRATION

Revisions of Agency Information Collection of a Previously Approved Collection; Request for Comments

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice of submission to the Office of Management and Budget.

SUMMARY: As required by the Paperwork Reduction Act of 1995, the National Credit Union Administration (NCUA) is submitting the following extensions and revisions of currently approved collections to the Office of Management and Budget (OMB) for renewal.

DATES: Written comments should be received on or before January 8, 2024 to be assured consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Copies of the submission may be obtained by contacting Mahala Vixamar at (703) 718–1155, emailing *PRAComments@ncua.gov,* or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

OMB Number: 3133–0004.

Title: NCUA Call Report.

Type of Review: Revision of a currently approved collection.

Abstract: Sections 106 and 202 of the Federal Credit Union Act require federally insured credit unions (FICUs) to make financial reports to the NCUA. Section 741.6 of the NCUA Rules and Regulations requires all FICUs to submit a Call Report quarterly. Financial information collected through the Call Report is essential to NCUA supervision of Federal credit unions. This information also facilitates NCUA monitoring of other credit unions with share accounts insured by the National Credit Union Share Insurance Fund (NCUSIF).

Affected Public: Private Sector: Not-for-profit institutions.

Estimated Number of Respondents: 4,686.

Estimated Number of Responses per Respondent: 4.

Estimated Total Annual Responses: 18,744.

Estimated Hours per Response: 4.

Estimated Total Annual Burden Hours: 74,976.

Reason for Change: Burden decreased due to the number of respondents decreasing.

OMB Number: 3133–0040.

Title: Federal Credit Union Occupancy, Planning, and Disposal of Acquired and Abandoned Premises—12 CFR 701.36.

Type of Review: Revision of a currently approved collection.

Abstract: Section 107(4) of the Federal Credit Union Act authorizes a Federal credit union (FCU) to purchase, hold, and dispose of property necessary or incidental to its operations. Section 701.36 of NCUA Rules and Regulations interprets and implements this provision of the FCU Act by establishing occupancy, planning, and disposal requirements for acquired and abandoned premises. It also prohibits certain transactions. In addition, this section includes provisions in which an FCU may seek a waiver from certain requirements of the rule. NCUA reviews written waiver requests and makes a determination on the request based on safety and soundness considerations.

Affected Public: Private Sector: Not-for-profit institutions.

Estimated Number of Respondents: 18.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Responses: 18.

Estimated Hours per Response: 10.

Estimated Total Annual Burden Hours: 180.

Reason for Change: Burden increased due to the number of respondents increasing.

OMB Number: 3133–0127.

Title: Purchase, Sale, and Pledge of Eligible Obligations—12 CFR 701.23.

Type of Review: Revision of a currently approved collection.

Abstract: Section 701.23 authorizes Federal Credit Unions to sell and pledge loans and purchase eligible obligations from other institutions.

Affected Public: Private Sector: Not-for-profit institutions.

Estimated Number of Respondents: 343.

Estimated Number of Responses per Respondent: 79.154.

Estimated Total Annual Responses: 27,150.

Estimated Hours per Response: 0.40214.

Estimated Total Annual Burden Hours: 10,918.

Reason for Change: Burden decreased due to the number of respondents decreasing.

OMB Number: 3133–0141.

Title: Organization and Operations of Federal Credit Unions—Loan Participation, 12 CFR 701.22.

Type of Review: Revision of a currently approved collection.

Abstract: The NCUA Rules and Regulations, sections 701.22 and 741.225, outline the requirements for a loan participation program. FICUs are required to execute a written loan participation agreement with the lead lender. Additionally, the rule requires all FICUs to maintain a loan participation policy that establishes underwriting standards and maximum concentration limits. Credit unions may apply for waivers on certain key provisions of the rule.

Affected Public: Private Sector: Not-for-profit institutions.

Estimated Number of Respondents: 1,887.

Estimated Number of Responses per Respondent: 2.01695.

Estimated Total Annual Responses: 3,806.

Estimated Hours per Response: 0.7949.

Estimated Total Annual Burden Hours: 3,025.

Reason for Change: Burden decreased due to the number of respondents decreasing.

OMB Number: 3133–0189.

Title: Contractor Budget and Representations and Certifications.

Type of Review: Extension of a previously approved collection.

Abstract: Standardized information from prospective outside counsel is essential to the NCUA in carrying out its responsibility as regulator, conservator, and liquidating agent for federally insured credit unions. The information will enable the NCUA to further standardize the data it uses to select outside counsel, consider additional criteria in making its selections, and improve efficiency and recordkeeping related to its selection process.

Affected Public: Private Sector: Not-for-profit institutions.

Estimated Number of Respondents: 50.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Responses: 50.

Estimated Hours per Response: 2.

Estimated Total Annual Burden Hours: 100.

Reason for Change: Burden decreased due to the number of respondents decreasing.

Request For Comments: Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will become a matter of public record. The public is invited to submit comments concerning: (a) whether the collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the 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 the information on the respondents, including the use of automated collection techniques or other forms of information technology.

By the National Credit Union Administration Board.

Melane Conyers-Ausbrooks,

Secretary of the Board.

[FR Doc. 2023–26854 Filed 12–6–23; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL FOUNDATION OF THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

47th Meeting of the National Museum and Library Services Board; Correction

AGENCY: Institute of Museum and Library Services (IMLS), National Foundation of the Arts and the Humanities (NFAH).

ACTION: Notice; correction.

SUMMARY: IMLS published a document in the **Federal Register** of November 9, 2023, concerning notice of the 48th National Museum and Library Services Board meeting on December 13th, 2023. Since then, the agency has finalized the location of the meeting; it will be held at the Phoenix Art Museum.

FOR FURTHER INFORMATION CONTACT: Katherine Maas, Chief of Staff and Alternate Designated Federal Officer, (202) 653–4798; *kmaas@imls.gov.*

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of November 9, 2023, in FR Doc. 2023–24775, on page 77369, in the middle of the middle column, please adjust the **ADDRESSES** to read: The meeting will convene in a hybrid format. Virtual meeting and audio conference technology will be used to connect virtual attendees with in-person attendees. Instructions for joining will be sent to all registrants. In-person attendees will meet at the Phoenix Art Museum. If you wish to join the meeting virtually, please contact IMLS by December 11, 2023.

Dated: December 4, 2023.

Brianna Ingram,

Paralegal Specialist.

[FR Doc. 2023–26908 Filed 12–6–23; 8:45 am]

BILLING CODE 7036–01–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request; Office of Polar Programs Arctic Sciences Section

AGENCY: National Science Foundation.

ACTION: Notice.

SUMMARY: The National Science Foundation (NSF) is announcing plans to establish this collection. In accordance with the requirements of the Paperwork Reduction Act of 1995, we are providing the opportunity for public comment on this action. After obtaining and considering public comment, NSF

will prepare the submission requesting Office of Management and Budget (OMB) clearance of this collection for no longer than 3 years.

DATES: Written comments on this notice must be received by February 5, 2024 to be assured consideration. Comments received after that date will be considered to the extent practicable. Send comments to the address below.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Suite E7400, Alexandria, Virginia 22314; telephone (703) 292–7556; or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including Federal holidays).

SUPPLEMENTARY INFORMATION:

Title of Collection: IARPC Principles for Conducting Research in the Arctic Evaluation Survey.

OMB Control No.: 3145–New.

Expiration Date of Approval: Not applicable.

Abstract: The Interagency Arctic Research Policy Committee (IARPC) was established by the Arctic Research and Policy Act of 1984 (ARPA) to facilitate coordination and cooperation in Arctic research. Now a subcommittee of the National Science and Technology Council (NSTC), IARPC plays a critical role in enhancing scientific monitoring and advancing Arctic research through the coordination of Federal agencies as well as domestic and international collaborators. In 2018, IARPC released the revised Principles for Conducting Research in the Arctic OPP Principles for the Conduct of Research in the Arctic|NSF—National Science Foundation (*https://www.nsf.gov/geo/opp/arctic/conduct.jsp*) to guide research activities throughout the Arctic. In 2023, the IARPC's Participatory Research and Indigenous Leadership in Research Collaboration Team (one of five foundational activities in the Arctic Research Plan—IARPC Collaborations) (*https://www.iarpccollaborations.org/plan/index.html*) reframed these principles as SHARE:

- Sustain and build relationships
- Humble accountability
- Advance responsible environmental stewardship
- Effective communication

These Principles are directed at academic and federal researchers funded by IARPC agencies but are equally relevant to other individuals and organizations pursuing or funding research in the Arctic. They are guidelines for conducting responsible and ethical research and they encourage respect for all individuals, cultures, and the environment. The Principles are not intended to supplant existing regulations and guidelines; researchers should follow federal, state, and local regulations, policies and guidelines. Research involving human subjects must adhere to specific requirements. Projects on Indigenous homelands or involving Indigenous Peoples should be coordinated with Indigenous leadership and should follow all applicable regulations and local research guidelines.

The rapid changes occurring in the Arctic are complex, dynamic, and interconnected. Climate change and other environmental changes are profoundly impacting Arctic communities and have global consequences. As a result, emerging research questions are multidisciplinary and are best addressed by multiple Federal agencies working closely with non-Federal partners. Through a targeted approach to cross-cutting priority areas, the Interagency Arctic Research Policy Committee's (IARPC) Arctic Research Plan 2022–2026 addresses the most pressing Arctic research needs that require a collaborative approach and can advance understanding of the Arctic and climate change, inform policy and planning decisions, and promote the well-being of Arctic and global communities. The plan's priority areas respond to challenges identified by Arctic communities, Federal agencies with a presence in Alaska or a responsibility to understand the Arctic region, Federal agencies with Arctic investments, the state of Alaska, Tribal and Indigenous organizations, and other non-Federal entities.

Every five years, IARPC is required by law (ARPA) ''to prepare and execute an Arctic Research Plan in coordination with the U.S. Arctic Research Commission, the Governor of the State of Alaska, residents of the Arctic, the private sector, and public interest groups.'' The Arctic Research Plan 2022–2026 is the third plan since IARPC became a subcommittee of the NSTC and builds from the successes and communities of practice established by previous plans. It seeks to integrate these communities and create cross-cutting foci which require a focused research effort.

The IARPC PILR Collaboration work focuses on three objectives including PILR 1 to fulfill Federal requirement to consult with Federally recognized Tribes and Alaska Native Corporations. The IARPC Principles survey stems from PILR Deliverable 1.2 to Evaluate the Principles for Conducting Research in the Arctic 2018, and update as needed based on the evaluation. This survey will enable an evaluation of understanding and implementation of the SHARE Principles among three primary groups, Arctic Indigenous and local community members and leadership, the scientific research community, and federal agency personnel.

Respondents: Arctic Indigenous and local community members and leadership (100); scientific research community (100), and federal agency personnel (100).

Estimated Number of Annual Respondents: 300.

Burden on the Public: Estimated 20 minutes to fill out the form. The estimated burden time is 102 hours.

Dated: December 4, 2023.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2023–26888 Filed 12–6–23; 8:45 am]

BILLING CODE 7555–01–P

NEIGHBORHOOD REINVESTMENT CORPORATION

Sunshine Act Meetings

TIME AND DATE: 2:00 p.m., Monday, December 18, 2023.

PLACE: 1255 Union Street NE, Suite 500, Washington, DC 20002.

STATUS: Parts of this meeting will be open to the public. The rest of the meeting will be closed to the public.

MATTERS TO BE CONSIDERED:

Regular Board of Directors Meeting

The Interim General Counsel of the Corporation has certified that in her opinion, one or more of the exemptions set forth in the Government in the Sunshine Act, 5 U.S.C. 552b(c)(2) and (4) permit closure of the following portion(s) of this meeting:

- Executive (Closed) Session

Agenda

I. Call to Order
II. Sunshine Act Approval of Executive (Closed) Session
III. Executive Session: Report From CEO
IV. Executive Session: Report From CFO
V. Executive Session: GAO Workplan Update
VI. Executive Session: Report From Interim General Counsel
VII. Executive Session: Report From CIO
VIII. Executive Session: NeighborWorks Compass Update
IX. Action Item: Approval of Meeting

Minutes—October 2 Audit Committee Meeting and October 19 Regular Board of Directors Meeting
X. Action Item: Delegation of Authority—Venue Contracts—Philadelphia (February 2025) and New Orleans (August 2025)
XI. Discussion Item: November 29 Audit Committee Meeting
XII. Discussion Item: Delegation of Authority—Future Venue Contracts
XIII. Discussion Item: Strategic Planning Process
XIV. 2024 Board Meeting Schedule
XV. Management Program Background and Updates Other Reports
a. 2024 Board Calendar
b. 2024 Board Agenda Planner
c. CFO Report
i. Financials (through 9/30/23)
ii. Single Invoice Approvals $100K and over
iii. Vendor Payments $350K and over
iv. Exceptions
d. Programs Dashboard
e. Housing Stability Counseling Program (HSCP)
f. Strategic Plan Scorecard—FY23 Q3

PORTIONS OPEN TO THE PUBLIC: Everything except the Executive (Closed) Session.

PORTIONS CLOSED TO THE PUBLIC: Executive (Closed) Session.

CONTACT PERSON FOR MORE INFORMATION: Jenna Sylvester, Paralegal, (202) 568–2560; *jsylvester@nw.org.*

Jenna Sylvester,

Paralegal.

[FR Doc. 2023–27028 Filed 12–5–23; 4:15 pm]

BILLING CODE P

NUCLEAR REGULATORY COMMISSION

[Docket No. 30–30429; NRC–2023–0202]

ProTechnics, a Division of Core Laboratories LP; Discharge of Radioactive Tracers in Well Completion Fluids

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment and finding of no significant impact; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing a finding of no significant impact (FONSI) and accompanying environmental assessment (EA) for a license amendment request from ProTechnics, a division of Core Laboratories LP (ProTechnics), byproduct material license no. 42–26928–01, to authorize discharge of well completion fluids containing very small amounts of short-lived radioactive tracers in offshore waters in the U.S. Outer Continental Shelf (OCS) of the Gulf of Mexico (GOM). Based on the analysis in the EA, the NRC staff has concluded that there would be no significant impacts on the quality of the human environment from ProTechnics' proposed license amendment request, and therefore, a FONSI is appropriate.

DATES: The EA and FONSI referenced in this document are available on December 7, 2023.

ADDRESSES: Please refer to Docket ID NRC–2023–0202 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

• *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0202. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.

• *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jean Trefethen, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–0867; email: *Jean.Trefethen@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is considering a license application request from ProTechnics to authorize discharge of well completion fluids containing very small amounts of short-lived radioactive tracers in offshore waters in the OCS of the GOM. In its license amendment request, ProTechnics stated that, in connection with well logging in the GOM, it performs single well subsurface tracer studies in established oil and gas production basins located in OCS waters. In general, all of the material that enters the formation would be retained behind a screen mesh. Only the material remaining on the well bore side of the screen mesh would be returned to the surface (ADAMS Accession Nos. ML22325A156 and ML23009B762). As required by section 51.21 of title 10 of the *Code of Federal Regulations* (10 CFR), and in light of ProTechnics' license amendment request, the NRC staff prepared an EA that documents its independent evaluation of the potential environmental impacts of the disposal of short-lived radioactive tracers in the offshore waters. Based on the analysis in the EA, the NRC staff has concluded that there would be no significant impacts on the quality of the human environment from ProTechnics' proposed disposal methods, and therefore, the NRC is issuing a FONSI.

II. Summary of Environmental Assessment

Description of the Proposed Action

ProTechnics is seeking a license amendment to authorize discharge of well completion fluids containing very small amounts of short-lived radioactive tracers in offshore waters in the OCS of the GOM.

Environmental Impacts of the Proposed Action

The NRC staff has assessed the potential environmental impacts from ProTechnics' disposal of short-lived radioactive tracers in the offshore waters of the GOM. The NRC staff expect the radioactive tracer beads to remain chemically inert in the GOM seawater, due to the ceramic coating on the beads. Thus, the embedded radioactive metal particles would not dissolve or leach out of the beads to combine with the seawater. Data to support this conclusion was provided with ProTechnics' license amendment request. Additionally, the radioisotopes used have a short half-life (70 to 84 days) and therefore, would decay in a short period of time.

Environmental Impacts of the Alternatives to the Proposed Action

An alternative to the proposed action is the no-action alternative. Under the no-action alternative, the NRC would not grant ProTechnics' license

amendment request for disposal of limited concentrations of short-lived radioactive tracers into offshore waters of the OCS in the GOM. In order for ProTechnics to continue supporting oil and gas drilling operations in the OCS of the GOM, it would need a license amendment to authorize retention of the tracer materials on the drilling rigs or support vessels. The retained well completion fluids containing the tracer materials would need to be transported to shore for transfer to an authorized disposal facility. The NRC staff considers that transfer and movement of the well completion fluids containing tracer material would present an increased likelihood of accidents and an increased potential for occupational and public radiological doses in comparison to the proposed action.

Agencies and Person Consulted

The NRC staff consulted with National Oceanic and Atmospheric Administration (NOAA) Fisheries regarding its determination that the proposed action is not likely to adversely affect listed species or habitats. By email dated November 17, 2023, NOAA Fisheries concurred with the NRC staff's determination. Therefore, no further consultation is required under Section 7 of the Endangered Species Act of 1973, as amended. Further, the NRC staff determined that the proposed action is not the type of activity that has the potential to cause effects on historic properties. Therefore, consistent with 36 CFR 800.3(a)(1), no consultation is required under Section 106 of the National Historic Preservation Act.

III. Finding of No Significant Impact

The final EA is available in ADAMS under Accession No. ML23334A173.

Dated: December 4, 2023.

For the Nuclear Regulatory Commission.

Jill S. Caverly,

Acting Chief, Environmental Project Management Branch 2, Division of Rulemaking, Environmental, and Financial Support, Office of Nuclear Material Safety, and Safeguards.

[FR Doc. 2023–26915 Filed 12–6–23; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2021–68; MC2024–86 and CP2024–88; MC2024–87 and CP2024–89; MC2024–88 and CP2024–90; MC2024–89 and CP2024–91]

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:* December 8, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Docketed Proceeding(s)

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).:* CP2021–68; *Filing Title:* USPS Notice of Amendment to Priority Mail Express, Priority Mail, First-Class Package Service & Parcel Select Contract 8, Filed Under Seal; *Filing Acceptance Date:* November 30, 2023; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Arif Hafiz; *Comments Due:* December 8, 2023.

2. *Docket No(s).:* MC2024–86 and CP2024–88; *Filing Title:* USPS Request to Add USPS Ground Advantage Contract 7 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 30, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* December 8, 2023.

3. *Docket No(s).:* MC2024–87 and CP2024–89; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 125 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 30, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Arif Hafiz; *Comments Due:* December 8, 2023.

4. *Docket No(s).:* MC2024–88 and CP2024–90; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 126 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 30, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Arif Hafiz; *Comments Due:* December 8, 2023.

5. *Docket No(s).:* MC2024–89 and CP2024–91; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 127 to Competitive

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[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).

Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 30, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Arif Hafiz; *Comments Due:* December 8, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–26795 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 1, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 27 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–92, CP2024–94.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26834 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 28, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 117 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–77, CP2024–79.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26815 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 22, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 115 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–72, CP2024–74.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26813 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 20, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 111 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–68, CP2024–69.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26829 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 28, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 119 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–79, CP2024–81.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26817 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, USPS Ground Advantage®, and Parcel Select Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 1, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail, USPS Ground Advantage®, and Parcel Select Contract 1 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–93, CP2024–95.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26838 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 28, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 121 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–81, CP2024–83.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26819 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 20, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 109 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–66, CP2024–67.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26827 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 30, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Ground Advantage® Contract 7 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–86, CP2024–88.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26836 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 29, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 123 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–83, CP2024–85.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26821 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 27, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Ground Advantage® Contract 6 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–75, CP2024–77.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26835 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 22, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 114 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–71, CP2024–73.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26812 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 21, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 112 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–69, CP2024–70.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26830 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 1, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Ground Advantage® Contract 8 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–91, CP2024–93.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26837 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 22, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 113 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–70, CP2024–71.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26811 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 30, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 125 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–87, CP2024–89.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26823 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 30, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 127 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–89, CP2024–91.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26825 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 28, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 118 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–78, CP2024–80.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26816 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 20, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 110 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–67, CP2024–68.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26828 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 30, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 126 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–88, CP2024–90.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26824 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 29, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 124 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–85, CP2024–87.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26822 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 22, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 116 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–73, CP2024–75.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26814 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 29, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 26 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–84, CP2024–86.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26833 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 27, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 24 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–74, CP2024–76.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26831 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 28, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 122 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–82, CP2024–84.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26820 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 27, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 25 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–76, CP2024–78.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26832 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 1, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 128 to Competitive Product List.* Documents

are available at *www.prc.gov,* Docket Nos. MC2024–90, CP2024–92.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–26826 Filed 12–6–23; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99062; File No. SR–NYSEARCA–2023–81]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Update Citations to Rule 600(b) of Regulation National Market System

December 1, 2023.

Pursuant to section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on November 20, 2023, NYSE Arca, Inc. (''Exchange'') filed with the Securities and Exchange Commission (''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 update citations to Rule 600(b) of Regulation National Market System (''Regulation NMS'') in Rule 5.3–O (Criteria for Underlying Securities); Rule 5.4–O (Withdrawal of Approval of Underlying Securities); Rule 7.31–E (Orders and Modifiers); Rule 9.5320–E (Prohibition Against Trading Ahead of Customer Orders); and Rule 11.6810 (Consolidated Audit Trail—Definitions). The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to update citations to Rule 600(b) of Regulation NMS in Rule 5.3–O (Criteria for Underlying Securities); Rule 5.4–O (Withdrawal of Approval of Underlying Securities); Rule 7.31–E (Orders and Modifiers); Rule 9.5320–E (Prohibition Against Trading Ahead of Customer Orders); and Rule 11.6810 (Consolidated Audit Trail—Definitions).

In 2021, the Securities and Exchange Commission (the ''Commission'') amended Regulation NMS under the Act in connection with the adoption of the Market Data Infrastructure Rules.[4] As part of that initiative, the Commission adopted new definitions in Rule 600(b) of Regulation NMS and renumbered the remaining definitions, including the definition of Intermarket Sweep Order (formerly Rule 600(b)(30)), Listed Option (formerly Rule 600(b)(35)), and NMS Stock (formerly Rule 600(b)(47)).

The Exchange accordingly proposes to update the relevant citations to Rule 600(b) in its rules as follows.

- The citation to the definition of Intermarket Sweep Order in Rule 7.31–E(e)(3) and Rule 9.5320–E, Commentary .04, would be changed to Rule 600(b)(38).
- The citation to the definition of NMS Stock in Rule 5.3–O, Rule 5.4–O, and Rule 11.6810(qq) would be changed to Rule 600(b)(55).
- The citation to the definition of Listed Option in Rule 11.6810(y) would be changed to Rule 600(b)(43).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b)(5) of the Exchange Act,[5] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that the proposed changes to its rules to correct citations to Rule 600(b) of Regulation NMS would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed change is designed to update an external rule reference. The Exchange believes that member organizations would benefit from the increased clarity, thereby reducing potential confusion and ensuring that persons subject to the Exchange's jurisdiction, regulators, and the investing public can more easily navigate and understand the Exchange's rules. The Exchange further believes that the proposed amendment 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 clarity, thereby reducing potential confusion.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with section 6(b)(8) of the Act,[6] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competitive issues but rather would modify Exchange rules to update citations to Rule 600(b) of Reg NMS. Since the proposal does not substantively modify system functionality or processes on the Exchange, the proposed changes will not impose any burden on competition.

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

Pursuant to section 19(b)(3)(A) of the Act [7] and Rule 19b–4(f)(6) [8] thereunder, the Exchange has designated this proposal as one that effects a change that: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 90610, 86 FR 18596 (April 9, 2021) (S7–03–20).

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78f(b)(8).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

(iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.[9]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii) [10] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The proposed change raises no novel legal or regulatory issues and modifies the Exchange's rules to correct citations to Rule 600(b) of Regulation NMS, which should help prevent confusion and result in increased clarity within the Exchange's rules. Therefore, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change operative upon filing.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–NYSEARCA–2023–81 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–NYSEARCA–2023–81. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–NYSEARCA–2023–81 and should be submitted on or before December 28, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–26799 Filed 12–6–23; 8:45 am]

BILLING CODE 8011–01–P

[9] In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change 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.

[10] 17 CFR 240.19b–4(f)(6)(iii).

[11] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12), (59).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99065; File No. 4–818]

Program for Allocation of Regulatory Responsibilities Pursuant to Rule 17d–2; Notice of Filing of Proposed Plan for the Allocation of Regulatory Responsibilities Between the Financial Industry Regulatory Authority, Inc. and Nasdaq PHLX LLC

December 1, 2023.

Pursuant to section 17(d) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 17d–2 thereunder,[2] notice is hereby given that on November 17, 2023, the Financial Industry Regulatory Authority, Inc. ("FINRA") and Nasdaq PHLX LLC ("PHLX") (together with FINRA, the "Parties") filed with the Securities and Exchange Commission ("Commission" or "SEC") a plan for the allocation of regulatory responsibilities, dated November 15, 2023 ("17d–2 Plan" or the "Plan"). The Commission is publishing this notice to solicit comments on the 17d–2 Plan from interested persons.

I. Introduction

Section 19(g)(1) of the Act,[3] among other things, requires every self-regulatory organization ("SRO") registered as either a national securities exchange or national securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to section 17(d) or section 19(g)(2) of the Act.[4] Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO ("common members"). Such regulatory duplication would add unnecessary expenses for common members and their SROs.

Section 17(d)(1) of the Act [5] was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication.[6] With respect to a common member, section 17(d)(1) authorizes the Commission, by rule or

[1] 15 U.S.C. 78q(d).

[2] 17 CFR 240.17d–2.

[3] 15 U.S.C. 78s(g)(1).

[4] 15 U.S.C. 78q(d) and 15 U.S.C. 78s(g)(2), respectively.

[5] 15 U.S.C. 78q(d)(1).

[6] *See* Securities Act Amendments of 1975, Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 249, S. Rep. No. 94–75, 94th Cong., 1st Session 32 (1975).

order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with applicable statutes, rules, and regulations, or to perform other specified regulatory functions.

To implement section 17(d)(1), the Commission adopted two rules: Rule 17d–1 and Rule 17d–2 under the Act.[7] Rule 17d–1 authorizes the Commission to name a single SRO as the designated examining authority (''DEA'') to examine common members for compliance with the financial responsibility requirements imposed by the Act, or by Commission or SRO rules.[8] When an SRO has been named as a common member's DEA, all other SROs to which the common member belongs are relieved of the responsibility to examine the firm for compliance with the applicable financial responsibility rules. On its face, Rule 17d–1 deals only with an SRO's obligations to enforce member compliance with financial responsibility requirements. Rule 17d–1 does not relieve an SRO from its obligation to examine a common member for compliance with its own rules and provisions of the federal securities laws governing matters other than financial responsibility, including sales practices and trading activities and practices.

To address regulatory duplication in these and other areas, the Commission adopted Rule 17d–2 under the Act.[9] Rule 17d–2 permits SROs to propose joint plans for the allocation of regulatory responsibilities with respect to their common members. Under paragraph (c) of Rule 17d–2, the Commission may declare such a plan effective if, after providing for appropriate notice and comment, it determines that the plan is necessary or appropriate in the public interest and for the protection of investors; to foster cooperation and coordination among the SROs; to remove impediments to, and foster the development of, a national market system and a national clearance and settlement system; and is in conformity with the factors set forth in section 17(d) of the Act. Commission approval of a plan filed pursuant to Rule 17d–2 relieves an SRO of those regulatory responsibilities allocated by the plan to another SRO.

[7] 17 CFR 240.17d–1 and 17 CFR 240.17d–2, respectively.

[8] *See* Securities Exchange Act Release No. 12352 (April 20, 1976), 41 FR 18808 (May 7, 1976).

[9] *See* Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976).

II. Proposed Plan

The proposed 17d–2 Plan is intended to reduce regulatory duplication for firms that are common members of both PHLX and FINRA.[10] Pursuant to the proposed 17d–2 Plan, FINRA would assume certain examination and enforcement responsibilities for common members with respect to certain applicable laws, rules, and regulations.

The text of the Plan delineates the proposed regulatory responsibilities with respect to the Parties. Included in the proposed Plan is an exhibit (the ''PHLX Certification of Common Rules,'' referred to herein as the ''Certification'') that lists every PHLX rule, and select federal securities laws, rules, and regulations, for which FINRA would bear responsibility under the Plan for overseeing and enforcing with respect to PHLX members that are also members of FINRA and the associated persons therewith (''Dual Members'').

Specifically, under the 17d–2 Plan, FINRA would assume examination and enforcement responsibility relating to compliance by Dual Members with the rules of PHLX that are substantially similar to the applicable rules of FINRA,[11] as well as any provisions of the federal securities laws and the rules and regulations thereunder delineated in the Certification (''Common Rules''). In the event that a Dual Member is the subject of an investigation relating to a transaction on PHLX, the plan acknowledges that PHLX may, in its discretion, exercise concurrent jurisdiction and responsibility for such matter.[12]

Under the Plan, PHLX would retain full responsibility for surveillance, examination, investigation and enforcement with respect to trading activities or practices involving PHLX's own marketplace, including, without limitation, registration pursuant to its applicable rules of associated persons (*i.e.,* registration rules that are not Common Rules); its duties as a DEA pursuant to Rule 17d–1 under the Act; and any PHLX rules that are not Common Rules, except for PHLX Rules for any PHLX member that operates as a facility (as defined in section 3(a)(2) of the Exchange Act), acts as an outbound router for PHLX and is a member of FINRA (''Router Member'').[13]

[10] The proposed 17d–2 Plan refers to these common members as ''Dual Members.'' *See* Paragraph 1(c) of the proposed 17d–2 Plan.

[11] *See* paragraph 1(b) of the proposed 17d–2 Plan (defining Common Rules). *See also* paragraph 1(f) of the proposed 17d–2 Plan (defining Regulatory Responsibilities). Paragraph 2 of the Plan provides that annually, or more frequently as required by changes in either PHLX rules or FINRA rules, the parties shall review and update, if necessary, the list of Common Rules.

[12] *See* paragraph 5 of the proposed 17d–2 Plan.

The text of the proposed 17d–2 Plan is as follows:

Agreement Between Financial Industry Regulatory Authority, Inc. and NASDAQ PHLX LLC Pursuant to Rule 17d–2 Under the Securities Exchange Act of 1934

This Agreement, by and between Financial Industry Regulatory Authority, Inc. (''FINRA'') and Nasdaq PHLX LLC (''PHLX''), is made this 15th day of November, 2023 (the ''Agreement''), pursuant to section 17(d) of the Securities Exchange Act of 1934 (the ''Exchange Act'') and Rule 17d–2 thereunder, which permits agreements between self-regulatory organizations to allocate regulatory responsibility to eliminate regulatory duplication. FINRA and PHLX may be referred to individually as a ''party'' and together as the ''parties.''

Whereas, FINRA and PHLX desire to reduce duplication in the examination of their Dual Members (as defined herein) and in the filing and processing of certain registration and membership records; and

Whereas, FINRA and PHLX desire to execute an agreement covering such subjects pursuant to the provisions of Rule 17d–2 under the Exchange Act and to file such agreement with the U.S. Securities and Exchange Commission (the ''SEC'' or ''Commission'') for its approval.

Now, therefore, in consideration of the mutual covenants contained hereinafter, FINRA and PHLX hereby agree as follows:

1. Definitions. Unless otherwise defined in this Agreement or the context otherwise requires, the terms used in this Agreement shall have the same meaning as they have under the Exchange Act and the rules and regulations thereunder. As used in this Agreement, the following terms shall have the following meanings:

(a) ''*PHLX Rules*'' or ''*FINRA Rules*'' shall mean the rules of PHLX or FINRA, respectively, as the rules of an exchange or association are defined in Exchange Act section 3(a)(27).

(b) ''*Common Rules*'' shall mean the PHLX Rules that are substantially similar to the applicable FINRA Rules and certain provisions of the Exchange Act and SEC rules set forth on *Exhibit 1* in that examination for compliance with such provisions and rules would not require FINRA to develop one or more new examination standards, modules, procedures, or criteria in order to analyze the application of the rule, or a Dual Member's activity, conduct, or output in relation to such provision or rule; provided, however, Common Rules shall not include the application of the SEC, PHLX or FINRA rules as they pertain to violations of insider trading activities, which is covered by a separate 17d–2 Agreement by and among Cboe BZX Exchange, Inc., Cboe BYX Exchange, Inc., Chicago Stock Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., MEMX LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq PHLX LLC, The Nasdaq

[13] *See* paragraph 2 of the proposed 17d–2 Plan.

Stock Market LLC, NYSE National, Inc., New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., Investors' Exchange LLC and Long-Term Stock Exchange, Inc. approved by the Commission on September 23, 2020. Common Rules shall not include any provisions regarding: (i) notice, reporting or any other filings made directly to or from PHLX; (ii) incorporation by reference of other PHLX Rules that are not Common Rules; (iii) exercise of discretion in a manner that differs from FINRA's exercise of discretion including, but not limited to exercise of exemptive authority by PHLX; (iv) prior written approval of PHLX; and (v) payment of fees or fines to PHLX.

(c) ''*Dual Members*'' shall mean those PHLX members that are also members of FINRA and the associated persons therewith.

(d) ''*Effective Date*'' shall have the meaning set forth in paragraph 13.

(e) ''*Enforcement Responsibilities*'' shall mean the conduct of appropriate proceedings, in accordance with the FINRA Code of Procedure (the Rule 9000 Series) and other applicable FINRA procedural rules, to determine whether violations of Common Rules have occurred, and if such violations are deemed to have occurred, the imposition of appropriate sanctions as specified under the FINRA Code of Procedure and FINRA's sanction guidelines.

(f) ''*Regulatory Responsibilities*'' shall mean the examination responsibilities and Enforcement Responsibilities relating to compliance by the Dual Members with the Common Rules and the provisions of the Exchange Act and the rules and regulations thereunder, and other applicable laws, rules and regulations, each as set forth on *Exhibit 1* attached hereto. The term ''Regulatory Responsibilities'' shall also include the surveillance, investigation and Enforcement Responsibilities relating to compliance by Dual Members with Rule 14e–4 of the Exchange Act (''Rule 14e–4''), with a focus on the standardized call option provision of Rule 14e–4(a)(1)(ii)(D).

2. Regulatory Responsibilities. FINRA shall assume Regulatory Responsibilities for Dual Members. Attached as *Exhibit 1* to this Agreement and made part hereof, PHLX furnished FINRA with a current list of Common Rules and certified to FINRA that such rules are substantially similar to the corresponding FINRA Rule (the ''Certification''). FINRA hereby agrees that the rules listed in the Certification are Common Rules as defined in this Agreement. Each year following the Effective Date of this Agreement, or more frequently if required by changes in either the PHLX Rules or FINRA Rules, PHLX shall submit an updated list of Common Rules to FINRA for review which shall add PHLX Rules not included in the current list of Common Rules that qualify as Common Rules as defined in this Agreement; delete PHLX Rules included in the current list of Common Rules that no longer qualify as Common Rules as defined in this Agreement; and confirm that the remaining rules on the current list of Common Rules continue to be PHLX Rules that qualify as Common Rules as defined in this Agreement. Within 30 days of receipt of such updated list, FINRA shall confirm in writing whether the rules listed in any updated list are Common Rules as defined in this Agreement. Notwithstanding anything herein to the contrary, it is explicitly understood that the term ''Regulatory Responsibilities'' does not include, and PHLX shall retain full responsibility for (unless otherwise addressed by separate agreement or rule) the following (collectively, the ''Retained Responsibilities''):

(a) Surveillance, examination, investigation and enforcement with respect to trading activities or practices involving PHLX's own marketplaces;

(b) registration pursuant to its applicable rules of associated persons (*i.e.,* registration rules that are not Common Rules);

(c) discharge of its duties and obligations as a Designated Examining Authority pursuant to Rule 17d–1 under the Exchange Act; and

(d) any PHLX Rules that are not Common Rules, except for PHLX Rules for any PHLX member that operates as a facility (as defined in section 3(a)(2) of the Exchange Act), acts as an outbound router for PHLX and is a member of FINRA (''Router Member'') as provided in paragraph 5. As of the date of this Agreement, Nasdaq Execution Services, LLC is the only Router Member.

3. No Charge. There shall be no charge to PHLX by FINRA for performing the Regulatory Responsibilities under this Agreement except as hereinafter provided. FINRA shall provide PHLX with ninety (90) days advance written notice in the event FINRA decides to impose any charges to PHLX for performing the Regulatory Responsibilities under this Agreement. If FINRA determines to impose a charge, PHLX shall have the right at the time of the imposition of such charge to terminate this Agreement; provided, however, that FINRA's Regulatory Responsibilities under this Agreement shall continue until the Commission approves the termination of this Agreement.

4. Reassignment of Regulatory Responsibilities. Notwithstanding any provision hereof, this Agreement shall be subject to any statute, or any rule or order of the Commission. To the extent such action is inconsistent with this Agreement, such action shall supersede the provisions hereof to the extent necessary for them to be properly effectuated and the provisions hereof in that respect shall be null and void.

5. Notification of Violations. In the event that FINRA becomes aware of apparent violations of any PHLX Rules, which are not listed as Common Rules, discovered pursuant to the performance of the Regulatory Responsibilities assumed hereunder, FINRA shall notify PHLX of those apparent violations for such response as PHLX deems appropriate. With respect to apparent violations of any PHLX Rules by any Router Member, FINRA shall not make referrals to PHLX pursuant to this paragraph 5. Such apparent violations shall be processed by, and enforcement proceedings in respect thereto will be conducted by, FINRA as provided in this Agreement. In the event that PHLX becomes aware of apparent violations of any Common Rules, discovered pursuant to the performance of the Retained Responsibilities, PHLX shall notify FINRA of those apparent violations and such matters shall be handled by FINRA as provided in this Agreement. Each party agrees to make available promptly all files, records and witnesses necessary to assist the other in its investigation or proceedings. Apparent violations of Common Rules shall be processed by, and enforcement proceedings in respect thereto shall be conducted by FINRA as provided hereinbefore; provided, however, that in the event a Dual Member is the subject of an investigation relating to a transaction on PHLX, PHLX may in its discretion assume concurrent jurisdiction and responsibility.

6. Continued Assistance.

(a) FINRA shall make available to PHLX all information obtained by FINRA in the performance by it of the Regulatory Responsibilities hereunder with respect to the Dual Members subject to this Agreement. In particular, and not in limitation of the foregoing, FINRA shall furnish PHLX any information it obtains about Dual Members which reflects adversely on their financial condition. PHLX shall make available to FINRA any information coming to its attention that reflects adversely on the financial condition of Dual Members or indicates possible violations of applicable laws, rules or regulations by such firms.

(b) The parties agree that documents or information shared shall be held in confidence, and used only for the purposes of carrying out their respective regulatory obligations. Neither party shall assert regulatory or other privileges as against the other with respect to documents or information that is required to be shared pursuant to this Agreement.

(c) The sharing of documents or information between the parties pursuant to this Agreement shall not be deemed a waiver as against third parties of regulatory or other privileges relating to the discovery of documents or information.

7. Dual Member Applications.

(a) Dual Members subject to this Agreement shall be required to submit, and FINRA shall be responsible for processing and acting upon all applications submitted on behalf of partners, officers, registered personnel and any other person required to be approved by the PHLX Rules and FINRA Rules or associated with Dual Members thereof. Upon request, FINRA shall advise PHLX of any changes of allied members, partners, officers, registered personnel and other persons required to be approved by the PHLX Rules and FINRA Rules.

(b) Dual Members shall be required to send to FINRA all letters, termination notices or other material respecting the individuals listed in paragraph 7(a).

(c) When as a result of processing such submissions FINRA becomes aware of a statutory disqualification as defined in the Exchange Act with respect to a Dual Member, FINRA shall determine pursuant to sections 15A(g) and/or section 6(c) of the Exchange Act the acceptability or continued applicability of the person to whom such disqualification applies and keep PHLX advised of its actions in this regard for such subsequent proceedings as PHLX may initiate.

(d) Notwithstanding the foregoing, FINRA shall not review the membership application, reports, filings, fingerprint cards, notices, or other writings filed to determine if such documentation submitted by a broker or dealer, or an associated person therewith or other persons required to register or qualify by examination meets the PHLX requirements for general membership or for specified categories of membership or participation in PHLX, such as PSX Market Maker, Equities ECN, Order Entry Firm, or any similar type of PHLX membership or participation that is created after this Agreement is executed. FINRA shall not review applications or other documentation filed to request a change in the rights or status described in this paragraph 7(d), including termination or limitation on activities, of a member or a participant of PHLX, or a person associated with, or requesting association with, a member or participant of PHLX.

8. Branch Office Information. FINRA shall also be responsible for processing and, if required, acting upon all requests for the opening, address changes, and terminations of branch offices by Dual Members and any other applications required of Dual Members with respect to the Common Rules as they may be amended from time to time. Upon request, FINRA shall advise PHLX of the opening, address change and termination of branch and main offices of Dual Members and the names of such branch office managers.

9. Customer Complaints. PHLX shall forward to FINRA copies of all customer complaints involving Dual Members received by PHLX relating to FINRA's Regulatory Responsibilities under this Agreement. It shall be FINRA's responsibility to review and take appropriate action in respect to such complaints.

10. Advertising. FINRA shall assume responsibility to review the advertising of Dual Members subject to the Agreement, provided that such material is filed with FINRA in accordance with FINRA's filing procedures and is accompanied with any applicable filing fees set forth in FINRA Rules.

11. No Restrictions on Regulatory Action. Nothing contained in this Agreement shall restrict or in any way encumber the right of either party to conduct its own independent or concurrent investigation, examination or enforcement proceeding of or against Dual Members, as either party, in its sole discretion, shall deem appropriate or necessary.

12. Termination. This Agreement may be terminated by PHLX or FINRA at any time upon the approval of the Commission after one (1) year's written notice to the other party, except as provided in paragraph 3.

13. Effective Date. This Agreement shall be effective upon approval of the Commission.

14. Arbitration. In the event of a dispute between the parties as to the operation of this Agreement, PHLX and FINRA hereby agree that any such dispute shall be settled by arbitration in Washington, DC in accordance with the rules of the American Arbitration Association then in effect, or such other procedures as the parties may mutually agree upon. Judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction. Each party acknowledges that the timely and complete performance of its obligations pursuant to this Agreement is critical to the business and operations of the other party. In the event of a dispute between the parties, the parties shall continue to perform their respective obligations under this Agreement in good faith during the resolution of such dispute unless and until this Agreement is terminated in accordance with its provisions. Nothing in this paragraph 14 shall interfere with a party's right to terminate this Agreement as set forth herein.

15. Amendment. This Agreement may be amended in writing duly approved by each party. All such amendments must be filed with and approved by the Commission before they become effective.

16. Limitation of Liability. Neither FINRA nor PHLX nor any of their respective directors, governors, officers or employees shall be liable to the other party to this Agreement for any liability, loss or damage resulting from or claimed to have resulted from any delays, inaccuracies, errors or omissions with respect to the provision of Regulatory Responsibilities as provided hereby or for the failure to provide any such responsibility, except with respect to such liability, loss or damages as shall have been suffered by one or the other of FINRA or PHLX and caused by the willful misconduct of the other party or their respective directors, governors, officers or employees. No warranties, express or implied, are made by FINRA or PHLX with respect to any of the responsibilities to be performed by each of them hereunder.

17. Relief from Responsibility. Pursuant to sections 17(d)(1)(A) and 19(g) of the Exchange Act and Rule 17d–2 thereunder, FINRA and PHLX join in requesting the Commission, upon its approval of this Agreement or any part thereof, to relieve PHLX of any and all responsibilities with respect to matters allocated to FINRA pursuant to this Agreement; provided, however, that this Agreement shall not be effective until the Effective Date.

18. Severability. Any term or provision of this Agreement that is invalid or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such invalidity or unenforceability without rendering invalid or unenforceable the remaining terms and provisions of this Agreement or affecting the validity or enforceability of any of the terms or provisions of this Agreement in any other jurisdiction.

19. Separate Agreement. This Agreement is wholly separate from (1) the multiparty Agreement made pursuant to Rule 17d–2 of the Exchange Act among Cboe BZX Exchange, Inc., BOX Exchange, Cboe Exchange, Inc., Cboe C2 Exchange, Inc., Nasdaq ISE, LLC, Financial Industry Regulatory Authority, Inc., Miami International Securities Exchange, LLC, NYSE American LLC, NYSE Arca, Inc., The Nasdaq Stock Market, LLC, Nasdaq BX, Inc., Nasdaq PHLX LLC, Nasdaq GEMX, LLC, Cboe EDGX Exchange, Inc., Nasdaq MRX, LLC, MIAX PEARL, LLC, MIAX Emerald, LLC, and MEMX LCC approved by the Commission on October 18, 2022 involving the allocation of regulatory responsibilities with respect to common members for compliance with common rules relating to the conduct by broker-dealers of accounts for listed options, index warrants, currency index warrants and currency warrants or (2) the multiparty Agreement made pursuant to Rule 17d–2 of the Exchange Act among NYSE American LLC, Cboe BZX Exchange, Inc., the Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., Nasdaq ISE, LLC, Financial Industry Regulatory Authority, Inc., NYSE Arca, Inc., The Nasdaq Stock Market LLC, BOX Exchange LLC, Nasdaq BX, Inc., Nasdaq PHLX LLC, Miami International Securities Exchange, LLC, Nasdaq GEMX, LLC, Nasdaq MRX, LLC, MIAX PEARL, LLC, MIAX Emerald, LLC, and MEMX LLC approved by the Commission on November 23, 2022 involving options-related market surveillance matters and such agreements as may be amended from time to time.

20. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and such counterparts together shall constitute one and the same instrument.

* * * * *

Exhibit 1

PHLX Certification of Common Rules

PHLX hereby certifies that the requirements contained in the rules listed below for PHLX are identical to, or substantially similar to, the comparable FINRA Rules or SEC Rules identified.

Common Rules shall not include provisions regarding (i) notice, reporting or any other filings made directly to or from PHLX, (ii) incorporations by reference to other PHLX Rules that are not Common Rules, (iii) exercise of discretion in a manner that differs from FINRA's exercise of discretion including, but not limited to exercise of exemptive authority, by PHLX, (iv) prior written approval of PHLX, and (v) payment of fees or fines to PHLX.

PHLX Rule	FINRA or SEC Rule
General 2, Section 11 Contact Information Requirements #	4517. Member Filing and Contact Information Requirements.
General 3, Rule 1002(b) Qualifications of Exchange Members and Associated Persons; Registration of Branch Offices and Designation of Office of Supervisory Jurisdiction #.	FINRA By-Laws Article III, Sec. 1; FINRA By-Laws Article III, Sec. 3(a) and (b).

PHLX Rule	FINRA or SEC Rule
General 3, Rule 1002(d). Qualifications of Exchange Members and Associated Persons; Registration of Branch Offices and Designation of Office of Supervisory Jurisdiction #.	3110(a)(3) Supervision and SM .01 and .02. Supervision* and FINRA By-Laws Article IV, Sec. 8.
General 3, Rule 1012(c)(1). Duty to Ensure the Accuracy, Completeness, and Current Nature of Membership Information Filed with the Exchange #.	1122. Filing of Misleading Information as to Membership or Registration; FINRA By-Laws Article IV, Sec. 1(c).
General 4, Section 1, 1210. Registration Requirements #	1210. Registration Requirements; FINRA By-Laws, Article V, Sec. 1; FINRA By-Laws, Article V, Sec. 2; FINRA By-Laws, Article V, Sec. 3.
General 4, Section 1, 1220. Registration Categories [1]#	1220. Registration Categories.
General 4, Section 1, Rule 1230(1)–(2)(D) and Supplementary Material .01. Associated Persons Exempt from Registration #.	1230. Associated Persons Exempt from Registration.
General 4, Section 1, 1240. Continuing Education Requirements [2]#	1240. Continuing Education.
General 4, Section 1, 1250. Electronic Filing Requirements for Uniform Forms #.	1010. Electronic Filing Requirements for Uniform Forms.
General 9, Section 1(b). Manipulative Operations and General 9, Section 2(b)(i) Customers' Securities and Excessive Trading of Members.	2020. Use of Manipulative, Deceptive or Other Fraudulent Devices*; 6140 Other Trading Practices; 5350 Stop Orders; 6130 Transactions Related to Initial Public Offerings.
General 9, Section 1(c)(1). Standards of Commercial Honor and Principles of Trade.	2010. Standards of Commercial Honor and Principles of Trade *.
General 9, Section 1(a). Prohibition Against Trading Ahead of Customer Orders.	5320. Prohibition Against Trading Ahead of Customer Orders.
General 9, Section 1(c)(2). Anti-Intimidation/Coordination	5240. Anti-Intimidation/Coordination.
General 9, Section 1(c)(3). Conduct Inconsistent with Just and Equitable Principles of Trade.	5290. Order Entry and Execution Practices.
General 9, Section 2(a). Customers' Securities and Excessive Trading of Members.	2150(a). Improper Use of Customers' Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts.
General 9, Section 11. Best Execution and Interpositioning	5310. Best Execution and Interpositioning.
General 9, Section 19. Discretionary Accounts	3260. Discretionary Accounts.
General 9, Section 20. Supervision	3110. Supervision.
General 9, Section 30. Books and Records	4511. General Requirements.
General 9, Section 35. Nonregistered Foreign Finders	Rule 2040(c). Payments to Unregistered Persons.
General 9, Section 39. Fidelity Bonds	4360. Fidelity Bonds.
General 9, Section 58. Advertisements, Market Letters, Research Reports and Sales Literature.	2210. Communications with the Public.
Options 6E, Section 1(a). Maintenance, Retention and Furnishing of Books, Records and Other Information #.	4511(a). General Requirements.
Options 10, Section 7(g) and (h).# Supervision of Accounts	3120. Supervisory Control System. 3130. Annual Certification of Compliance and Supervisory Processes.
Options 10, Section 10. Confirmations to Customers	2232. Customer Confirmations.
Options 10, Section 17. Profit Sharing	2150(c). Improper Use of Customers' Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts.

[1] FINRA shall only have Regulatory Responsibilities regarding General 4, Section 1, 1220 to the extent that PHLX recognizes the same categories of limited principal and representative registration.

[2] FINRA Rule 1240.01 allows for other persons to make their election to participate in the continuing education program under Rule 1240(c) either (1) between January 31, 2022, and March 15, 2022; or (2) between March 15, 2023, and December 31, 2023. In contrast, Supplementary Material .02 of Nasdaq PHLX General 4, Section 1, 1240 allows for other persons to make their election to participate in the continuing education program under PHLX General 4, Section 1, 1240(c) either (1) by March 15, 2022, or (2) between July 6, 2023, and December 31, 2023. Therefore, FINRA shall not have Regulatory Responsibilities regarding elections made by other persons under General 4, Section 1, 1240(c) between March 15, 2023, and July 5, 2023.

* FINRA shall not have any Regulatory Responsibilities for these rules as they pertain to violations of insider trading activities, which is covered by a separate 17d–2 Agreement by and among Cboe BZX Exchange, Inc., Cboe BYX Exchange, Inc., NYSE Chicago, Inc., Cboe EDGA Exchange Inc., Cboe EDGX Exchange Inc., Financial Industry Regulatory Authority, Inc., MEMX, LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq PHLX LLC, The Nasdaq Stock Market LLC, NYSE National, Inc., New York Stock Exchange, LLC, NYSE American LLC, NYSE Arca Inc., Investors' Exchange LLC, and the Long-Term Stock Exchange, Inc. as approved by the SEC on September 23, 2020.

In addition, the following provisions shall be part of this 17d–2 Agreement:

The following provisions are covered by the Agreement between the Parties:

- SEC '34 Act Section 28(e) Effect on Existing Law
- SEC '34 Act Rule 10b–10 Confirmation of Transactions
- SEC '34 Act Rule 203 of Regulation SHO Borrowing and Delivery Requirements
- SEC '34 Act Rule 606 of Regulation NMS Disclosure of Order Routing Information
- SEC '34 Act Rule 607 of Regulation NMS Customer Account Statements
- SEA Rule 14e–4—Prohibited Transactions in Connection with Partial Tender Offers^

^ FINRA shall perform surveillance, investigation, and Enforcement Responsibilities for SEA Rule 14e–4(a)(1)(ii)(D).

III. Date of Effectiveness of the Proposed Plan and Timing for Commission Action

Pursuant to section 17(d)(1) of the Act [14] and Rule 17d–2 thereunder,[15] after December 22, 2023, the Commission may, by written notice, declare the plan submitted by PHLX and FINRA, File No. 4–818, to be effective if the Commission finds that the plan is necessary or appropriate in the public interest and for the protection of investors, to foster cooperation and coordination among self-regulatory organizations, or to remove impediments to and foster the development of the national market system and a national system for the clearance and settlement of securities transactions and in conformity with the factors set forth in section 17(d) of the Act.

[14] 15 U.S.C. 78q(d)(1).

[15] 17 CFR 240.17d–2.

IV. Solicitation of Comments

In order to assist the Commission in determining whether to approve the proposed 17d–2 Plan and to relieve

PHLX of the responsibilities which would be assigned to FINRA, interested persons are invited to submit written data, views, and arguments concerning the foregoing. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/other.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number 4–818 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, Station Place, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number 4–818. 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/other.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the plan also will be available for inspection and copying at the principal offices of PHLX and FINRA. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to File No. 4–818 and should be submitted on or before December 22, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–26800 Filed 12–6–23; 8:45 am]

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[16] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 20117 and # 20118; New York Disaster Number NY–20002]

Administrative Disaster Declaration of a Rural Area for the State of New York

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 New York dated 12/01/2023.

Incident: Severe Storms and Flooding.

Incident Period: 07/09/2023 through 07/10/2023.

DATES: Issued on 12/01/2023.

Physical Loan Application Deadline Date: 01/30/2024.

Economic Injury (EIDL) Loan Application Deadline Date: 9/03/2024.

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.

Primary Counties: Clinton

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 201176 and for economic injury is 201180.

The State which received an EIDL Declaration is New York.

(Catalog of Federal Domestic Assistance Number 59008)

Isabella Guzman,

Administrator.

[FR Doc. 2023–26895 Filed 12–6–23; 8:45 am]

BILLING CODE 8026–09–P

DEPARTMENT OF STATE

[Public Notice: 12278]

Overseas Schools Advisory Council Notice of Meeting

SUMMARY: The Overseas Schools Advisory Council, Department of State, will hold its January Committee Meeting. This meeting is open to the public.

DATES: Thursday, January 31, 2024, from 9 a.m. until approximately 4 p.m.

ADDRESSES: Conference Room 1107, Department of State, 2201 C Street NW, Washington, DC.

SUPPLEMENTARY INFORMATION: The Overseas Schools Advisory Council works closely with the U.S. business community on improving those American-sponsored schools overseas that are assisted by the Department of State and attended by dependents of U.S. Government employees, and the children of employees of U.S. corporations and foundations abroad.

This meeting will address issues related to the work and the support provided by the Overseas Schools Advisory Council to the American-sponsored overseas schools. There will be a report and discussion about the status of the Council-sponsored Child Protection Project and discussion on a possible project addressing school based mental health issues. The Council will also receive a report from a representative of the College Board.

Moreover, the Regional Education Officers in the Office of Overseas Schools will make presentations on the activities and initiatives in the American-sponsored overseas schools.

Members of the public may attend the meeting and join in the discussion, subject to the instructions of the Chair. Admittance of public members will be limited to the seating available. Access to the Department of State is controlled, and individual building passes are required for all attendees. Persons who plan to attend should advise the office of Mr. Mark Ulfers, Director of Office of Overseas Schools Department of State, telephone 202–261–8200, prior to January 9, 2024. Each visitor to the Department of State meeting will be asked to provide his/her date of birth and either driver's license or passport number at the time of registration and attendance and must carry a valid photo ID to the meeting.

Personal data is requested pursuant to Public Law 99–399 (Omnibus Diplomatic Security and Antiterrorism Act of 1986), as amended; Public Law 107–56 (USA PATRIOT Act); and Executive Order 13356. The purpose of the collection is to validate the identity of individuals who enter Department facilities. The data will be entered into the Visitor Access Control System (VACS–D) database. Please see the Security Records System of Records Notice (State-36) at *https://www.state.gov/wp-content/uploads/2019/05/Security-Records-STATE-36.pdf* for additional information.

Any requests for reasonable accommodation should be made at the time of registration. All such requests will be considered, however, requests made after January 9 might not be possible to fill. All attendees must use the 21st Street entrance to the building for Thursday's meeting.

Mark E. Ulfers,

Executive Secretary, Overseas Schools Advisory Council, Department of State.

[FR Doc. 2023–26914 Filed 12–6–23; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2022–1204]

FAA Policy Regarding Air Carrier Incentive Program

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final policy statement.

SUMMARY: This policy statement updates FAA policy regarding incentives offered by airport sponsors to air carriers for improved air service. It is longstanding practice for airport operators to offer incentives to air carriers to promote new air service at an airport, including both new air carriers serving the airport and new destinations served. The updated policy statement supersedes the 2010 *Air Carrier Incentive Program Guidebook.* The policy statement includes general principles to assess whether an airport sponsor's air carrier incentive program (ACIP) complies with the sponsor's FAA grant assurances. It also includes guidance on the permissibility of various specific aspects of an ACIP, as well as ACIP implementation.

DATES: This final policy statement is effective December 7, 2023.

ADDRESSES: For information on where to obtain copies of documents and other information related to this policy statement, see ''How To Obtain Additional Information'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Kevin C. Willis, Director, Office of Airport Compliance and Management Analysis, ACO, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591, telephone (202) 267–3085; facsimile: (202) 267–4629.

SUPPLEMENTARY INFORMATION: Airports obligated under the terms of an Airport Improvement Program (AIP) grant agreement include virtually all commercial airports in the United States. At each of these airports, the airport sponsor must ensure that an air carrier incentive program (ACIP) is consistent with the sponsor's FAA grant agreements, including standard Grant Assurances relating to economic discrimination, reasonable fees, and use of airport revenue. In the 1999 *Policy and Procedures Regarding the Use of Airport Revenue,* the FAA provided that certain costs of activities promoting new air service and competition at an airport are permissible as a tool for commercial airports to establish or retain scheduled air service. In the 2010 *Air Carrier Incentive Program Guidebook,* the FAA provided more detailed guidance on both the use of airport revenue and the temporary reduction or waiver of airport fees as an incentive for carriers to begin serving an airport or begin service on a route not currently served from the airport. A number of U.S. airport sponsors have used ACIPs in recent years, and the agency had the opportunity to review many of these programs for consistency with the sponsor's grant agreements, Grant Assurances, and other Federal obligations. Based on that experience, the FAA is publishing its revised agency policy on ACIPs.

I. Authority for the Policy

This policy is published under the authority described in title 49 of the United States Code, subtitle VII, part B, chapter 471, section 47122(a). The policy will not have the force and effect of law and is not meant to bind the public in any way, and the publication of this policy is intended only to provide information to the public regarding existing requirements under the law and agency policies. Mandatory terms such as ''must'' in this notice describe established statutory or regulatory requirements.

II. Background

A. Overview of Air Carrier Incentive Programs

Airports and communities of all sizes use air carrier incentives in order to attract new air service. Incentives may be offered to new entrant carriers to begin service at an airport or to incumbent carriers at an airport to add new routes. Incentives may apply to international or domestic service.

ACIPs can be divided into two primary categories: programs funded by the airport itself (''airport-sponsored incentives'') and those funded by the local community (''community-sponsored incentives''). The primary distinction between these two groups relates to the funding used for an incentive. For airport-sponsored incentives using airport funds, the use of the funds must comply with the requirements of Federal law and FAA grant agreements for use of airport revenue. In contrast, community-sponsored incentives using non-airport funds may be used in a broader set of ways. Community-sponsored incentives have been funded by various community groups, including local governments, local chambers of commerce and tourism organizations and local businesses. Airport-sponsored incentives largely involve a reduction or waiver of landing fees and other airport fees. Airport sponsors may also contribute to marketing programs, provided the marketing focuses on the airport rather than destination marketing. Community-sponsored incentives can include more direct financing of routes, including minimum revenue guarantees, travel banks, and marketing funding that may include destination marketing. Another

important distinction is the role played by the airport sponsor. The sponsor may have a direct management role of the airport-sponsored incentive program, or a limited role advising the non-airport entity responsible for the community-sponsored incentive program.

B. Federal Obligations

Airport sponsors that have accepted grants under the AIP have agreed to comply with certain Federal requirements included in each AIP grant agreement as sponsor assurances. The Airport and Airway Improvement Act of 1982 (AAIA) (Pub. L. 97–248), as amended and recodified at 49 U.S.C. 47101 *et seq.,* requires that the FAA obtain certain assurances from an airport sponsor as a condition of receiving an AIP grant. Several of these standard Grant Assurances relate to the extent to which an airport sponsor can provide incentives to an air carrier in return for new air service at the airport.

Grant Assurance 22: Economic discrimination: Grant Assurance 22, paragraph 22.a. requires the airport sponsor to allow access by aeronautical operators and services on reasonable terms and without unjust discrimination. Paragraph 22.e. of Grant Assurance 22 further requires: ''Each air carrier using such airport . . . shall be subject to such nondiscriminatory and substantially comparable rules, regulations, conditions, rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation as are applicable to all such air carriers which make similar use of such airport and utilize similar facilities, subject to reasonable classifications such as tenants or non-tenants and signatory carriers and non-signatory carriers.''

The FAA has determined that a carrier starting new service at an airport is temporarily not similarly situated to carriers with established route service at the same airport. Accordingly, an airport sponsor may offer a waiver or reduction of fees and jointly market new service, for a fixed time and within certain limits, without unjustly discriminating against carriers not offering new service and not participating in the air carrier incentive program.

Grant Assurance 22 also serves to prohibit an airport sponsor from charging carriers and other operators not participating in an incentive program for any costs of an air carrier incentive program. Charging non-participating operators for the costs of an incentive would be a cross-subsidy of the incentive program, and therefore not a reasonable fee component for nonparticipating operators.

The FAA's Policy Regarding Airport Rates and Charges provides detailed guidance on the acceptable components of carrier and other aeronautical user fees. Any ACIP adopted under this Policy must conform to the Policy Regarding Airport Rates and Charges.

Grant Assurance 24, Fee and Rental Structure: Grant Assurance 24 generally requires that an airport sponsor maintain an airport rate structure that makes the airport as self-sustaining as possible. For purposes of planning and implementing an ACIP, the airport sponsor must assure that a marketing program to promote increases in air passenger service does not adversely affect the airport's self-sustainability and the existing resources needed for the operation and maintenance of the airport. The Policy Regarding Airport Rates and Charges provides further guidance on compliance with Grant Assurance 24.

Grant Assurance 25, Airport Revenues: Grant Assurance 25, which implements 49 U.S.C. 47107(b), generally requires that airport revenues be used for the capital and operating costs of the airport or local airport system. Title 49 U.S.C. 47133 imposes the same requirement directly on obligated airport sponsors. The FAA Policy and Procedures Regarding the Use of Airport Revenue (Revenue Use Policy), in section V.A.2, provides that expenditures for the promotion of an airport, promotion of new air service and competition at the airport, and marketing of airport services are legitimate costs of an airport's operation. Air carrier operations are not a capital or operating cost of an airport; therefore, use of airport revenue for a carrier's operations is a prohibited use of airport revenue. Accordingly, while an airport sponsor can assume certain marketing costs relating to service at the airport, the sponsor may not make payments in any form from airport revenue to a carrier for operating at the airport, including for providing air service at the airport.

C. Related Federal Programs

Essential Air Service Program: Following deregulation of the airline industry, the Essential Air Service (EAS) program was put into place to guarantee that communities that were served by certificated air carriers before airline deregulation maintain a minimal level of scheduled air service. The United States Department of Transportation (Department) implements this program by subsidizing at least a minimum of daily flights from each designated EAS community/airport, usually to a large- or medium-hub airport, except for within Alaska. As of May 2023, the Department subsidizes commuter and air carriers, and air taxis to serve 61 communities in Alaska and 111 communities in the 48 contiguous states and Puerto Rico that otherwise would not receive any passenger air transportation. Because the EAS program largely involves Federal payments to air carriers, the EAS program does not affect the responsibilities of an airport. Eleven (11) communities receive funding, via grant agreements, through the Alternate Essential Air Service (AEAS) program. Those 11 communities obtain their own air service, currently all from a commuter air carrier, operating all flights as public charters under DOT Part 380 regulations.

Small Community Air Service Development Program. The Small Community Air Service Development Program (SCASDP) is a Federal grant program designed to provide financial assistance to small communities to help them enhance their air service. The program is managed by the Associate Director, Small Community Air Service Development Program, under the Office of Aviation Analysis, in the Office of the Secretary of Transportation. Grantees must be public entities and can include local governments and airport operators. Grant funds may be used for a variety of measures to promote air service and are dispersed on a reimbursable basis. SCASDP grant funds are not airport revenue and may be used for purposes for which airport revenue is prohibited, including direct subsidy of air carrier operations.

Holding a SCASDP grant does not affect an airport sponsor's obligations under its AIP grant agreements. The Department's order awarding SCASDP grants states that a SCASDP grant does not relieve the airport sponsor from the obligation to use airport revenues only for purposes permitted by the AIP Grant Assurances and Federal law. Accordingly, if airport revenues are used as local match funds for a SCASDP grant, those funds remain subject to Grant Assurance 25; however, this would not prevent an airport sponsor using airport revenue as a local match to SCASDP grants similar to airport revenue being used as a local match to AIP grants. This permits airport sponsors to pursue reasonable strategies to promote the airport and provide incentives to encourage new air service.

D. The 2010 Air Carrier Incentive Guidebook

Previous FAA policy on ACIPs was published in the *Air Carrier Incentive Program Guidebook,* issued in September 2010 (and referred to below as ''the Guidebook'' or ''the 2010 Guidebook''). While the Guidebook served as a useful description of FAA policy on ACIPs, with the publication of this policy update, the FAA is grounding the policy more in basic principles rather than in a detailed list of prohibited practices. The intention is to provide more flexibility for airport sponsors to design particular incentive programs while remaining in compliance with Federal obligations regarding economic discrimination, reasonable fees, and use of airport revenue.

E. FAA Experience With ACIPs

In the last 20 years, and particularly since the publication of the 2010 Guidebook, there has been a proliferation of ACIPs. ACIPs have been implemented at more than 250 U.S. commercial service airports. Some airport sponsors have used ACIPs on occasion or intermittently, while others have maintained ACIPs on a recurring and renewable annual basis. ACIPs have been used at smaller airports seeking to acquire and maintain any level of air carrier service, while sponsors of larger hub airports have also used ACIPs to add to existing service patterns. While most ACIPs have complied with Federal obligations as outlined in the 2010 Guidebook, several practices have raised issues of compliance:

• There have been cases where an airport sponsor has sought service from a specific air carrier and tailored its ACIP for that purpose, which can present an issue of unjust discrimination.

• While sponsors have avoided direct cash subsidies to carriers, some ACIPs have included incentives that could be seen as efforts to circumvent the clear prohibition on the use of airport revenue for subsidy of carrier operations.

• Sponsors have made direct cash payments to carriers for marketing costs under a joint marketing program without appropriate documentation.

• Use of a sponsor's community funds for practices such as airline subsidies and revenue guarantees for a carrier may be inconsistent with the sponsor's Grant Assurances.

• Sponsors have entered into incentive arrangements with a carrier with no notice to the public or other carriers of the terms of the incentive program. Non-participating carriers may have no means of determining whether and how the incentive program affects aeronautical fees at the airport.

In consideration of agency experience with the oversight of ACIPs in recent years, the FAA is issuing this restatement of the agency policy on ACIPs.

F. Summary of the Notice of Proposed Policy

The FAA published a proposed policy on ACIPs on February 3, 2023, with a request for public comment. The proposed policy articulated five general principles to summarize the framework under which an airport sponsor can implement an ACIP:

• Discrimination between carriers participating in an ACIP and non-participating carriers must be justified and time-limited.

• A sponsor may not use airport revenues to subsidize air carriers.

• A sponsor may not cross-charge non-participating carriers or other aeronautical users to subsidize ACIP carriers.

• The terms of an ACIP should be made public.

• Use of airport funds for an incentive program must not adversely affect the resources needed for operation and maintenance of the airport.

The proposed policy also included a number of updates and clarifications, several of which differ from the material in the *2010 Guidebook.* Key provisions in the proposed policy include:

• Revising the definition of *new service* to comprise ''any nonstop service to an airport destination not currently served with nonstop service, or any service to an airport by a new entrant carrier.'' This proposed definition would modify the definition in 2010 Guidebook primarily by eliminating increased frequencies from the definition of *new service,* and by clarifying that only nonstop service qualifies.

• Allowing incentives for three seasons (up to three years from the start of service) for *seasonal service,* which is defined as service offered for less than six months of the year.

• Clarifying that an ACIP may be offered for new cargo service, separate from any ACIP offered for new passenger service.

• Clarifying that incentives may be based on the number of passengers actually carried or the seat-miles associated with new service, as long as they are constructed in a way that avoids unjust discrimination and so that the resulting reduction in fees does not exceed the amount of the standard fees the carrier receiving the incentive would have been charged without the incentive.

• Articulating expectations for ACIP transparency, including the disclosure of proposed ACIPs and incentives granted.

• Modifying the 2010 Guidebook's prohibition of airport sponsor staff from assisting or advising a non-airport entity on an ACIP that used general community funds, and clarifying the circumstances and limitations under which an airport sponsor can provide technical assistance to non-airport entities.

• Clarifying that payments of marketing and advertising costs directly to a carrier under an ACIP will be considered a prohibited diversion of airport revenue, and allowing payments of airport revenue for marketing only to the entity providing the marketing services.

• Modifying the expected process for airports with a limited ACIP budget that may limit incentives to a single carrier so that a request for proposals (RFP) process is no longer the stated preferred way to award the incentive. Instead, the availability of an ACIP, along with any limitations, needs to be publicly disclosed at least 30 days prior to entering an agreement with a carrier. Another difference from the 2010 Guidebook is that the proposed policy in this area does not distinguish based on an airport's size.

• Clarifying that airport sponsors have discretion as to whether their ACIP applies to an air carrier restarting service that was previously subject to an incentive but had been canceled due to various reasons.

• Allowing carrier incentives that were initiated prior to the issuance date of the new policy to continue until they expire, as long as they complied with the FAA's previous policy guidance (with a maximum timeframe of two years, consistent with the 2010 Guidebook). However, incentives initiated on or after the issuance date of the final policy must conform to the guidance in the final policy statement.

The FAA also requested comments on whether incentives for upgauging to a larger aircraft type should continue to be allowed consistent with the petition partially granted to the Clark County Department of Aviation, Nevada, in 2012.

The proposed policy also addressed several other aspects of ACIPs and the ACIP process.

The FAA invited comments on the proposed ACIP policy for 60 days, and the comment period closed on April 4, 2023.

G. General Overview of Comments

The FAA received comments from 19 industry stakeholders. Commenters included Airlines for America (A4A), the American Association of Airport Executives (AAAE), Airports Council International—North America (ACI–NA), 15 airport sponsors, and one private company. The majority of individual airport sponsor comments represent large hub airports; however, the FAA also received several comments from sponsors for smaller airports.

Commenters generally supported the FAA's initiative to update its ACIP policy and guidance given the evolution of the aviation industry since the publication of the 2010 Guidebook. Most commenters, particularly airport stakeholders, supported the FAA's stated goal of providing additional flexibility to airport sponsors to design ACIPs within the framework of the sponsors' federal obligations, although there were differing perspectives on whether the proposed policy accomplishes that goal.

Commenters had suggestions for modifications to several aspects of the proposed policy. Some areas of the proposed policy generated numerous and/or particularly strong comments, including:

- The definition of *new service,* particularly the exclusion of new frequencies on routes that already have nonstop service;
- Procedures in cases where an ACIP has a limited budget and can only be awarded to one carrier;
- Incentives for upgauging, as well as incentives that vary based on passengers or seat-miles;
- ACIP transparency expectations;
- Technical assistance for non-airport entities; and
- Whether funds can be paid directly to an air carrier as part of a marketing incentive.

Comments on these and other areas of the proposed policy, as well as the FAA's responses and, in some cases, changes to the proposed policy, are discussed in greater detail below.

III. Discussion of Public Comments and the Final Policy

The FAA has made changes to this policy in response to comments made by the public. Some of the changes are to terminology to improve clarity, while other more substantive changes are in response to comments raised by stakeholders. Summaries of the comments and the FAA's responses are grouped by category in the following subsections.

A. Policy Approach, ACIP Flexibility and Guiding Principles

ACI–NA and four individual airport sponsors affirmed their support for the FAA's stated goal of providing more flexibility to airport sponsors, but commented that they believe the proposed policy did not live up to this intention. These commenters recommended that the FAA adopt less prescriptive language in order to place fewer limits on airport sponsors' ability to design ACIPs. ACI–NA went on to request that the FAA clearly state that the final policy has no force of law and eliminate any suggestion that airport sponsors must comply with it.

Tampa International Airport (TPA) requested that the policy explicitly reaffirm that certain uses of airport revenue are permissible in accordance with the Revenue Use Policy.

The FAA notes that without a policy that articulates criteria for which incentives are allowed, there would be no protected ACIPs, as such programs are inherently discriminatory. Grant Assurance 22 prohibits unjust discrimination and requires substantially comparable fees for all air carriers that make similar use of the airport and utilize similar facilities (subject to reasonable classifications such as tenants or non-tenants and signatory carriers and non-signatory carriers). The FAA is providing this policy to guide airports regarding the FAA's interpretation of the grant assurances and to avoid unjust discrimination.

For further clarity, and to address TPA's comment, the FAA has added a sentence to the second principle in the policy affirmatively stating, ''Fee reductions, fee waivers, and marketing assistance as incentives to new service are permitted to the extent described in the Policy and Procedures Concerning the Use of Airport Revenue.''

Regarding ACI–NA's comment about the final policy having no force of law, the notice of proposed policy contained the following statement: ''The policy proposed under this notice will not have the force and effect of law and is not meant to bind the public in any way, and the notice is intended only to provide information to the public regarding existing requirements under the law and agency policies. Mandatory terms such as ''must'' in this notice describe established statutory or regulatory requirements.'' The FAA has maintained a similar statement in the ''Authority for this Policy'' section of this final policy statement.

B. Definitions

New Service: There were numerous comments on the definition of new service, particularly focused on whether additional service to existing markets should be included as eligible for an ACIP.

A4A and Rick Husband Amarillo International Airport (AMA) commented that the proposed policy's definition of new service was too broad. Some A4A members and AMA believe that new entrants who did not previously serve an airport and enter a market that already has nonstop service should not be eligible for incentives, as this may unfairly advantage the new entrant carrier at the expense of the incumbent carrier on the route.

ACI–NA, AAAE, and nine airport sponsors commented that the proposed policy's definition of new service was too restrictive. All of these commenters believe that ACIPs should be permitted to provide incentives for frequency increases in existing markets, as stated in the 2010 Guidebook. Several commenters specifically raised discrimination concerns or questions about situations where a new entrant carrier (that previously did not provide any service to an airport) could receive an incentive for starting service on a route that already had nonstop service from another carrier, whereas a carrier that already serves a different market from that airport could not receive an incentive for starting service on that same route. Similarly, several commenters believe that incumbent carriers should be eligible for incentives if they add frequencies in markets that they already serve.

Some commenters had specific suggestions to limit the applicability of incentives for additional frequencies. Denver International Airport (DEN) recommended setting a minimum increased frequency that would qualify as an incentive, such as 50% over the previous year, and specifying the markets that qualify. Similarly, the Metropolitan Washington Airports Authority (MWAA) and the City of Phoenix Aviation Department (PHX) suggested that increased frequency incentives would be most appropriate for markets that the airport sponsor identifies as underserved.

Multiple commenters linked their comments on incentives for frequency increases to incentives for upgauging, noting that both represent increases in capacity in markets that already have nonstop service and therefore it is logical that either both types of incentives be permitted or both types be prohibited.

Finally, ACI–NA also commented that the definition of new service should be expanded to include direct, one-stop service. Houston Airport System (HAS) had a similar comment, noting that international air service to interior U.S. destinations in particular may often begin on a one-stop basis and that cargo service often has enroute stops. DEN also requested clarification about whether ''any service by a new entrant carrier'' includes both direct and nonstop service.

The FAA recognizes the logic in maintaining a consistent approach between different forms of additional capacity on existing routes, and that in many cases increased capacity on an existing route can be very valuable to an airport and the community it serves. At the same time, the FAA believes that there is a distinction between, on the one hand, a route going from twice a week service to daily service (or daily service to three times a day service), and, on the other hand, a route going from 10 flights a day to 12 flights a day. Therefore, the FAA has modified the definition of new service in the final policy to include ''a significant increase in capacity on preexisting service to a specific airport destination'' as permissible for airport sponsors to include in an ACIP. While the FAA is leaving the definition of ''significant'' to each airport sponsor to articulate in its ACIP based on local circumstances, the agency encourages sponsors who choose to offer incentives for frequency increases to consider defining a threshold percentage increase in order to qualify for incentives.

The FAA has also added language to the *Service Frequency* section of the final policy to clarify that if an airport sponsor chooses to offer incentives for frequency increases on preexisting service, these incentives:

- Are limited to one year;
- May not discriminate based on whether the frequency addition is from a carrier that already serves the route;
- Cannot be the only type of incentive in a sponsor's ACIP; and
- Should only apply to the increased frequencies to the extent that those frequencies result in a significant net increase in seat capacity to the specific airport destination. (In other words, if a carrier adds frequency on smaller aircraft so that there is not a significant increase in seat capacity, the frequency increase would not be eligible for an incentive.)

The FAA is not adopting the suggestion to expand the proposed definition of new service to incorporate one-stop service in addition to nonstop service. While the FAA understands that there may be some value in one-stop service as a way for an air carrier to test a market, the value of one-stop service is significantly lower than nonstop service from a passenger's perspective. In addition, the FAA is concerned that, in a predominantly hub-and-spoke aviation system, the different combinations and permutations of one-stop service would make this very difficult to monitor.

Seasonal Service: A4A and San Diego International Airport (SAN) both supported the proposed definition of seasonal service. However, DEN and the Greater Orlando Aviation Authority (MCO) commented that the International Air Transport Association (IATA) summer season lasts approximately seven months, from March to October and suggested that the FAA should define seasonal service as being offered less than seven months per year rather than six months, as in the proposed policy.

The FAA agrees with the logic of matching IATA seasonal definitions and has modified the final policy to define seasonal service as nonstop service offered for less than seven months of the calendar year.

New Entrant Carrier and Incumbent Carrier: ACI–NA objected to the proposed policy's definition of ''new entrants'' on the grounds that there is a definitional gap between incumbent carriers (who are defined as ''actively providing service'') and new entrant carriers (who are defined as ''not previously providing any air service'') because a carrier could have provided air service to a particular airport in prior years, but not be actively flying to that airport. ACI–NA recommended that the FAA not define ''new entrant carrier'' and ''incumbent carrier'' in this policy and instead allow individual airport sponsors to define these terms in their ACIPs. ACI–NA also commented that some air carriers have recently begun serving smaller communities by contractual arrangement with bus companies and requested that such service be eligible for incentives if it sold by air carriers, even if it is not aeronautical.

Two airport sponsors, TPA and the Port of Seattle (SEA), recommended modifying the new entrant definition so that new entrants can be considered carriers that are new to a particular market rather than a new carrier at a sponsor airport; several airports raised similar comments under the new service definition.

The FAA's intent in defining new entrants as carriers who were ''not previously providing any air service'' was that the new entrant carrier was not providing air service to the particular airport immediately prior to starting service. To clarify, the FAA has modified the final policy to use the word ''currently'' consistently to refer to the state of air service at the origin airport immediately prior to the execution of an incentive agreement (and has defined the term accordingly). In addition, the flexibility that the policy affords to airport sponsors regarding choosing whether to offer incentives for the restart of service that had previously been offered at the airport should help address the concern about the definitional gap. The FAA is not expanding the definition of carriers to include bus operators. Bus service is not considered to be aeronautical activity and is not ''a local facility owned or operated by the airport owner or operator.'' Accordingly, use of airport revenue and resources to incentivize bus service would be inconsistent with the requirements for the use of airport revenue. The FAA believes that the modifications in the final policy to allow incentives for incumbent carriers who add service in markets that they did not previously serve effectively address the comments from TPA and SEA on the new entrant definition.

Preexisting Service: SAN commented that there should be a threshold of at least two flights per week on an annualized or a seasonal basis in order to qualify as preexisting service. MWAA commented that the seasonal service provisions should allow for a market to be considered unserved during the months that the seasonal service does not operate so that a carrier entering the market during the off-season could also receive incentives.

The FAA believes that the modifications in the final policy to allow incentives for significant frequency increases on preexisting service obviates the justification for a minimum threshold for preexisting service, as airport sponsors may offer incentives for frequency increases, as long as they are consistent with the limitations of the final policy. The FAA has modified the definition of preexisting service to clarify that an airport destination served nonstop on a seasonal basis is considered not to be currently served nonstop in other months for the purposes of this policy.

Other Clarifications: The FAA has made several other clarifications to the definitions and terminology throughout the policy. Based on several comments, the proposed policy may have been unclear at times when using the word ''airport'' whether the policy was referring to the airport offering the incentive or the airport destination.

Therefore, the FAA has introduced and defined the term ''origin airport'' as the airport which is offering an incentive under an ACIP and clarified that references to the ''airport sponsor'' in the policy are to the sponsor of the origin airport. The final policy also defines ''airport destination'' as the airport receiving new service from the origin airport and uses that term consistently throughout the policy.

In response to comments from ACI–NA, HAS and MWAA, the FAA has also clarified that it is permissible for ACIPs to define each airport within a metropolitan area as a separate airport destination.

Finally, the FAA also re-ordered the definitions so that terms are in alphabetical order.

C. Seasonal Service Applicability

Three airport sponsors commented that they support the proposed policy's provision that permits incentives for up to three years for new seasonal service to an airport destination that was previously unserved. AAAE generally supports increased flexibility for incentives for new seasonal service, but commented that the FAA should not be prescriptive in terms of defining the eligible timeframe. TPA commented that a two-year limit should be sufficient to establish a new seasonal service in the market. A4A commented that seasonal service incentive time limits should mirror time limits for other types of new service (two years for previously unserved markets and one year for new service in previously served markets).

The FAA believes that the rationale for allowing incentives for seasonal service to continue for up to three years in order to build the market remains valid, and therefore has finalized this aspect of the policy as proposed.

D. New Entrant Incentives

The proposed policy reiterated the 2010 Guidebook in stating that new entrants who begin nonstop service on a previously unserved route from the origin airport can receive incentives for up to two years, and that ACIPs may offer incentives to new entrant carriers for providing service to an airport destination with preexisting service, while excluding incumbent air carriers. In that case, the new entrant incentives are limited to no more than one year.

PHX objected to the exclusion of incumbent carriers from incentives that a new entrant carrier would be eligible for, and stated that an airport should have flexibility to determine whether a destination should be eligible for incentives, rather than limit incentives based on whether the carrier is a new entrant. In addition, two commenters asked for clarification regarding this provision. TPA asked what happens if a second carrier begins nonstop service following the first entrant in the same market but within the two-year incentive period and specifically whether the first entrant would no longer be eligible for a two-year incentive. MCO asked about a similar scenario, but whether the second new entrant would also be eligible for two years of incentives if minimal time has passed between start dates.

The FAA believes that the modifications to the new service definition would allow ACIPs to provide incentives to incumbent carriers who provide new service to an airport destination with preexisting service. However, the FAA has retained the new entrant language from the proposed policy, which gives airport sponsors latitude to limit incentives to new entrants on routes with preexisting service if they choose to do so, on the grounds that a new entrant carrier is temporarily not similarly situated to an incumbent carrier at the origin airport.

Regarding the questions raised by TPA and MCO, the FAA's interpretation is that a second new entrant into a given market would only be eligible for one year of incentives, as the airport destination in question would no longer be ''not currently served nonstop from the origin airport.'' The timeframe of incentives for the first new entrant would need to be addressed according to the airport sponsor's ACIP and the contract with the carrier. As discussed below, the FAA encourages airport sponsors to define the criteria for the ''first air carrier to establish service'' in their ACIPs in order to avoid disputes.

E. Procedures If ACIP Has a Limited Budget

ACI–NA, DEN, and SAN expressed support for the proposed policy's provisions that permit airport sponsors of any size to limit incentives to one carrier in cases where the sponsor has a limited budget, provided that information regarding the ACIP, including the limited availability, is disclosed at least 30 days prior to signing a contract with a carrier. AAAE supports the flexibility to limit incentives but commented that the FAA's proposed language on how to do so was too restrictive.

A4A expressed general support for the disclosure provisions, along with concern that the proposal may be insufficient to prevent undisclosed dealings with a favored carrier. A4A recommended that the policy state that disclosure is a requirement rather than an expectation, that ''posting'' the ACIP on a website is insufficient and should be replaced by direct communication to carriers, and that an airport sponsor should not be allowed to commence individual carrier discussions regarding incentives under a limited ACIP until after the ACIP (including limitations) is disclosed. A4A also requested that the FAA clarify what it means to be the first carrier to ''establish new service'' or ''enter the market'' because these may have different interpretations and pointed out that the proposed policy uses different phrasing in the *New Service vs Preexisting Service* compared to the *New Entrant Carriers* section. In contrast, ACI–NA recommended that the FAA leave the interpretation of these phrases to the reasonable discretion of airport sponsors.

The FAA believes that the proposed policy generally strikes an appropriate balance between practicality and the benefits of disclosure. The FAA remains convinced that it is appropriate for disclosure to be an expectation rather than a requirement due to the non-regulatory nature of this policy.

Regarding the definition of the ''first carrier'' that ''establishes new service'' or ''enters the market,'' the FAA agrees with A4A that the language should be more consistent between the two referenced sections of the policy (although not exactly the same because the sections are describing different cases). The final policy uses ''establishes service to the origin airport'' in the *New Entrant Carriers* section. The FAA agrees with ACI–NA that the definition of establishing service is best left to individual airport sponsors rather than prescribed by the FAA; however, the FAA agrees with A4A that the criteria should be clearly defined and disclosed. Therefore, the final policy adds ''criteria by which the first air carrier to establish service is determined'' to what airport sponsors are expected to disclose at least 30 days prior to signing a contract with a carrier.

Finally, in response to comments discussed in the *ACIP Transparency* section, and to be consistent with modifications made to that section of the policy to clarify that airport sponsors are not expected to disclose detailed air carrier incentives for specific routes in advance of signing a contract, the FAA has removed language about posting planned incentives as part of the disclosure expectations.

F. Service Frequency

The FAA received no comments on the proposed language to permit airport sponsors to allow different incentive levels for different frequencies of service

(*e.g.,* three flights per week versus five flights per week), and has maintained this language in the final policy.

The FAA has also expanded this section to describe the conditions under which an airport sponsor may choose to offer incentives for frequency increases on preexisting service, as detailed above under *Definitions.*

G. Cargo Carriers

A4A, AAAE, and DEN all expressed support for the proposed policy's clarification that it is not unjustly discriminatory for an ACIP to distinguish between passenger and cargo carriers. The FAA has maintained this language in the final policy.

H. Incentives Based on Number of Passengers or Seat-Miles

ACI–NA, along with three individual airport sponsors, expressed support for the proposed policy regarding incentives that are based on the number of passengers or seat-miles flown on new service. SAN, while supporting the proposed policy, also commented that the FAA should also consider incentives on a per passenger basis relative to the proportion of total passengers that an incentivized airline carries at the airport. A4A expressed strong opposition to these types of incentives, alleging that they violate the Airline Deregulation Act (ADA), the FAA's guiding principles on economic nondiscrimination, and the prohibition on use of airport revenues to subsidize air carriers.

The FAA believes that the underlying rationale for these types of incentives, as discussed in the proposed policy, continues to justify incentives that vary based on passengers or seat-miles flown and that, provided that ACIPs are not restricted to particular aircraft types, these types of incentives do not violate the ADA or other restrictions. In addition, the FAA notes that in many cases airport charges increase based on the size of the aircraft or number of passengers carried, and the policy limits fee reductions to the charges that an air carrier would have otherwise incurred. The FAA has made minor wording changes to this section in the final policy to improve clarity. Based on the modification to the final policy to allow incentives for frequency increases, the FAA believes that the scenario outlined by SAN in its comment would generally be consistent with the policy, subject to review of a particular incentive for discriminatory effect.

In the section on aircraft type, the FAA has clarified in the final policy that incentives based on *specific* aircraft types are unjustly discriminatory, in order to distinguish from incentives that vary based on the size of an aircraft.

I. Incentives for Upgauging

ACI–NA, AAAE, and eight individual airport sponsors expressed general support for upgauging incentives. Several of these individual airport sponsors suggested specific limitations. MCO and the Gerald R. Ford International Airport Authority (GRR) commented that incentives for upgauging should be permitted if there is a net increase in service offered. DEN suggested a minimum capacity increase threshold, such as 50 percent above the previous year, in order to qualify for an upgauging incentive and that airport sponsors should clearly designate markets that qualify. AMA similarly recommended limiting upgauging incentives to cases where the new aircraft has at least 50 percent more seats than the previous aircraft. In addition, AMA suggested restricting upgauging incentives so that upgauging cannot be the only incentive in the sponsor's ACIP, upgauging cannot be the only incentive granted to a carrier for any specific incentive period, and the carrier receiving an upgauging incentive cannot contract its schedule in order to operate fewer flights with the larger aircraft or cancel other routes to the airport during the incentive period. SAN does not take a stance on upgauging incentives, but notes that upgauging could be a useful tool for airports in the future to maximize airfield capacity.

A4A, ACI–NA, and TPA all noted that there is a link between upgauging and frequency additions on preexisting service, in that both represent capacity increases in markets that are already served, and therefore they should be treated consistently. ACI–NA and TPA asserted that incentives should be permitted in both cases. A4A stated that upgauging does not fit the definition of new service in the policy as proposed. However, A4A added that if the FAA does not adopt the previously proposed definition of new service, then A4A takes no position on whether incentives for upgauging should be permitted, as their members have different views on the issue.

The FAA agrees with the commenters that there should be consistency in the treatment of increased capacity in markets that are already served. Therefore, in the final policy, the FAA adopts similar language for upgauging as described for frequency additions above, which also incorporates many of the suggestions from AMA, DEN, GRR, and MCO. Specifically, if upgauging incentives are permitted as part of a sponsor's ACIP, those incentives are limited to one year, and cannot be the only incentive in the sponsor's ACIP. In addition, in order to receive incentives, the upgauging must result in a significant net increase in seat capacity to the airport destination involved. As in the case of incentives for frequency increases, the FAA is leaving the definition of ''significant'' to each airport sponsor to articulate in its ACIP based on local circumstances, but encourages sponsors who choose to offer incentives for upgauging to consider defining a threshold percentage increase in order to qualify for incentives. The FAA is not adopting AMA's suggested restriction that upgauging cannot be the only incentive granted to a carrier for any specific incentive period, but notes that an airport sponsor could choose to add that provision in its published ACIP if deemed appropriate for its local circumstances.

J. Legacy vs Low-Cost Carriers

The FAA received no comments regarding the proposed provision to prohibit ACIPs from targeting carriers with particular types of business models or being designed for a preferred carrier; the final policy adopts this provision as proposed with one minor clarifying change.

K. ACIP Transparency

A4A and five individual airport sponsors expressed general support for the proposed policy's provisions regarding ACIP transparency. However, several of these commenters also gave specific suggestions for modifications in this area. A4A recommended that the policy state that disclosure is a requirement rather than an expectation and that the airport sponsor be required to provide direct notification to the air carriers through their designated airport affairs representative, as posting the ACIP on the airport sponsor's public website or notifying industry trade groups may not constitute sufficient notification. A4A also recommended expansion of the provision regarding airport sponsors providing the necessary financial documentation to demonstrate that there is no cross-charging and that an ACIP has no effect on rates and charges of other aeronautical users. A4A stated that the only way to demonstrate that landing fee and terminal rental waivers meet these requirements is for the airport sponsor to include the associated landed weight and/or terminal space in the rates and charges calculation along with an associated credit for the waived fees, and also suggested the addition of language

specifying that an ACIP may not reduce payments or credits that a non-incentivized carrier would otherwise receive from the airport sponsor in the absence of the incentivized service.

While supporting most of the transparency provisions, three airport sponsors raised concerns that the proposed policy could be interpreted as calling for airport sponsors to provide advanced notice of each specific incentive agreement with an air carrier, which may be impractical and raises competitive issues. ACI–NA and several other airport sponsors also raised concerns or questions regarding this issue. While expressing general support for transparency, West Virginia International Yeager Airport (CRW) requested that the final policy clarify that the airport sponsor may negotiate and adjust the published ACIPs on a case-by-case basis (so long as the agreed-to elements of the incentives comply with the ACIP policy), depending on the needs of the airline and the airport for the new service offered.

ACI–NA, AAAE and five individual airport sponsors generally objected to the transparency policy as proposed. Most of these commenters expressed concern that the public disclosure provisions were overly burdensome, in some cases impractical, and unnecessary because the information is in many cases already publicly available or would be obtainable through a public records request. Several of these commenters suggested eliminating the transparency section entirely and allowing airport sponsors to determine what and when to disclose. ACI–NA expressed support for the public notice not being an ''absolute requirement.''

Several stakeholders also raised clarifying questions regarding the interpretation of proposed provisions regarding ACIP transparency. A4A requested clarification on whether the transparency provisions are intended to apply to air carriers as well as the public, noting potential inconsistent use of terms in the proposed policy. DEN requested clarification as to whether the policy calls for airport sponsors to post incentives actually granted under incentive agreements with carriers or incentives dispersed, since these may not be the same thing. TPA requested that the FAA provide a more specific definition of ''periodic'' in terms of how frequently airport sponsors should post listings of carriers benefiting from incentives. TPA also inquired whether full incentive agreements and the financial documentation need to be published as public notice documents.

The FAA believes that increased transparency is a necessary element in the policy, both in terms of public availability before an ACIP is implemented and disclosure once it is in effect, because the transparency helps to ensure compliance with Grant Assurances 22, 23, 24, and 25 and related policies, including Rates and Charges and Revenue Use. The policy attempts to strike a balance of setting an expectation of reasonable disclosure without being overly burdensome. The final policy largely adopts the proposed policy in this area with some clarifications.

The intent of the policy is that airport sponsors disclose the existence of an ACIP and its terms and conditions at least 30 days in advance of signing an incentive agreement with a carrier so that all carriers are aware of the existence of an incentive program and have an opportunity to participate or raise concerns. However, there is not an expectation for advance notice of a specific incentive agreement because, as noted in several comments, such notice would potentially prematurely disclose competitive commercial information. Such information would be published periodically on a retroactive basis. Therefore, the FAA has added a clause in the final policy to clarify that advance notice of specific incentive agreements is not expected as long as those agreements comply with the terms and conditions of the previously published ACIP. The FAA notes that if an airport sponsor were to adjust the published ACIP as a result of negotiations with a particular air carrier so that the terms would be different than those previously published, the FAA's expectation would be that the airport sponsor would publish the revised terms of conditions of its ACIP at least 30 days prior to signing an incentive agreement. Such a modification of the terms of an ACIP for a specific carrier without notice would potentially raise concerns of unjust discrimination.

In response to one of A4A's comments, the FAA is adding language to the third guiding principle to clarify that non-incentivized carriers may not be charged ''directly or indirectly'' for the costs of an ACIP unless all non-participating carriers agree.

The FAA remains convinced that it is appropriate for disclosure to be an expectation rather than a regulatory requirement due to the non-regulatory nature of this policy. The FAA believes that posting an ACIP on an airport sponsor's public website or providing information through appropriate industry trade groups likely provides broader notice than communicating an ACIP through the designated airport affairs representative; notification through the airport affairs representative may provide effective notice to incumbent carriers serving the airport, but may not reach potential new entrant carriers, who would also be interested parties.

Regarding A4A's comments requesting clarification, the transparency provisions are primarily intended to apply to airport sponsors disclosing information to air carriers, although the information should be available to the broadest possible universe of carriers (*i.e.,* those who currently serve the airport and those who do not). To avoid confusion, the final policy deletes the phrase ''for the public'' from the first clause of the proposed policy on ACIP transparency. In response to DEN's question about whether airport sponsors are expected to post incentives granted or actual dispersed funds, the policy does set expectations of posting the incentives granted undersigned agreements, although nothing prevents an airport sponsor from also disclosing the actual dispersed funds if the sponsor believes that doing so would provide a more complete picture. A sponsor may also have separate obligations to disclose rate information to incumbent carriers. Regarding TPA's request for a more specific definition of ''periodic,'' the FAA expects each airport sponsor to determine a reasonable frequency for publishing this information, given that a ''one size fits all'' solution is likely not appropriate as incentive programs may be utilized differently at different airports. Similarly, in response to TPA's inquiry about whether documents must be published as public notice documents, the FAA is not prescribing particular means of issuing notice and recognizes that local public information requirements may vary, but whatever means are used must be effective in advising carriers potentially eligible for or affected by the ACIP of its existence.

L. Subsidies/Third-Party Costs

ACI–NA, GRR, and the Port Authority of New York and New Jersey (PANYNJ) expressed opposition to the proposed policy's statement that ''a waiver or assumption of costs that would normally be charged by a third party (ground handling, fuel, etc.) would be considered a subsidy and is not permissible for an ACIP.'' ACI–NA commented that ''costs that would normally be charged by a third party'' has different meanings at different airports and states that the airport sponsor should be able to waive costs such as ground handling or fuel service fees under an ACIP when the sponsor is

the sole provider of those services at the airport. ACI–NA and PANYNJ suggested that airport sponsors should be able to waive fees that the sponsor charges to third parties that are then passed on to air carriers. GRR commented that several successful incentive programs have included ground handling waivers and airport sponsors should have flexibility to provide such a waiver if/when appropriate.

The final policy makes no changes to the proposed policy in this area. The FAA is concerned that permitting waivers of charges for ground handling by a commercial operator would cross a line into subsidies prohibited by the requirements for use of airport revenue. Allowing the sponsor to pay these charges would also potentially result in inequitable treatment across airports depending on whether the airport sponsor is the sole provider of ground handling services. Therefore, the final policy maintains the prohibition on including costs that are normally charged by a third party, with ''normal'' having the meaning of standard practice industrywide.

M. Airport v. Non-Airport Revenues and Technical Assistance

A4A, AAAE, ACI–NA, and five individual airport sponsors expressed general support for the FAA's proposed policy regarding distinctions between airport revenues and non-airport revenues, including the proposal that airport staff be permitted to provide certain types of technical assistance to non-airport entities regarding ACIPs that do not use airport revenue, which represents a change to the 2010 Guidebook.

A4A commented that the policy should be modified to have airport staff disclose the details of their technical assistance to the air carrier airport affairs representative (or designee), and to clarify that the policy prohibits airport staff from handling or co-mingling non-airport funds. ACI–NA, AAAE and the Cedar Rapids Airport Commission (CID) commented that the policy should not list three specific types of technical assistance that airport staff can provide, should include an expanded list, or should clarify that the list is a non-exhaustive set of examples. AAAE also commented that many of its members believe that the policy should be modified to allow airport staff to participate in decision-making processes (including voting) regarding non-airport ACIPs and/or handle non-airport funds in certain limited circumstances. CRW requested that the FAA clarify that the term ''local'' as used throughout the policy includes programs sponsored by state governments and other non-federal entities.

In the final policy, the FAA has updated references to ''local'' governments to include state and other non-federal entities. In addition, the final policy explicitly clarifies that airport staff may not have responsibility for the handling and disposition of non-airport funds. The FAA did not adopt the suggestion to set an expectation that airport staff disclose the details of their technical assistance to their air carrier airport affairs representative, as doing so could reveal confidential commercial information. The FAA believes that having airport staff participate in decision-making processes or handle non-airport funds crosses the line between technical assistance and active participation and therefore the final policy continues to prohibit these activities. The FAA also believes that it is helpful to list types of technical assistance that are permitted and notes that these are fairly broad categories that encompass the longer list of examples of technical assistance that were included in ACI–NA's comment. The final policy therefore maintains this listing. However, the FAA has added text to clarify that other similar types of technical assistance consistent with the intent and parameters of this section are also permitted.

N. Marketing Incentives

A4A, AAAE, ACI–NA, and 13 individual airport sponsors commented that the FAA's proposal to prohibit airport sponsors from transferring marketing incentive funds to a carrier was infeasible and inconsistent with industry practice for how marketing programs are executed. Several of these commenters stated that it would be impractical for airport sponsors, particularly as public entities, to execute individual contracts with marketing service providers, as called for under the proposed policy. Many commenters suggested alternate approaches that are closer to current practice and would permit airport sponsors to transfer marketing incentive funds to a carrier provided that there is appropriate documentation of the expenditures. PANYNJ suggested that in order for an airport sponsor to transfer marketing ACIP funds directly to an air carrier, the sponsor should maintain sufficient documentation that demonstrates that funds would be used only for approved marketing activities and that those funds are not transferred until after services have been rendered.

The FAA appreciates the unified insight from the industry on this issue and believes that PANYNJ's suggestion strikes an appropriate balance between practicality and ensuring that prohibited subsidies are avoided. The final policy incorporates the suggested language describing the requisite documentation to support the payment of marketing funds directly to an air carrier.

O. Incentives for Individual Travelers

The FAA received no comments regarding the proposed provision; the final policy adopts this provision as proposed.

P. Charges for Non-Participating Carriers

A4A expressed support for the proposed policy's provision that an ACIP may not increase fees charged to non-participating carriers or other aeronautical users and tenants of the airport subject to the requirement for reasonable fees under 49 U.S.C. 47107(a)(1) and Grant Assurance 22.

A4A provided a recommendation to clarify that an ACIP may not reduce payments or credits that would otherwise be received from the airport sponsor in the absence of the incentivized service because cash payments are not always provided to air carriers.

The FAA has incorporated the proposed clarification into the final policy, as this is consistent with the intent of the policy language.

Q. Self-Sustaining Rate Structure

The FAA received no comments regarding the proposed provision; the final policy adopts this provision as proposed.

R. Restart of Previous Service

AAAE, ACI–NA, PANYNJ, and SAN all expressed general support for the proposed policy's provision to permit airport sponsors to use their own discretion when choosing whether to offer incentives for a carrier to restart service that the same carrier had offered previously but cancelled due to significant external circumstances or poor route performance, with examples of the COVID–19 pandemic or the 9/11 terrorist attacks provided as circumstances where such flexibility would be helpful. A4A expressed conceptual support of the discretion to provide incentives to restart service that ended due to significant external circumstances but opposition to the inclusion of poor route performance as a justification, on the grounds that this raises concerns of unjust discrimination and potential abuse by an air carrier. A4A also recommended that the policy include specific waiting periods in

order to qualify for incentives related to the restart of service. DEN also requested more specific guidelines in this area, and expressed concern that leaving incentives for the restart of service to the discretion of individual airport sponsors may put some airports at a competitive disadvantage due to varying interpretations.

The FAA has made two modifications to the final policy as a result of the comments. The FAA's intent was that this flexibility would be exercised in the aftermath of extraordinary external events such as natural or manmade disasters, including (for example) the COVID–19 pandemic. To convey this, the final policy refers to ''extraordinary'' external circumstances rather than ''significant,'' and eliminates the reference to ''poor route performance in past years'' as a justification for an airport sponsor to offer incentives for the restart of previously cancelled service. After this adjustment, the FAA believes it is not necessary to add a specific waiting period or further guidelines regarding the implementation of incentives for the restart of previous service, given that the impact of an extraordinary external circumstance may vary depending on the event and may be quite different in different locations. Therefore, airport sponsors should have flexibility to implement such an incentive if they choose to do so based on their individual circumstances, as long as it is consistent with other provisions in the final policy (including the limits on the length of time an incentive can be in effect).

S. FAA Review of ACIPs

The proposed policy stated that the FAA will review an ACIP for compliance with an airport sponsor's Federal obligations if the airport sponsor requests such a review, but that the agency does not approve ACIPs. A4A commented that air carriers should also be permitted to request that the FAA review an airport sponsor's ACIP. HAS commented that if an airport sponsor seeks FAA's input on an ACIP, the agency should provide either approval or a detailed explanation of what specifically needs to be changed. DEN recommended that the FAA develop and implement a mechanism for airport sponsors to request formal written approval that a proposed ACIP is consistent with the five general principles of acceptable ACIPs.

The FAA agrees that it would be appropriate for an air carrier to request FAA review of an ACIP and notes that this informal review could reduce the likelihood of more formal disputes; therefore, the final policy permits a potentially affected air carrier to request FAA review of an ACIP. While the FAA does not formally approve ACIPs, the agency would provide feedback on whether the ACIP appears to be in line with Grant Assurances and will provide recommendations for modification if appropriate. The FAA also notes that ACIPs are typically reviewed as part of the agency's regular airport financial reviews.

T. Existing Incentives/Effective Date

SAN expressed support for the proposed policy's provision allowing existing ACIPs that complied with the 2010 Guidebook to sunset as programs compliant with the new policy are brought online. DEN commented that it would be better for the FAA to set a firm date when the final policy would be effective and noted that airports would need at least 60 days' notice from the date of publication of a final policy in order to provide time to revise and gain internal approval of the revised ACIP and provide the requisite 30 day notice to air carriers. PHX noted that the FAA should allow ample time for airports to respond to proposed changes and implement them, given that the ACIP guidance has remained unchanged since 2010.

The FAA recognizes DEN's comment about the logistics involved in revising an ACIP and posting it for 30 days in compliance with this policy. At the same time, FAA believes it is important to minimize the transition period. Therefore, the agency has modified the final policy so that incentive agreements contracted under ACIPs 60 days or more after the issuance date must comply with the new policy. The agency notes that any specific incentive agreements contracted prior to that point under ACIPs that were in effect prior to this new policy being issued should comply with the 2010 Guidebook and all grant assurances and other FAA policies. The FAA has also clarified that the relevant date is when the contract is signed, as the terms ''initiated'' and ''provided'' may have been unclear. Finally, the FAA has clarified that any new ACIP or modification to an existing ACIP (as opposed to a specific incentive agreement under an ACIP that was already in effect) after the issuance of this new policy must comply with the new policy (*i.e.,* without a 60-day grace period).

U. Other Topics/Miscellaneous

CRW commented that the FAA should provide clarification as to the circumstances when a sponsor can use airport funds as a SCASDP match without violating Grant Assurance 25. The relationship of SCASDP to FAA grant assurances and the Revenue Use Policy is discussed in Section C. (*Related Federal Programs*) under the Background section of this document.

CID's comments raised the question of whether those portions of the 2010 Guidebook not addressed in the updated policy will continue to apply. The FAA reiterates that the updated policy entirely supersedes the 2010 Guidebook.

A4A suggested that FAA consider developing a supplemental document, such as a frequently asked questions (FAQs) or quick reference guide, in conjunction with the final policy. The FAA will consider developing such a document on an as-needed basis.

ACI–NA requested that the FAA allow incentives based on time of day to allow airport sponsors to provide incentives to air carriers to fly at off-peak times. The FAA believes that the suggestion by ACI–NA is effectively a congestion management program using airport fees. As such, it is outside the scope of this policy.

Exhaustless, Inc., objected to what it characterizes as FAA and State interference in the open, competitive market for air transportation. Exhaustless recommended that all states, airports, cities, and any other governmental entity stop all activity to subsidize air carriers to comply with various laws and air transport agreements. The FAA notes that air service incentives are standard practice within the aviation industry, including in other countries. Incentives offered by airport sponsors are intended to be temporary and justified on the basis of unique issues associated with the start-up of new air service. No changes to the policy were adopted in response to this comment.

MWAA commented that the FAA should engage in more meaningful dialogue with airport sponsors, and that a 60-day comment period is insufficient for sponsors to provide meaningful input. The FAA disagrees with this comment and notes that the development of the draft policy included discussions with industry stakeholders. FAA chose to engage in a formal public comment process and believes that the 60-day comment period is sufficient given the scope of the policy.

IV. Availability of Documents

A. Policy Documents

You can get an electronic copy of this policy using the internet by:

(1) Searching the Federal eRulemaking portal (*www.regulations.gov*);

(2) Visiting FAA's Regulations and Policies web page at (*https://www.faa.gov/regulations_policies;* or

(3) Accessing the Government Printing Office's web page at (heep://*www.gpoaccess.gov/index.html*).

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Airport Compliance and Management Analysis, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267–3085. Make sure to identify the docket number, notice number, or amendment number of this proceeding.

B. Comments Submitted to the Docket

Comments received may be viewed by going to *https://www.regulations.gov* and following the online instructions to search the docket number for this action. Anyone is able to search the electronic form of all comments received into any of the FAA's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.).

C. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires the FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document may contact its local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the internet, visit *https://www.faa.gov/regulations_policies/rulemaking/sbre_act/.*

The Policy

In consideration of the foregoing, the FAA issues the following statement of policy on air carrier incentive programs, to supersede the *Air Carrier Incentive Program Guidebook* issued in 2010.

Air Carrier Incentive Programs

Many U.S. airport sponsors have found it beneficial to encourage new air service and new carriers at their airports by offering air carrier incentive programs (ACIPs), in the form of reductions or waivers of airport charges, and/or support for marketing new service.

ACIPs represent a limited exception to the general rule stated in Grant Assurance 22 paragraph 22.e., guaranteeing all carriers non-discriminatory and equivalent rates and charges for each carrier's category. FAA has reconciled this exception with the general rule on the understanding that a new carrier operating at an airport, or a carrier starting a new route, operates at a disadvantage with established carriers until the new service becomes known and accepted. In that sense, the carrier operating new service is not similarly situated to established carriers, and a sponsor may reduce charges to the new service carrier in some circumstances, for a limited time, without violating Grant Assurances 22, 23, 24, or 25.

In considering whether an ACIP complies with a sponsor's Federal grant agreements, the FAA will apply these general principles to the particular elements of the ACIP:

- *Discrimination between carriers participating in an ACIP and non-participating carriers must be justified and time-limited.* Differences in airport charges for carriers under an ACIP from those charged to other carriers at an airport must not be unjustly discriminatory. Differences in charges must be justified by differences in the carriers' costs of starting and marketing new service at the airport and must be temporary.
- *A sponsor may not use airport revenues to subsidize air carriers.* Using airport revenue for cash payments and other forms of subsidy for a carrier providing new service is considered revenue diversion and is therefore prohibited by grant agreements and Federal law. Fee reductions, fee waivers, and marketing assistance as incentives to new service are permitted to the extent described in the Policy and Procedures Concerning the Use of Airport Revenue.
- *A sponsor may not cross-charge non-participating carriers or other aeronautical users to subsidize ACIP carriers.* Carriers not participating in an ACIP may not be charged directly or indirectly for the costs of the ACIP or for airport costs left uncovered as a result of the reduction or waiver of charges for an ACIP carrier, unless all non-participating carriers agree.
- *The terms of an ACIP should be made public.* Publishing the intent to implement an ACIP, as well as information on how the ACIP is being used, ensures all eligible carriers are aware of the program, allows nonparticipating operators to review the potential effect of the ACIP on standard airport rates and charges, and minimizes the grounds for complaints of unjust discrimination.
- *Use of airport funds for an ACIP must not adversely affect airport operations or maintenance.* A sponsor adopting an ACIP must maintain a self-sustaining rate structure that continues to provide funds for necessary operations and maintenance responsibilities, without increasing rates charged to non-participating operators.

Guidance on particular program elements in this policy applies generally to each of those elements. For variations on those elements, or program elements not specifically addressed in this guidance, the above five principles will govern the agency's ultimate determination of whether a particular ACIP is consistent with the sponsor's AIP Grant Assurances.

I. Definitions

A. *Airport destination:* The airport receiving new service from the origin airport. Each airport within a metropolitan area may be defined as a separate airport destination for purposes of this policy.

B. *Currently:* For the purposes of this policy, ''currently'' means the time immediately prior to the signing of an incentive agreement.

C. *Incumbent Carrier:* An air carrier currently providing air service to the origin airport.

D. *New Entrant Carrier:* An air carrier that is not currently providing any air service to the origin airport.

E. *New Service:*

1. Any nonstop service to an airport destination not currently served with nonstop service from the origin airport;

2. Any service to the origin airport by a new entrant carrier; or

3. A significant increase in capacity on preexisting service to a specific airport destination.

F. *Origin airport:* The airport that is providing an incentive under an ACIP. For the purposes of this policy, the ''airport sponsor'' is the sponsor of the origin airport.

G. *Preexisting service:* Service to any airport destination that is currently served nonstop from the origin airport. An airport destination served nonstop only in one season is considered not currently served nonstop during the off-season.

H. *Seasonal Service:* Nonstop service that is offered for less than 7 months of the calendar year.

II. An ACIP May Contain Any of Several Elements That Do Not Unjustly Discriminate Against Non-Participating Carriers, Consistent With Grant Assurances 22 and 23

A. New Service v. Preexisting Service

1. Limiting an incentive to new service is not in itself unjust discrimination. Incentives for flights to an airport destination not currently served with nonstop service may be provided for up to two years.

2. New seasonal services (to an airport destination not currently served) are allowed to receive incentives for 3 seasons of service, up to 3 consecutive years from the start of the incentive.

3. Generally, new service incentives must be available to all carriers offering new service on the same basis but are subject to the distinctions permitted under other paragraphs in Section II of this policy.

a. However, airport sponsors are allowed to restrict incentives for new service if they have a limited budget. Airport sponsors are allowed to restrict incentives to one carrier if they have disclosed to all carriers that they are limiting incentives to only the first air carrier that establishes new service.

b. Airport sponsors are expected to provide public notification of the availability of an ACIP, including any limits on availability and criteria by which the first air carrier to establish service is determined, for a minimum of 30 days before signing a contract with a carrier.

B. New Entrant Carriers

1. Incentives for a new entrant carrier on nonstop service to an airport destination that is not currently served nonstop from the origin airport can be provided for up to two years.

2. Incentives can be offered to new entrant carriers for providing service to an airport destination with preexisting service, while excluding incumbent air carriers. In that case, the new entrant incentives are limited to no more than one year. After one year, the new entrant would be considered an incumbent air carrier, and similarly situated to other carriers at the airport. This applies to new entrants providing seasonal service as well as those providing year-round service.

3. Generally, new entrant incentives must be available to all new entrant carriers on the same basis. The ACIP may not select one new entrant and deny the program to another new entrant.

a. However, if an airport sponsor has a limited budget and has disclosed to all carriers that they are restricting incentives to only the first new entrant that establishes service to the origin airport, then the airport sponsor is allowed to limit incentives to one carrier.

b. Airport sponsors are expected to provide public notification of the availability of an ACIP, including any limits on availability and criteria by which the first air carrier to establish service is determined, for a minimum of 30 days before signing a contract with a carrier.

C. Service Frequency

1. It is not unjustly discriminatory to offer different levels of incentives for different frequencies of service (*i.e.,* daily versus less than daily). For example, incentives typically offered for 5 days a week service can be discounted 40% for 3 days a week service.

2. If an airport sponsor offers incentives for increased frequencies on preexisting service, these incentives are limited to no more than one year. If offered, this incentive must be made available to any carrier adding frequencies to the airport destination, regardless of whether the carrier previously provided nonstop service to that airport destination.

a. Incentives for increased frequencies on preexisting service are considered supplemental to other incentives and cannot be the only incentive in the sponsor's ACIP.

b. Incentives should only apply to the increased frequencies to the extent that those frequencies result in a significant net increase in seat capacity to the specific airport destination.

D. Cargo Carriers

1. It is not unjustly discriminatory for incentives to distinguish between passenger and cargo carriers.

E. Per-Passenger and Per-Seat Mile Incentives

1. Incentives that vary on a per passenger or per seat-mile basis are not inherently unjustly discriminatory, but the airport sponsor should ensure that the incentives offered would not be considered a subsidy and would not result in unjust discrimination against non-participating carriers.

2. The total value of fee reductions offered as an incentive on a per passenger or per seat-mile basis cannot exceed the amount of the fees that otherwise would have been incurred by a carrier for its operations at the airport.

F. Aircraft Type

1. Incentives based on specific aircraft types are unjustly discriminatory because they could unreasonably exclude certain carriers that do not operate the type of aircraft identified.

2. Incentives for upgauging, to the extent they are allowed as a significant increase in capacity on a preexisting route, must be structured to avoid limitation to a particular aircraft type or types and are limited to no more than one year.

a. Incentives for upgauging on preexisting service are considered supplemental to other incentives and cannot be the only incentive in the sponsor's ACIP.

b. Upgauging incentives should only apply to the increased capacity if there is a significant net increase in seat capacity to the specific airport destination.

G. Legacy v. Low-Cost Carriers

1. Incentives cannot target carriers with particular types of business models (*e.g.,* legacy versus low-cost carriers), nor should they be designed for a preferred carrier.

H. ACIP Transparency

1. The FAA expects airport sponsors to provide effective notification of the availability and implementation of ACIPs to both incumbent and potential new entrant carriers (*e.g.,* posting on an airport sponsor's public website; notification to industry trade groups). Information posted should include the incentives offered; the program eligibility criteria; identification of new service; and for incentives awarded, a periodic listing of all carriers benefiting from the ACIP, the incentives received, and identification of the incentivized service.

2. An airport sponsor is expected to provide effective public notice of an ACIP at least 30 days before signing an agreement with a carrier to implement an incentive.

3. Advance public notice is not expected of a specific incentive agreement with a carrier as long as the agreement is consistent with the previously publicized ACIP. Lists of specific incentive agreements should be published periodically as described in paragraph H.1.

4. To ensure transparency, an ACIP agreement should be a standalone document, consistent with the published ACIP information, and not embedded with any other agreement the airport sponsor and the carrier may enter into, such as a lease or operating agreement.

5. Airport sponsors should make information on funding for any ACIP available to all aeronautical users at the airport, and sponsors should be ready to provide the necessary financial

documentation to demonstrate that there is no cross-charging and that the program has no effect on rates and charges of other aeronautical users.

III. An ACIP May Not Include Direct or Indirect Subsidies of Air Carriers, as Prohibited by 49 U.S.C. 47133 and 49 U.S.C. 47107, and Grant Assurance 25

A. Incentives v. Subsidies

1. A subsidy occurs when airport funds flow, under all circumstances or conditionally, to a carrier with no goods or services being provided to the airport in return. For this purpose, air service is not considered a ''service'' provided to the airport. Any incentives where airport funds or assets (*e.g.,* fuel) are transferred to a carrier, directly or indirectly (*e.g.,* revenue or loan guarantees) would be regarded as prohibited subsidies.

2. A waiver of costs that an airport sponsor would otherwise charge a carrier (*e.g.,* landing fees or terminal rents) is not considered a subsidy, if for a limited duration consistent with the policies above. However, a waiver or assumption of costs that would normally be charged by a third party (ground handling, fuel, etc.) would be considered a subsidy and is not permissible for an ACIP. Incentives tied to specific customer service metrics (on-time performance, luggage delivery, etc.) are also not permissible.

B. Airport v. Non-Airport Revenues and Application to Subsidies and Other Revenue Guarantees

1. Airport sponsors are prohibited from using airport funds to subsidize air carrier operations.

2. A sponsor local government, state government, or other non-Federal airport sponsor may use non-airport funds for subsidies and other uses that would be prohibited if airport funds were used. However, any use of funds would still need to meet Grant Assurance obligations prohibiting unjust discrimination.

3. Local and state governments and community organizations not party to an AIP grant agreement, however, can use non-airport funds for incentives that would not be permissible for an obligated airport sponsor, including directing incentives toward a specific carrier and using their non-airport funds for revenue guarantees.

a. If a local or state government or community organization chooses to fund a program to support new air service using non-airport funds, those funds may not be commingled with airport funds, and airport staff may not have responsibility for the handling and disposition of non-airport funds. Any funds placed in an airport's account are treated as airport revenues. As long as community incentives are kept separate from airport funds, the community organization's funding would not be considered airport revenue and therefore not subject to its special requirements.

b. Airport staff can provide technical assistance to non-airport entities regarding ACIPs that do not use airport revenue, where the non-airport entity, and not the airport sponsor, is the agency responsible for decisions on expenditure of the funds. The role of airport staff can be advisory, but the airport staff cannot be involved in the decision-making process or handle non-airport funds. The airport staff's assistance may include:

i. Guidance on the economic viability of prospective markets;

ii. Understanding of carrier business models and aircraft performance characteristics;

iii. Information on the availability of the airport sponsor's ACIP to support the new service within the limits described in this policy;

iv. Other types of technical assistance consistent with the intent and overall parameters of this section.

C. Marketing Incentives

1. Airport sponsors are permitted to contribute to the marketing of new service, but airport funds must either flow directly to the marketing provider, or be provided to a carrier only after the carrier has paid the marketing provider and submitted an invoice to the airport for incentive-related marketing with supporting documentation.

2. A marketing program must promote use of the airport. Use of airport funds for general economic development or for marketing and promotional activities unrelated to the airport is prohibited by 49 U.S.C. 47107(k)(2)(B).

D. Incentives for Individual Travelers

1. Airport sponsors are prohibited from offering cash incentives to travelers for flying a route, as this indirectly subsidizes the carrier serving that route.

2. However, airport sponsors are allowed to offer coupons for food, parking or other benefits tied to general use of the airport, as long as the benefit is not restricted to passengers who fly a specific carrier or route.

IV. An ACIP May Not Result in an Increase in Charges for Non-Participating Carriers or Other Aeronautical Users of the Airport

A. An ACIP May Not Increase Fees Charged to Non-Participating Carriers or Other Aeronautical Users and Tenants of the Airport Subject to the Requirement for Reasonable Fees Under 49 U.S.C. 47107(a)(1) and Grant Assurance 22

1. The costs of an ACIP may not be passed on to non-participating carriers or other aeronautical users in any form. The costs of an ACIP include direct costs, such as marketing, and the general costs of airport operation and maintenance that are not covered by the carrier in an ACIP as a result of a reduction or waiver of fees.

2. An acceptable ACIP will not result in an increase in the sponsor charges to non-participating carriers, *i.e.,* on the charges that carriers would have paid in the absence of the incentivized service.

3. For an airport sponsor with a residual fee methodology, an ACIP may not reduce the residual payment to non-participating carriers each year. An ACIP may not reduce any other payments or credits that would otherwise be received from the airport sponsor in the absence of the incentivized service.

V. An ACIP May Not Adversely Affect an Airport's Self-Sustaining Rate Structure, as Required by Grant Assurance 24

A. An ACIP Must Be Funded From a Source That Not Only Does Not Increase Rates for Non-Participating Parties, But Also Does Not Involve the Use of Funds Necessary for the Proper Operation and Maintenance of the Airport

VI. FAA Oversight/Administration

A. Restart of Previous Service

1. Airport sponsors can use their own discretion when choosing whether to offer incentives for a carrier to restart service that the same carrier had offered previously but cancelled either due to extraordinary external circumstances (*e.g.,* an extreme natural, manmade, or public health crisis, such as hurricanes, terrorism, or pandemic).

2. In any event, discretion for service restart may not be used to extend an incentive beyond the limits provided in this policy.

B. FAA Review

1. The FAA does not approve ACIPs. At the request of an airport sponsor or of an air carrier potentially affected by an ACIP, the FAA will review an ACIP

for compliance with the sponsor's Federal obligations.

C. Existing, New, and Modified Incentives

1. Existing carrier incentives for which contracts are signed prior to the issuance date of this policy and up to 60 days thereafter, under programs that were in effect on the issuance date of this policy and complied with the FAA's previous policy guidance, may continue as implemented until they expire. All such existing incentives will expire within two years of the first flight that is eligible for an incentive.

2. Incentives for which contracts are signed more than 60 days after the issuance date of this policy must conform to the guidance in this policy statement.

3. Any new incentive program or modification of an existing incentive program after publication must comply with the requirements of this policy (*i.e.,* without a 60-day grace period).

Issued in Washington, DC.

Kevin C. Willis,

Director, Office of Airport Compliance and Management Analysis.

[FR Doc. 2023–26809 Filed 12–6–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2023–0087]

Petition for Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on October 10, 2023, Union Pacific Railroad (UP) petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 225 (Railroad Accidents/Incidents: Reports Classification, and Investigations). FRA assigned the petition Docket Number FRA–2023–0087.

Specifically, UP requests relief from § 225.25(h), *Recordkeeping,* which requires that a railroad post ''a listing of all injuries and occupational illnesses reported to FRA as having occurred at an establishment . . . in a conspicuous location at that establishment.'' In its petition, UP states that it ''maintains a web portal that allows employees to access and review information from internet enabled electronic devices . . . [and] includes a link to UP's posting of all injuries and occupational illnesses reported to the FRA.'' In support of its request, UP states that the digital posting allows employees to access the injury and occupational illness information quickly and easily from any location and at any time of day. Additionally, the reporting team can keep the listings up-to-date and accurate. UP also states that the listing will additionally be available on a television mounted to a wall at work locations where such screens are available, beginning with the Council Bluffs, Iowa, terminal as a pilot site. Moreover, UP notes that ''employees may also request a copy of the logs from their respective supervisor at any time.''

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov.*

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted at *www.regulations.gov.* Follow the online instructions for submitting comments.

Communications received by February 5, 2024 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacy-notice* for the privacy notice of *regulations.gov.*

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2023–26804 Filed 12–6–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[FTA Docket No. FTA 2023–0030]

Agency Information Collection Activity Under OMB Review: FTA Program Evaluation for Processes and Outcomes

AGENCY: Federal Transit Administration (FTA), Department of Transportation (DOT).

ACTION: Notice of request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the Federal Transit Administration (FTA) to request the Office of Management and Budget (OMB) to approve a new information collection titled: FTA Program Evaluation for Processes and Outcomes.

DATES: Comments must be received on or before February 5, 2024.

ADDRESSES: You may send comments, identified by docket number FTA–2023–0030, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov,* insert docket number FTA–2023–0030 in the keyword box and click ''Search.'' Next, choose the notice listed, click on the ''Comment'' button, and follow the online instructions for submitting a comment.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC, 20590–0001.
- *Hand Delivery/Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Instructions: You must include the agency name and docket number for this notice at the beginning of your comments. Submit two copies of your comments if you submit them by mail. For confirmation that FTA has received your comments, include a self-addressed stamped postcard. Note that all comments received, including any personal information, will be posted

and will be available to internet users, without change, to *https://www.regulations.gov.* You may review DOT's complete Privacy Act Statement in the **Federal Register** published April 11, 2000, (65 FR 19477), or you may visit *https://www.regulations.gov.*

Docket: For access to the docket to read background documents and comments received, go to *https://www.regulations.gov* at any time. Background documents and comments received may also be viewed at the U.S. Department of Transportation, 1200 New Jersey Avenue SE, Docket Operations, M–30, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Julianne Lee at 202–366–6597 or *julianne.lee@dot.gov.*

SUPPLEMENTARY INFORMATION: Interested parties are invited to send comments regarding any aspect of this information collection, including: (1) the necessity and utility of the information collection for the proper performance of the functions of FTA; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the collected information; and (4) ways to minimize the collection burden without reducing the quality of the collected information. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection.

Title: FTA Program Evaluation for Processes and Outcomes

OMB Number: 2132—New Information Request

Background

The Foundations for Evidence-Based Policymaking Act of 2018 (Pub. L.115–435) requires Federal agencies to develop evidence to support policymaking. Federal agencies, including FTA, must systematically collect and analyze data to assess the effectiveness and efficiency of their programs through evaluation. According to the Act, "an evaluation is an assessment, using systematic data collection and analysis, of one or more programs, policies, and/or organizations intended to assess their effectiveness and efficiency." Evidence resulting from evaluations and other evidence-building activities should be used to inform leaders about whether Federal programs and activities are achieving their intended results and contribute to improved use of data and evidence-based decision making. To effectively evaluate programs, FTA needs to collect data directly from program participants, such as State departments of transportation (DOTs), metropolitan planning organizations (MPOs), transit authorities, State and local government units, and Indian tribes, to understand their experiences and benefits of program participation. Participants may be engaged through surveys or focus groups to collect relevant data. The Office of Management and Budget (OMB) and the Government Accountability Office (GAO) strongly advocate for stakeholder engagement in evaluation design. See: OMB Memorandum M–19–23, available at: *https://www.whitehouse.gov/wp-content/uploads/2019/07/M-19-23.pdf* and OMB Memorandum M–21–27, available at: *https://www.whitehouse.gov/wp-content/uploads/2021/06/M-21-27.pdf.* To ensure alignment with ongoing efforts, this information request seeks to support FTA in meeting the Evidence Act's requirements and contribute to FTA's broader framework of evidence-based decision-making. This is a voluntary data and information collection, with no participation requirement to receive Federal benefits. The survey portion of this information collection differs from other similar efforts, such as the FTA Stakeholder Survey which targets grant recipients and inquires on customer satisfaction with a range of FTA services and knowledge of rulemaking. Current and previous information collections for grant applicants and recipients to provide routine program planning and metrics on plans and deliverables are separate from this collection. Rather, this information collection will allow FTA decision makers to understand challenges and barriers to program implementation, identify opportunities for improving program communications and outreach, and make stronger linkages between program progress and outcomes.

Title: FTA Program Evaluation for Processes and Outcomes.

OMB Control Number: 2132–New.

Forms: None.

Type of Review: New.

Respondents: State departments of transportation (DOTs) and metropolitan planning organizations (MPOs), transit authorities, States and local government units, and Indian tribes.

Estimated Annual Respondents: 1444 respondents.

Estimated Annual Number of Responses: 2166 responses.

Estimated Total Annual Burden: 5054 hours.

Frequency: Annual.

Nadine Pembleton,

Deputy Associate Administrator, Office of Administration.

[FR Doc. 2023–26839 Filed 12–6–23; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2023–0038]

Initial Decision That Certain Frontal Driver and Passenger Air Bag Inflators Manufactured by ARC Automotive Inc. and Delphi Automotive Systems LLC Contain a Safety Defect; Second Extension of Written Submission Deadline

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Second extension of deadline for written submissions in response to agency's initial decision that certain frontal driver and passenger air bag inflators manufactured by ARC Automotive Inc. and Delphi Automotive Systems LLC contain a safety defect.

SUMMARY: The original deadline for the submission of written information in response to the agency's Initial Decision was October 20, 2024. NHTSA previously extended the deadline to December 4, 2023, and is now extending the deadline a second time. The new deadline is December 18, 2023.

DATES: The written submission deadline related to the Initial Decision published on September 8, 2023, at 88 FR 62140, is extended to December 18, 2023.

ADDRESSES: You may submit written submissions to the docket number identified in the heading of this document by any of the following methods:

• *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the online instructions for submitting comments.

• *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

• *Hand Delivery or Courier:* 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

• *Fax:* 202–493–2251.

Instructions: All submissions must include the agency name and docket number. Note that all written

submissions received will be posted without change to *https://www.regulations.gov,* including any personal information provided. Please see the Privacy Act discussion below. We will consider all written submissions received before the close of business on Monday, December 18, 2023.

Docket: For access to the docket to read background documents or written submissions received, go to *https://www.regulations.gov* at any time or to 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays. Telephone: 202–366–9826.

Privacy Act: In accordance with 49 U.S.C. 30118(b)(1), NHTSA will make a final decision only after providing an opportunity for manufacturers and any interested person to present information, views, and arguments. DOT posts written submissions submitted by manufacturers and interested persons, without edit, including any personal information the submitter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 Federal Docket Management System (FDMS)), which can be reviewed at *www.transportation.gov/privacy.*

Confidential Business Information: If you wish to submit any information under a claim of confidentiality, you must submit your request directly to NHTSA's Office of the Chief Counsel. Requests for confidentiality are governed by 49 CFR part 512. NHTSA is currently treating electronic submission as an acceptable method for submitting confidential business information (CBI) to the agency under part 512. If you would like to submit a request for confidential treatment, you may email your submission to Ashley Simpson in the Office of the Chief Counsel at *Ashley.Simpson@dot.gov* or you may contact her for a secure file transfer link. At this time, you should not send a duplicate hardcopy of your electronic CBI submissions to DOT headquarters. If you claim that any of the information or documents provided to the agency constitute confidential business information within the meaning of 5 U.S.C. 552(b)(4), or are protected from disclosure pursuant to 18 U.S.C. 1905, you must submit supporting information together with the materials that are the subject of the confidentiality request, in accordance with part 512, to the Office of the Chief Counsel. Your request must include a cover letter setting forth the information specified in our confidential business information regulation (49 CFR 512.8) and a certificate, pursuant to § 512.4(b) and part 512, appendix A. In addition, you should submit a copy, from which you have redacted the claimed confidential business information, to the Docket at the address given above.

FOR FURTHER INFORMATION CONTACT: Ashley Simpson, Office of the Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; (202) 366–8726.

SUPPLEMENTARY INFORMATION: On September 5, 2023, NHTSA issued an Initial Decision That Certain Frontal Driver and Passenger Air Bag Inflators Manufactured by ARC Automotive Inc. and Delphi Automotive Systems LLC Contain a Safety Defect pursuant to 49 U.S.C. 30118(a) and 49 CFR 554.10. 88 FR 62140 (Sept. 8, 2023). More specifically, NHTSA initially determined that certain air bag inflators manufactured by ARC Automotive Inc. (ARC) and Delphi Automotive Systems LLC (Delphi) through January 2018 may rupture when the vehicle's air bag is commanded to deploy, causing metal debris to be forcefully ejected into the passenger compartment of the vehicle, and that these rupturing air bag inflators pose an unreasonable risk of serious injury or death to vehicle occupants. In accordance with 49 U.S.C. 30118(b)(1) and 49 CFR 554.10(c)(4), the Initial Decision provided manufacturers and any interested person an opportunity to present information, views, and arguments in response to the Initial Decision at a public meeting and/or by submitting written information to the Agency. The Initial Decision scheduled the public meeting for October 5, 2023 and set a deadline for written submissions of October 20, 2023. NHTSA previously extended the written submission deadline to December 4, 2023. 88 FR 73069.

To provide additional opportunity for any interested person to present information, views, and arguments in response to the Initial Decision, NHTSA is providing an additional 14 days to the period during which interested persons can provide written submissions. The prior deadline of December 4, 2023 is extended, and written submissions from any interested person are now due on or before December 18, 2023.

Authority: 49 U.S.C. 30118(a), (b); 49 CFR 554.10; delegations of authority at 49 CFR 1.50(a) and 49 CFR 501.8.

Eileen Sullivan,

Associate Administrator for Enforcement.

[FR Doc. 2023–26797 Filed 12–6–23; 8:45 am]

BILLING CODE 4910–59–P

TREASURY DEPARTMENT

Internal Revenue Service

Electronic Tax Administration Advisory Committee; Request for Nominations

AGENCY: Internal Revenue Service, Department of Treasury.

ACTION: Request for nominations.

SUMMARY: The Internal Revenue Service (IRS) is requesting applications from individuals with experience in such areas as state tax administration, cybersecurity and information security, tax software development, tax preparation, payroll and tax financial product processing, systems management and improvement, implementation of customer service initiatives, public administration, and consumer advocacy to be considered for selection as members of the Electronic Tax Administration Advisory Committee (ETAAC).

DATES: Written nominations must be received on or before Jan. 31, 2024.

ADDRESSES: Applications may be submitted via fax to 855–811–8020 or via email to *PublicLiaison@irs.gov.* Application packages are available on the IRS website at *https://www.irs.gov/etaac.* Application packages may also be requested by telephone from National Public Liaison, 202–317–4299 (not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Alec Johnston at (202) 317–4299, or send an email to *publicliaison@irs.gov.*

SUPPLEMENTARY INFORMATION: The IRS strongly encourages representatives from consumer groups with an interest in tax issues to apply.

Nominations should describe and document the proposed member's qualifications for ETAAC membership, including the applicant's knowledge of regulations and the applicant's past or current affiliations and involvement with the particular tax segment or segments of the community that the applicant wishes to represent on the committee. Applications will be accepted for current vacancies from qualified individuals and from professional and public interest groups that wish to have representation on ETAAC. Submissions must include an application and resume.

ETAAC provides continuing input into the development and implementation of the IRS organizational strategy for electronic tax administration. The ETAAC provides an organized public forum for discussion of electronic tax administration issues—such as prevention of identity theft-

related refund fraud—in support of the overriding goal that paperless filing should be the preferred and most convenient method of filing tax and information returns. ETAAC members work closely with the Security Summit, a joint effort of the IRS, state tax administrators and the nation's tax industry, to fight identity theft and refund fraud. ETAAC members convey the public's perceptions of IRS electronic tax administration activities, offer constructive observations about current or proposed policies, programs and procedures, and suggest improvements.

This is a volunteer position. Members will serve three-year terms on the ETAAC to allow for a rotation in membership and ensure different perspectives are represented. Travel expenses within government guidelines will be reimbursed. In accordance with Department of Treasury Directive 21–03, a clearance process including fingerprints, tax checks, a Federal Bureau of Investigation criminal check and a practitioner check with the Office of Professional Responsibility will be conducted.

The establishment and operation of the Electronic Tax Administration Advisory Committee (ETAAC) is required by the Internal Revenue Service (IRS) Restructuring and Reform Act of 1998 (RRA 98), title II, section 2001(b)(2). ETAAC follows a charter in accordance with the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C., app. 2. The ETAAC provides continued input into the development and implementation of the IRS's strategy for electronic tax administration. The ETAAC will research, analyze, consider, and make recommendations on a wide range of electronic tax administration issues and will provide input into the development of the strategic plan for electronic tax administration. Members will provide an annual report to Congress by June 30.

Applicants must complete the application form, which includes describing and documenting the applicant's qualifications for ETAAC membership. Applicants must submit a short one or two-page statement including recent examples of specific skills and qualifications as they relate to: cybersecurity and information security, tax software development, tax preparation, payroll and tax financial product processing, systems management and improvement, implementation of customer service initiatives, consumer advocacy and public administration. Examples of critical thinking, strategic planning and oral and written communication are desirable.

An acknowledgement of receipt will be sent to all applicants.

Equal opportunity practices will be followed in all appointments to the ETAAC in accordance with Department of Treasury and IRS policies. The IRS has a special interest in assuring that women and men, members of all races and national origins, and individuals with disabilities have an opportunity to serve on advisory committees. Therefore, IRS extends particular encouragement to nominations from such appropriately qualified individuals.

Dated: November 30, 2023.

John A. Lipold,

Designated Federal Official.

[FR Doc. 2023–26703 Filed 12–6–23; 8:45 am]

BILLING CODE P

UNIFIED CARRIER REGISTRATION PLAN

Sunshine Act Meetings—Notice of Cancellation

The Unified Carrier Registration Plan Enforcement Subcommittee has cancelled the virtual subcommittee meeting previously scheduled for December 4, 2023, 12:00 p.m. to 3:00 p.m., Eastern time.

CONTACT PERSON FOR MORE INFORMATION: Elizabeth Leaman, Chair, Unified Carrier Registration Plan Board of Directors, (617) 305–3783, *eleaman@board.ucr.gov.*

Alex B. Leath,

Chief Legal Officer, Unified Carrier Registration Plan.

[FR Doc. 2023–26999 Filed 12–5–23; 4:15 pm]

BILLING CODE 4910–YL–P

UNIFIED CARRIER REGISTRATION PLAN

Sunshine Act Meetings

TIME AND DATE: December 8, 2023, 9:00 a.m. to 3:00 p.m., Central time.

PLACE: This meeting will take place at the Hyatt Place San Antonio/Riverwalk Hotel, 601 S St. Mary's Street, San Antonio, TX 78205. The meeting will also be accessible via conference call and via Zoom Meeting and Screenshare. Any interested person may call (i) 1–929–205–6099 (U.S. Toll) or 1–669–900–6833 (U.S. Toll), Meeting ID: 934 8621 6961, to listen and participate in this meeting. The website to participate via Zoom Meeting and Screenshare is *https://kellen.zoom.us/meeting/register/tJcpf--qrz0jHNWJD7And5d9JryuJmFkf-nH.*

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED: The Unified Carrier Registration Plan Enforcement Subcommittee (the ''Subcommittee'') will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement. The subject matter of this meeting will include:

Proposed Agenda

I. Call to Order—UCR Enforcement Subcommittee Chair

The Subcommittee Chair will welcome attendees, call the meeting to order, call roll for the Subcommittee, confirm whether a quorum is present, and facilitate self-introductions.

II. Verification of Publication of Meeting Notice—UCR Executive Director

The UCR Executive Director will verify the publication of the meeting notice on the UCR website and distribution to the UCR contact list via email followed by the subsequent publication of the notice in the **Federal Register**.

III. Review and Approval of Subcommittee Agenda and Setting of Ground Rules—UCR Enforcement Subcommittee Chair

For Discussion and Possible Subcommittee Action

The Subcommittee Agenda will be reviewed, and the Subcommittee will consider adoption.

Ground Rules

➢ Subcommittee action only to be taken in designated areas on agenda

IV. Review and Approval of Subcommittee Minutes From the March 2, 2023 Meeting—UCR Enforcement Subcommittee Chair

For Discussion and Possible Subcommittee Action

Draft minutes from the March 2, 2023 Subcommittee meeting via teleconference will be reviewed. The Subcommittee will consider action to approve.

V. Discussion on Awarding of Annual UCR Enforcement Awards and Award Criteria—UCR Enforcement Subcommittee Chair, UCR Enforcement Subcommittee Vice-Chair

For Discussion and Possible Subcommittee Action

The Subcommittee Chair will lead a discussion on the prospect of awarding

annual UCR Enforcement Awards. Award criteria could include best enforcement efficiency rate, most violations issued overall, and an annual award to the inspector who issues the most UCR violations. The Subcommittee may take action to recommend the implementation of an awards program to the Board of Directors.

VI. Discussion of Biannual Enforcement Blitzes—UCR Enforcement Subcommittee Chair and UCR Enforcement Subcommittee Vice-Chair

For Discussion and Possible Subcommittee Action

The Subcommittee Vice-Chair will lead a discussion concerning the possible implementation of a biannual enforcement blitz. The blitz would target UCR enforcement in both participating and non-participating states, with a weeklong voluntary blitz to occur at the beginning of each registration year. Those states/agencies who issue UCR violations but do not upload inspections to the NRS would be provided forms to submit enforcement data. The subcommittee may take action to recommend an enforcement blitz to the Board of Directors.

VII. Discussion of Roadside Enforcement for Carriers Who Are Under-Registered—UCR Enforcement Subcommittee Chair, UCR Enforcement Subcommittee Vice-Chair, and Representatives From Seikosoft

The Subcommittee Vice-Chair will lead a discussion on the possibility of roadside enforcement for motor carriers who are identified as under-registered.

VIII. Enforcement Training PowerPoint Development—UCR Enforcement Subcommittee Chair, UCR Enforcement Subcommittee Vice-Chair

The Subcommittee Chair will provide an update on the progress of the creation of the enforcement training PowerPoint.

IX. Other Business—UCR Enforcement Subcommittee Chair

The Subcommittee Chair will call for any other items Subcommittee members would like to discuss.

X. Adjournment—UCR Enforcement Subcommittee Chair

The Subcommittee Chair will adjourn the meeting.

The agenda will be available no later than 5:00 p.m. Eastern time, November 30, 2023 at: *https://plan.ucr.gov.*

CONTACT PERSON FOR MORE INFORMATION: Elizabeth Leaman, Chair, Unified Carrier Registration Plan Board of Directors, (617) 305–3783, *eleaman@board.ucr.gov.*

Alex B. Leath,

Chief Legal Officer, Unified Carrier Registration Plan.

[FR Doc. 2023–27000 Filed 12–5–23; 4:15 pm]

BILLING CODE 4910–YL–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–NEW]

Agency Information Collection Activity under OMB Review: Servicemembers' Group Life Insurance—Spouse Coverage (FSGLI) Election and Certificate Form

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain,* select ''Currently under Review—Open for Public Comments'', then search the list for the information collection by Title or ''OMB Control No. 2900–NEW.''

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20420, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–NEW'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: Public Law 104–13; 44 U.S.C. 3501–3521.

Title: Service Members' Group Life Insurance—Spouse Coverage (FSGLI) Election and Certification Form SGLV 8286A.

OMB Control Number: 2900–NEW.

Type of Review: New collection.

Abstract: Family Servicemembers' Group Life Insurance (FSGLI) provides insurance coverage to spouses of Servicemember's Group Life Insurance (SGLI) insured individuals. SGLI and all associated insurance programs are VA benefits. The SGLV 8286A form is used by Service Members and their spouses when the Service Member is unable to access their Servicemembers Group Life Insurance Online Enrollment System (SOES) account to electronically elect, increase, decrease or decline coverage. If the member is increasing or electing coverage on their spouse after prior declination or reduction and the spouse has health issues, the member's uniformed service reviews the request and sends to the primary insurer for the SGLI program, The Prudential Insurance Company of America (Prudential), through its' Office of Servicemembers' Group Life Insurance (OSGLI), to underwrite and make a decision on coverage. This form ensures members, and their spouses can continue to use the form to manage their FSGLI spousal benefits.

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 190 on October 3, 2023, pages 68287–68288.

Affected Public: Individuals or Households.

Estimated Annual Burden: 267 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 1,600.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023–26872 Filed 12–6–23; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

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Part II

Department of Transportation

Federal Highway Administration

23 CFR Part 490

National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 490

[FHWA Docket No. FHWA–2021–0004]

RIN 2125–AF99

National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure

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

ACTION: Final rule.

SUMMARY: This final rule amends FHWA's regulations governing national performance management measures and establishes a method for the measurement and reporting of greenhouse gas (GHG) emissions associated with transportation (GHG measure). It requires State departments of transportation (State DOT) and metropolitan planning organizations (MPO) to establish declining carbon dioxide (CO_2) targets for the GHG measure and report on progress toward the achievement of those targets. The rule does not mandate how low targets must be. Rather, State DOTs and MPOs have flexibility to set targets that are appropriate for their communities and that work for their respective climate change and other policy priorities, as long as the targets aim to reduce emissions over time. The FHWA will assess whether State DOTs have made significant progress toward achieving their targets.

DATES: This final rule is effective January 8, 2024.

FOR FURTHER INFORMATION CONTACT: Mr. John G. Davies, Office of Natural Environment, (202) 366–6039, or via email at *JohnG.Davies@dot.gov,* or Mr. Lev Gabrilovich, Office of the Chief Counsel, (202) 366–3813, or via email at *Lev.Gabrilovich@dot.gov.* Office hours are from 8 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This document, the notice of proposed rulemaking (NPRM), all comments received, and all supporting material may be viewed online at *www.regulations.gov* using the docket number listed above. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at *www.federalregister.gov* and the Government Publishing Office's website at *www.GovInfo.gov.*

I. Executive Summary

The FHWA is amending its regulations on national performance management measures at 23 CFR part 490 (part 490) and establishing a method for the measurement and reporting of GHG emissions. The environmental sustainability, and specifically the carbon footprint, of the transportation system is a critically important attribute that State DOTs can and should use to assess the performance of the Interstate and non-Interstate NHS. Section 150(c) of Title 23, U.S.C., clearly directs FHWA to establish performance measures that the State DOTs can use to assess performance of the Interstate and non-Interstate NHS. Although the statute does not define the meaning of ''performance'' of the Interstate and non-Interstate NHS under 23 U.S.C. 150(c), Congress identified national goals under 23 U.S.C. 150(b), which include environmental sustainability. *See* 23 U.S.C. 150(b)(6). To support the environmental sustainability national goal, FHWA is interpreting ''performance'' of the Interstate System and non-Interstate NHS under 23 U.S.C. 150(c) to include the system's environmental performance. This definition of ''performance'' is also consistent with other Title 23, U.S.C. provisions, such as 23 U.S.C. 119, discussed later in this preamble.

The GHG measure established in this rule is the same as the measure proposed in the NPRM, which is the percent change in on-road tailpipe CO_2 emissions on the NHS relative to the reference year. The FHWA is finalizing a reference year of 2022 as part of this rule. The measure is part of the National Highway Performance Program (NHPP) performance measures that FHWA established in part 490 through prior rulemakings. The GHG measure requires State DOTs and MPOs that have NHS mileage within their State geographic boundaries and metropolitan planning area boundaries, respectively, to establish declining targets for reducing CO_2 emissions [1] generated by on-road mobile sources. The regulation uses ''NHS'' to mean the mainline highways of the NHS, consistent with the applicability of the measure described in § 490.503(a)(2). Consistent with the Transportation Performance Management (TPM) framework, State DOTs will establish 2- and 4-year statewide emissions reduction targets, and MPOs will establish 4-year emissions reduction targets for their metropolitan planning areas. In addition, the rule will require certain MPOs serving UZAs with populations of 50,000 or more to establish additional joint targets. Specifically, when the metropolitan planning area boundaries of two or more MPOs overlap any portion of an UZA, and the UZA contains NHS mileage, those MPOs will establish joint 4-year targets for that UZA. This joint target will be established in addition to each MPO's target for their metropolitan planning area. State DOTs and MPOs have the flexibility to set targets that work for their respective climate change policies and other policy priorities, so long as they are declining. The State DOTs and MPOs are also required to report on their progress in meeting the targets. The final rule applies to the 50 States, the District of Columbia, and Puerto Rico, consistent with the definition of the term ''State'' in 23 U.S.C. 101(a). To realize the benefits of a GHG measure as soon as is practicable, State DOTs will first establish targets and report those targets by February 1, 2024, and subsequent targets will be established and reported no later than October 1, 2026, with biennial reports thereafter.

The GHG measure will help the United States (U.S.) confront the increasingly urgent climate crisis. The Sixth Assessment Report by the Intergovernmental Panel on Climate Change (IPCC), released on August 7, 2021, confirms that human activities are increasing GHG concentrations that have warmed the atmosphere, ocean, and land at a rate that is unprecedented in at least the last 2000 years.[2] Changes in extreme events, along with anticipated future increases in the occurrence and severity of these events because of climate change, threaten the reliability, safety, and efficiency of the transportation system and the people who rely on it to move themselves and transport goods. At the same time,

[1] The proposed GHG measure specifically applies to CO_2 emissions, which is the predominant human-produced GHG. CO_2 is also the predominant GHG from on-road mobile sources, accounting for approximately 97 percent of total GHG emissions weighted by global warming potential in 2021. See U.S. Environmental Protection Agency, 2023: Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2021, table 2–13, available at *https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks-1990-2021.*

[2] *See* IPCC, 2021: Summary for Policymakers. In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, available at *https://www.ipcc.ch/report/ar6/wg1/#SPM.*

transportation contributes significantly to the causes of climate change,[3] representing the largest source of U.S. CO_2 emissions, and each additional ton of CO_2 produced by the combustion of fossil fuels contributes to future warming and other climate impacts.

The GHG measure aligns with Executive Orders (E.O.) described later in this preamble and supports the U.S. target of reducing GHG emissions 50–52 percent below 2005 levels in 2030, on course to reaching net-zero emissions economywide no later than 2050.[4] As a matter of transportation policy, DOT considers the GHG measure essential to improve transportation sector performance and demonstrate Federal leadership in the assessment and disclosure of climate pollution. The first step toward reducing GHG emissions involves inventorying and monitoring those emissions. By providing consistent and timely information about on-road mobile source emissions on the NHS, the GHG measure has the potential to increase public awareness of GHG emissions trends, improve the transparency of transportation decisions, enhance decisionmaking at all levels of government, and support better informed planning choices to reduce GHG emissions or inform tradeoffs among competing policy choices.

Furthermore, the rule responds to the direction in sections 1 and 2 of E.O. 13990 (86 FR 7037) that Federal agencies review any regulations issued or similar actions taken between January 20, 2017, and January 20, 2021, and, consistent with applicable law, take steps to address any such actions that conflict with the national objectives set forth in the order to address climate change. The FHWA reviewed its 2018 final rule (83 FR 24920, May 31, 2018) that repealed a GHG measure FHWA adopted in 2017 (2017 GHG measure) and determined that the repeal conflicts with those objectives.

After reviewing the 2018 final rule, FHWA has reconsidered its position that the Agency's authority to promulgate the 2017 final rule reflected a ''strained reading of the statutory language in section 150.'' 83 FR at 24923. The FHWA now concludes, as it did when establishing a GHG measure in the 2017 PM3 final rule, that it has the legal authority to establish the GHG measure under 23 U.S.C. 150. Specifically, FHWA is clearly directed under 23 U.S.C. 150(c)(3)(A)(ii)(IV)–(V) to establish measures for States to use to assess the performance of the Interstate System and non-Interstate NHS. Although the statute does not define performance, 23 U.S.C. 150(b)(6) identifies environmental sustainability as a national goal of the Federal-aid highway program, and Congress, in 23 U.S.C. 150(a), has declared that performance management, including the use of performance measures, is key to meeting the national goals of section 150(b). To address the national goal of environmental sustainability, FHWA has determined that the performance of the Interstate System and the NHS under 23 U.S.C. 150(c)(3)(A)(ii)(IV)–(V) logically includes environmental performance. The GHG measure is also appropriate in light of other provisions of Title 23, U.S.C., notably the NHPP provisions at 23 U.S.C. 119, which include requirements for State asset management plans that support progress toward the achievement of the national goals identified in 23 U.S.C. 150(b), including the national goal to enhance the performance of the transportation system while protecting and enhancing the natural environment at 23 U.S.C. 150(b)(6), and include a risk management analysis that specifically addresses extreme weather and resilience. *See* 23 U.S.C. 119(e)(2) and (e)(4)(D). This reconsideration is discussed in detail in section III.B in the NPRM, *see* 87 FR 42407–42410, and section III below.

The regulatory impact analysis (RIA) prepared pursuant to E.O. 12866, as amended by E.O. 14094, is available in the rulemaking docket (Docket No. FHWA–2021–0004). The RIA estimates the costs associated with establishing the GHG measure, derived from the costs of implementing the GHG measure for each component of the rule that may involve costs. To estimate the costs, FHWA assessed the level of effort that would be needed to comply with each applicable section in part 490 with respect to the GHG measure, including labor hours by labor category, over a 10-year study period (2023–32). Total costs over this period are estimated to be $10.8 million, discounted at 7 percent, and $12.7 million, discounted at 3 percent. The RIA also discusses anticipated benefits of the rule qualitatively because the anticipated quantitative benefits are difficult to forecast and monetize. These benefits include: (1) more-informed decision-making through the creation of complete, consistent, and timely information on GHG emissions; (2) greater accountability through the establishment of a more highly visible and transparent performance reporting system; and (3) improved progress toward achieving national transportation goals by including declining targets for CO_2 emissions on the NHS in the set of existing performance requirements designed to help the Federal-aid highway program support balanced performance outcomes and national climate policies.

II. Background and Regulatory History

The 2012 Moving Ahead for Progress in the 21st Century Act (MAP–21) (Pub. L. 112–141) and the 2015 Fixing America's Surface Transportation (FAST Act) (Pub. L. 114–94) transformed the Federal-aid highway program by establishing performance management requirements and tasking FHWA with carrying them out. To implement this program, FHWA established an organizational unit with dedicated full-time staff to coordinate with program staff from each of the performance areas to design and establish an approach to effectively implement the Title 23 performance provisions. The FHWA has technical and policy experts on staff to assist State DOTs and MPOs with implementing performance management and oversee program requirements. The FHWA implemented this performance management network through multiple rulemakings, which established in 23 CFR part 490 the performance measures and requirements for target establishment, reporting on progress, and how determinations would be made on whether State DOTs have made significant progress toward applicable targets.

The TPM requirements provide increased accountability and transparency, and facilitate efficient investment of Federal transportation funds through a focus on performance outcomes for the seven national

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[3] Jacobs, J.M., M. Culp, L. Cattaneo, P. Chinowsky, A. Choate, S. DesRoches, S. Douglass, and R. Miller, 2018: Transportation. In Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, pp. 479–511. doi: 10.7930/NCA4.2018.CH12.

[4] White House Fact Sheet: The Biden-Harris Electric Vehicle Charging Action Plan (December 13, 2021), available at *https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/13/fact-sheet-the-biden-harris-electric-vehicle-charging-action-plan/;* White House Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies (Apr. 22, 2021), available at *https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/;* White House Fact Sheet: President Biden's Leaders Summit on Climate (Apr. 23, 2021), available at *https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/23/fact-sheet-president-bidens-leaders-summit-on-climate/.*

transportation goals concerning safety, infrastructure condition, congestion reduction, system reliability, freight movement and economic vitality, environmental sustainability, and reduced project delivery delays. *See* 23 U.S.C. 150(b). Through performance management, recipients of Federal-aid highway funds make transportation investments to achieve short-term performance targets and make progress toward the seven statutory national transportation goals. Performance management allows FHWA to more effectively evaluate and report on the Nation's surface transportation conditions and performance.

Prior to MAP–21, there were no explicit statutory requirements for State DOTs or MPOs to demonstrate how their transportation programs supported national performance outcomes, making it difficult to assess the effectiveness of the Federal-aid highway program. The TPM requirements established in MAP–21 changed this paradigm by requiring State DOTs and MPOs to measure condition or performance, establish targets, assess progress toward targets, and report on condition or performance in a nationally consistent manner for the first time. *See* 23 U.S.C. 150(e); 23 CFR 490.107. As previously noted, FHWA conducted several rulemakings implementing the performance management framework. Most relevant to this proposed rule are three related national performance management measure rulemakings in which FHWA established various measures for State DOTs and MPOs to use to assess performance, found at 23 CFR part 490. The first rulemaking focused on Safety Performance Management (PM1), and a final rule published on March 15, 2016 (81 FR 13882), established performance measures for State DOTs to use to carry out the Highway Safety Improvement Program (HSIP). The second rulemaking on Infrastructure Performance Management (PM2) resulted in a final rule published on January 18, 2017 (82 FR 5886), that established performance measures for assessing pavement condition and bridge condition for the NHPP. The third rulemaking, System Performance Management (PM3), established measures for State DOTs and MPOs to use to assess the performance of the Interstate and non-Interstate NHS for the purpose of carrying out the NHPP; to assess freight movement on the Interstate System; and to assess traffic congestion and on-road mobile source emissions for the purpose of carrying out the Congestion Mitigation and Air Quality (CMAQ) Program. The PM3 final rule was published on January 18, 2017 (82 FR 5970). The PM3 rule addressed a broad set of performance issues and some of the national transportation goals, such as environmental sustainability, that were not addressed in the earlier rulemakings focused solely on safety and infrastructure condition. In the preamble to the PM3 proposed rule, published on April 22, 2016 (81 FR 23806), FHWA requested public comment on whether to establish a CO_2 emissions measure in the final rule and, if so, how to do so. The FHWA acknowledged the contribution of on-road sources to over 80 percent of U.S. transportation sector GHG emissions, and the historic Paris Agreement in which the U.S. and more than 190 other countries agreed in December 2015 to reduce GHG emissions, with the goal of limiting global temperature rise to less than 2 degrees Celsius above pre-industrial levels by 2050. The FHWA recognized that achieving U.S. climate goals would require significant GHG reductions from on-road transportation sources. *See* 81 FR 23830. Against this backdrop, FHWA stated that it was considering how GHG emissions could be estimated and used to inform planning and programming decisions to reduce long term emissions. The FHWA sought comment on the potential establishment and effectiveness of a GHG emissions measure as a planning, programming, and reporting tool, and FHWA requested feedback on specific considerations related to the design of such a measure. *See* 82 FR 23831.

In the PM3 final rule, after considering extensive public comments on whether and how FHWA should establish such a measure, FHWA established a GHG emissions performance measure to measure environmental performance in accordance with 23 U.S.C. 150(c)(3). The measure involved the percent change in CO_2 emissions from the reference year 2017, generated by on-road mobile sources on the NHS. After a change in Administration, FHWA repealed the 2017 GHG measure before the respective due dates for target setting or reporting. On October 5, 2017 (82 FR 46427), FHWA proposed to repeal the 2017 GHG measure. The FHWA requested public comment on whether to retain or revise the 2017 GHG measure. *See* 82 FR 46430. In light of policy direction at the time to review existing regulations to determine whether changes would be appropriate to eliminate duplicative regulations, reduce costs, and streamline regulatory processes, and after considering public comments received, on May 31, 2018 (83 FR 24920), FHWA repealed the GHG measure, effective on July 2, 2018. The FHWA identified three main reasons for the repeal: (1) reconsideration of the underlying legal authority; (2) the cost of the GHG measure in relation to the lack of demonstrated benefits; and (3) potential duplication of information produced by the GHG measure and information produced by other initiatives related to measuring CO_2 emissions.

On July 15, 2022 (87 FR 42401), FHWA published a NPRM to establish a GHG measure. After reconsidering the arguments for the 2018 final rule and finding them lacking, FHWA proposed to require State DOTs and MPOs that have NHS mileage within their State geographic boundaries and metropolitan planning area boundaries, respectively, to establish declining targets for reducing CO_2 emissions generated by on-road mobile sources, that align with the Administration's target of net-zero emissions, economy-wide, by 2050, accordance with the national policy established under section 1 of E.O. 13990, ''Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis'', section 201 of E.O. 14008, ''Tackling the Climate Crisis at Home and Abroad'', and at the Leaders Summit on Climate. Under the proposed rule, State DOTs would establish 2- and 4-year statewide emissions reduction targets, and MPOs would establish 4-year emissions reduction targets for their metropolitan planning areas. In addition, FHWA proposed to require MPOs serving select UZA to establish additional joint targets. The term ''urbanized area'' means a geographic area with a population of 50,000 or more, as designated by the Bureau of the Census. *See* 23 U.S.C. 101(a)(36); 23 CFR 450.104. The NPRM specified that when the metropolitan planning area boundaries of two or more MPOs overlap any portion of the same UZA, and the UZA contains NHS mileage, those MPOs would establish joint 4-year targets for that UZA. This joint target would be established in addition to each MPO's target for their metropolitan planning area. Further, FHWA proposed to require State DOTs and MPOs to set declining targets for reducing tailpipe CO_2 emissions on the NHS. Under the NPRM, State DOTs and MPOs would have the flexibility to set targets that work for their respective climate change policies and other policy priorities, so long as they aligned with the goal of net-zero GHG emissions, economy-wide, by 2050. The FHWA also proposed to require State DOTs and MPOs to report on their progress in

meeting the targets. The FHWA identified that the proposed rule would apply to the 50 States, the District of Columbia, and Puerto Rico, consistent with the definition of the term ''State'' in 23 U.S.C. 101(a). The FHWA now finalizes the proposed measure with some modifications.

III. Statutory Authority for Performance Management and the GHG Measure

The FHWA is establishing the GHG emissions performance measure under 23 U.S.C. 150(c)(3), which calls for FHWA to establish performance measures that the States can use to assess performance of the Interstate and non-Interstate NHS for the purpose of carrying out the NHPP under 23 U.S.C. 119. *See* 23 U.S.C. 150(c)(3)(A)(ii)(IV)–(V). The FHWA received many comments both in support and in opposition to the Agency's authority to promulgate this rulemaking. After considering these comments, FHWA reaffirms that Congress provided FHWA with clear authority to develop performance measures to help State DOTs and MPOs address significant and long-term issues impacting the performance of the transportation system. These comments and FHWA's response are further discussed in Section VII of this preamble.

The FHWA has determined that measuring environmental performance of the Interstate and non-Interstate NHS is vital to meeting the Agency's obligations under 23 U.S.C. 150. As discussed in the NPRM, Congress charged FHWA with establishing performance measures, but did not define the term ''performance,'' as used in 23 U.S.C. 150(c)(3). Thus, FHWA must interpret this term in the context of the statute, FHWA's statutory authority in Title 23, U.S.C., to administer the Federal-aid highway program, and congressional intent. Accordingly, FHWA is interpreting ''performance'' of the Interstate System and non-Interstate NHS under 23 U.S.C. 150(c) to include the system's environmental performance, consistent with the program's statutorily mandated goal to enhance the performance of the transportation system while protecting and enhancing the natural environment. *See* 23 U.S.C. 150(b). As described further in this preamble, FHWA interprets this national goal to mean that the Agency should take reasonable steps to assist State DOTs and MPOs measure and evaluate the GHG emissions on the Interstate and non-Interstate NHS. The FHWA's interpretation of performance under 23 U.S.C. 150(c) is consistent with 23 U.S.C. 119(e), which calls for State DOTs to develop a performance-driven asset management plan that would ''support progress toward the achievement of the national goals identified in section 150(b).'' 23 U.S.C. 119(e)(2). In addition, 23 U.S.C. 119(b) provides the purposes of the NHPP, which include supporting the condition and performance of the NHS, supporting construction of new facilities on the NHS, ensuring investments of Federal-aid funds in highway construction are directed to support progress toward the achievement of performance targets established in a State asset management plan, and supporting activities to increase the resiliency of the NHS to mitigate the cost of damages from sea level rise, extreme weather events, flooding, wildfires, or other natural disasters. Assessing environmental performance provides support for activities to increase the resiliency of the NHS to mitigate the cost of damages from sea level rise, extreme weather events, flooding, wildfires, or other natural disasters.

Importantly, FHWA does not believe its authority in this area is unlimited. Since 23 U.S.C. 150(c)(3)(A)(ii)(IV)–(V) refers only to the performance of the Interstate System and the non-Interstate NHS, FHWA only has authority to apply this measure to the Interstate System and the non-Interstate NHS. In addition, FHWA is only requiring that State DOTs and MPOs establish declining targets for GHG emissions on the NHS. The FHWA is neither requiring any specific targets nor mandating any penalties for failing to achieve these targets. The measure and the associated targets are intended only to help State DOTs and MPOs consistently and transparently monitor the current performance of the NHS, and plan transportation projects in a way that protects the long-term performance of the NHS.

As described in the NPRM, *see* 87 FR 42408, Congress specifically directed FHWA to establish measures for States to use to assess the performance of the Interstate System and the non-Interstate NHS. *See* 23 U.S.C. 150(c)(3)(A)(ii)(IV)–(V). Although Congress did not define the meaning of performance under this provision, the statute identifies seven national goals to inform performance management. Environmental sustainability is one of the specifically identified goals, which is defined as ''enhanc[ing] the performance of the transportation system while protecting and enhancing the natural environment.'' 23 U.S.C. 150(b)(6). Congress directed FHWA to determine the nature and scope of the specific performance measures that will fulfill the statutory mandate in 23 U.S.C. 150(c), and has not clarified this authority even after FHWA finalized the three national performance management measure rulemakings described earlier. The FHWA notes that 23 U.S.C. 150(c)(2)(C) limits performance measures to those described in 23 U.S.C. 150(c). When FHWA repealed the GHG performance measure, the Agency took an unduly narrow view and determined that since 23 U.S.C. 150(c)(2)(C) directs FHWA to limit performance measures only to those described in 23 U.S.C. 150(c), FHWA's previous interpretation that performance of the Interstate System and the National Highway System under 23 U.S.C. 150(c)(3)(A)(ii)(IV)–(V) includes environmental performance was overly broad. As FHWA described in the NPRM, *see* 87 FR 42408, this provision limits FHWA's authority to establish measures States use to assess performance only to the Interstate System and the non-Interstate NHS. However, the provision does not otherwise limit the meaning of ''performance,'' and upon reconsideration, FHWA has determined that its original interpretation of the scope of its section 150(c) authority from the 2017 final rule is the better read of the statute. Specifically, in light of the explicit statutory goal of environmental sustainability, the significant risks that climate change-driven extreme weather pose to the condition and performance of NHS, and FHWA's unquestioned authority to establish performance measures, FHWA believes that it is appropriate to interpret the meaning of performance of the Interstate System and the non-Interstate NHS under 23 U.S.C. 150(c)(3)(A)(ii)(IV)–(V) to include environmental performance.

As described in the NPRM and previously discussed in this preamble, this GHG measure is consistent with other parts of Title 23, U.S.C., notably 23 U.S.C. 119. Section 119(d)(1) of Title 23, U.S.C., establishes eligibility criteria for using funds apportioned to a State for carrying out the NHPP, but does not set forth all relevant considerations for carrying out the program. For example, 23 U.S.C. 119(d)(2) identifies purposes for eligible projects, including development and implementation of a State DOT's asset management plan for the NHS under 23 U.S.C. 119(e), and environmental mitigation efforts related to projects funded under 23 U.S.C. 119(g). Section 119(e) calls for a performance-driven asset management plan that would ''support progress toward the achievement of the national goals identified in Section 150(b)'',

which includes the environmental sustainability national goal under 23 U.S.C. 150(b)(6). Risk-based asset management planning under 23 U.S.C. 119(e) includes consideration of life-cycle costs and risk management, financial planning, and investment strategies. Rapidly changing climate and increased weather extremes because of fossil fuel combustion directly impact the condition and performance of transportation facilities because of increases in heavy precipitation, coastal flooding, heat, wildfires, and other extreme events. Extreme events are already leading to transportation challenges, inducing societal and economic consequences, which will only increase in the years ahead. The number of billion-dollar climate disaster events has been much higher over the last 5 years than the annual average over the last 30 years.[5] Low-income and vulnerable populations are disproportionately affected by the impacts of climate change.[6] These impacts are not attributable to any single action, but are exacerbated by a series of actions, including actions taken under the Federal-aid highway program. Recognizing the need to plan for and consider the risks of extreme weather, Congress amended the requirements for States' asset management plans under 23 U.S.C. 119(e) to include lifecycle cost and risk management analyses that specifically consider extreme weather and resilience. *See* 23 U.S.C. 119(e)(4)(D) (as amended by Pub. L. 117–58, sec. 11105). Measuring environmental performance through the GHG performance measure will assist States in considering CO_2 emissions from transportation in the performance management framework, including the impact of CO_2 emissions on the medium- and long-term conditions of transportation assets arising from the risks of, and costs related to extreme weather, and help frame responses to the growing climate crisis. Therefore, the GHG performance measure is appropriate in light of 23 U.S.C. 119, and FHWA has determined that the Agency's interpretation of ''performance'' to include ''environmental performance'' is consistent with 23 U.S.C. 119.

As FHWA noted in the NPRM, several other provisions in Title 23, U.S.C., support FHWA's authority for its proposal to address GHG emissions in this rulemaking. To help conceptualize FHWA's framework for analyzing its authority under Title 23, U.S.C., this preamble restates these provisions as follows:

- In Section 101(b)(3)(G), Congress declared that ''transportation should play a significant role in promoting economic growth, improving the environment, and sustaining the quality of life.''
- Section 134(a)(1) states as a matter of transportation planning policy that ''[i]t is in the national interest to encourage and promote the safe and efficient management, operation, and development of surface transportation systems . . . while minimizing transportation-related fuel consumption and air pollution through metropolitan and statewide transportation planning processes identified in this chapter.''
- Section 134(c)(1) requires MPOs to develop long range plans and transportation improvement programs to achieve the objectives in 23 U.S.C. 134(a)(1) through a performance-driven, outcome-based approach to planning.
- Section 134(h) defines the scope of the metropolitan planning process. Paragraphs (h)(1)(E) and (I), respectively, require consideration of projects and strategies that will ''. . . protect and enhance the environment, promote energy conservation, improve the quality of life . . .'' and ''. . . improve the resiliency and reliability of the transportation system . . .''.
- Section 135(d)(1) defines the scope of the statewide planning process. Paragraphs (d)(1)(E) and (I), respectively, require consideration of projects, strategies, and services that will ''. . . protect and enhance the environment, promote energy conservation, improve the quality of life . . .'', and ''. . . improve the resiliency and reliability of the transportation system . . .''.
- Section 135(d)(2) requires the statewide transportation planning process to ''. . . provide for the establishment and use of a performance-based approach to transportation decision-making to support the national goals described in Section 150(b) of this title . . .''.

The FHWA reaffirms that these Title 23, U.S.C., provisions make it clear that assessing infrastructure performance under 23 U.S.C. 150(c)(3) properly encompasses the assessment of environmental performance, including GHG emissions and other climate-related matters. As noted in FHWA's May 2018 repeal of the 2017 GHG measure, nothing in the statute specifically requires FHWA to adopt a GHG emissions measure. However, consistent with the statutory provisions cited above, no provision of law prohibits FHWA from adopting a GHG emissions measure, despite ample opportunity for Congress to do so.

On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117–58, also known as the ''Bipartisan Infrastructure Law'') (BIL) into law. The BIL does not explicitly direct FHWA to assess environmental performance. However, Congress set forth new programs and eligibilities under BIL that State DOTs and MPOs will use to address GHG emissions, and environmental performance will be central to proper administration of the programs. Thus, this GHG measure will help State DOTs and MPOs effectively use these new transportation dollars. For example, BIL authorized a new Carbon Reduction Program (CRP) codified at 23 U.S.C. 175. The CRP provides billions of dollars for Fiscal Years 2022–2026 for use on a range of projects that can demonstrate reductions in transportation emissions over the project's lifecycle. The CRP also requires State DOTs to develop a carbon reduction strategy in consultation with any MPO designated within the State to support efforts to reduce transportation emissions and identify projects and strategies to reduce these emissions. *See* 23 U.S.C. 175(d). Similarly, BIL included new language regarding national electric vehicle charging and hydrogen, propane, and natural gas fueling corridors to support changes in the transportation sector that help achieve a reduction in GHG emissions. *See* 23 U.S.C. 151. These programs are two examples of Congress' express focus on using transportation programs to reduce GHG emissions from transportation sources. The FHWA's GHG measure will help State DOTs and MPOs track the effectiveness of their transportation investments in projects that reduce GHG emissions, both through these programs and through other programs, such as the Surface Transportation Block Grant Program authorized at 23 U.S.C. 133.

The establishment of the GHG measure does not force investments in specific projects or strategies to reduce emissions, nor does it require the achievement of an absolute reduction target. However, FHWA has determined that the targets for the GHG measure

[5] NOAA National Centers for Environmental Information (NCEI), 2022: U.S. Billion-Dollar Weather and Climate Disasters, available at *https://www.ncdc.noaa.gov/billions/*, DOI: 10.25921/stkw-7w73.

[6] Ebi, K.L., J.M. Balbus, G. Luber, A. Bole, A. Crimmins, G. Glass, S. Saha, M.M. Shimamoto, J. Trtanj, and J.L. White-Newsome, 2018: Human Health. In *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, pp. 539–571. doi: 10.7930/NCA4.2018.CH14.

should show a reduction in CO_2 emissions. As discussed in response to comments in Section VII of this preamble, the establishment of declining targets is vital given the urgency of the climate crisis. Establishing declining targets will help State DOTs and MPOs plan toward reductions in GHG emissions and make Federal infrastructure investment decisions that reduce climate pollution, a principle set forth in E.O. 14008 (86 FR 7626). State DOTs and MPOs will set targets that indicate a reduction in CO_2 emissions, which FHWA has determined will be supportive of the policy goals set forth in 23 U.S.C. 150(b).

Although the rule requires declining targets for CO_2 emissions, FHWA is not setting forth any requirements in this rulemaking to determine how State DOTs and MPOs should determine their declining targets. In addition, as directed by 23 U.S.C. 145, States determine which of their projects shall be federally financed by Federal-aid highway formula dollars. State DOTs and MPOs will set and determine targets based on appropriate data as informed by State DOT and MPO policies and priorities. The FHWA is not prescribing what declining targets would look like in each State or MPO, and FHWA is not requiring State DOTs and MPOs to achieve targeted emission reductions, nor prescribing the selection of specific projects under this rulemaking. Thus, this approach is consistent with the Agency's authority under 23 U.S.C. 150(c) to establish measures for States to use to assess the performance of the Interstate and non-Interstate NHS in the furtherance of the national goal to enhance the performance of the transportation system while protecting and enhancing the natural environment.

In addition, adopting the measure for GHG emissions under 23 U.S.C. 150(c)(3) is appropriate in light of the structure of the TPM program. As discussed in the NPRM, Congress required FHWA to establish performance measures for a number of programs in addition to the NHPP, including an emissions related measure for the CMAQ Program under 23 U.S.C. 149. As discussed in the NPRM and in response to comments in Section VII of this preamble, the existence of the CMAQ emissions measure has raised questions regarding whether Congress intended FHWA to only measure emissions when those emissions are related to CMAQ, which is limited to criteria pollutants and nonattainment or maintenance areas under the Clean Air Act. However, this language only indicates congressional intent that FHWA establish a performance measure for on-road mobile source emissions for the purposes of carrying out the CMAQ Program. Nothing in 23 U.S.C. 150 limits measures that take into account emissions only to measures established for the purposes of carrying out the CMAQ Program. The FHWA has determined that it is appropriate to examine relevant emissions as part of assessing performance of the Interstate and non-Interstate NHS in support of the NHPP.

For all of these reasons, FHWA asserts the GHG measure is consistent with FHWA's authority under 23 U.S.C. 150(c).

Reconsideration of Previous Actions

As discussed in Section II of this preamble, and detailed in Section III.C of the NPRM, FHWA has previously proposed and finalized actions related to a GHG measure. Specifically, FHWA previously finalized the PM3 rule, through which the Agency considered extensive public comments on whether and how FHWA should establish a GHG measure. The FHWA determined that it was appropriate to measure environmental performance, specifically as the percent change in CO_2 emissions from the reference year 2017, generated by on-road mobile sources on the NHS (82 FR 5970). On October 5, 2017 (82 FR 46427), however, FHWA proposed to repeal the 2017 GHG measure. As discussed in more detail in the NPRM to this action, FHWA repealed the GHG measure on May 31, 2018 (83 FR 24920), in light of policy direction from the previous administration to review existing regulations to determine whether changes would be appropriate to eliminate duplicative regulations, reduce costs, and streamline regulatory processes, and after considering public comments received. The repeal was effective on July 2, 2018. The FHWA identified three main reasons for the repeal: (1) reconsideration of the underlying legal authority; (2) the cost of the GHG measure in relation to the lack of demonstrated benefits; and (3) potential duplication of information produced by the GHG measure and information produced by other initiatives related to measuring CO_2 emissions.

As part of this rulemaking, FHWA evaluated each of these rationales to examine whether they remain appropriate in light of current information. First, FHWA proposed, and now finalizes, that the Agency has reconsidered its interpretation of the statute. Consistent with the reasoning set forth in the PM3 rule, FHWA believes adopting this measure under 23 U.S.C. 150(c) is appropriate in light of the Agency's authority under that section and based on the Agency's authority under Title 23, U.S.C. as a whole, as previously described in this section and detailed further in Section III.B of the NPRM. *See* 87 FR 42407–42410. Second, FHWA has determined that the benefits of the rulemaking, although difficult to quantify, are substantial and justify finalizing this action. In its 2022 NPRM, FHWA described how the substantial benefits of this regulation justified reconsidering and rejecting the Agency's conclusion in the 2018 final rule that the benefits of a GHG measure were too speculative and outweighed by the costs to justify retaining the measure as part of the TPM program. *See* 87 FR 42410–42411. The benefits and policy rationale for this regulation are further described in Section IV of this preamble. Third, and as discussed in the 2022 NPRM, *see* 87 FR 42411–42412, FHWA has determined that the information produced by the GHG measure is not duplicative in relation to information produced by other initiatives related to measuring CO_2 emissions, but rather complements that data to support a whole-of-government approach to addressing GHG emissions. The importance of this measure is further described in Section IV of this preamble.

FHWA adopts in full its analysis in the 2022 NPRM justifying the reconsideration and rejection of the conclusion from the 2018 final rule that 23 U.S.C. 150 did not provide FHWA with authority to measure the environmental performance of the NHS and adopt a GHG measure, and that the overall statutory scheme of Title 23, U.S.C. supported a narrower interpretation of performance of the NHS, and emphasizes some key points here. In the 2018 repeal, FHWA concluded that 23 U.S.C. 119(d)(1)(A) delineates the national goals that are relevant to eligibility of projects for funding under the NHPP, and the national goals included in section 119(d)(1)(A) are consistent with an interpretation of ''performance'' that focuses on the physical condition of the system and the efficiency of transportation operations across the system, rather than environmental performance. 83 FR 24923–24924. Upon reexamination of the statute, FHWA has determined that this previous interpretation was incorrect. Section 119(d)(1) of Title 23, U.S.C., establishes eligibility criteria for using funds apportioned to a State for carrying out the NHPP, but does not set forth all

relevant considerations for carrying out the program. Specifically, States are also required to establish asset management plans under 23 U.S.C. 119(e). These plans shall include strategies toward improving or preserving the condition of the assets and the performance of the system, including supporting progress toward the national goals in 23 U.S.C. 150(b). FHWA's previous interpretation ignored Congress's express direction for States to develop these plans for the NHS, which address both asset condition and system performance, and referenced all of the national goals in section 150(b), rather than a subset of goals such as the goals identified in 23 U.S.C. 119(d)(1). In addition, FHWA observes that 23 U.S.C. 119(d)(2) provides eligibility for projects under the NHPP that go beyond the limited subset of national goals listed in section 119(d)(1). The statute identifies eligible projects that support the national goal of environmental sustainability, such as environmental restoration and pollution abatement, control of noxious weeds and establishment of native species, and other environmental mitigation efforts. *See* 23 U.S.C. 119(d)(2)(M)–(O). When FHWA repealed the PM3 rule and determined that performance measures under 23 U.S.C. 150(c)(3) are limited to advancing the nationals goal in section 119(d)(1), the Agency did not appropriately consider the section 119(e) requirement to develop an asset management plan that supports achievement of *all* national goals in 23 U.S.C. 150(b), and eligibility for projects that support achieving environmental sustainability. In reexamining this authority, FHWA has determined that the Agency must consider the totality of 23 U.S.C. 150(b) when interpreting the meaning of performance on the Interstate and non-Interstate NHS and how performance is to be measured.

Additionally, FHWA has identified above several other provisions of Title 23, U.S.C., that support FHWA's proposal to address GHG emissions in this rulemaking and make it clear that assessing infrastructure performance under 23 U.S.C. 150(c)(3) properly encompasses the assessment of environmental performance, including GHG emissions. In the 2018 repeal final rule, FHWA considered these provisions irrelevant because they do not ''specifically direct[ ] or require[ ] FHWA to adopt a GHG measure.'' 83 FR at 24923. However, these provisions do not prohibit FHWA from adopting a GHG measure—nor does any other provision in Title 23—and by stating the importance of protecting the environment and improving the resiliency of the transportation system, including through the use of performance management, these provisions clearly support the use of a GHG measure to assess the environmental performance of the NHS. As discussed above, the passage of BIL added additional programs and eligibilities to Title 23, and the administration of these programs will greatly benefit from the measurement of the environmental performance, including measurement of GHG emissions on the NHS. FHWA believes that these provisions of Title 23, including those added after the 2018 repeal of the GHG measure, serve to underscore the importance of reestablishing the GHG measure.

As discussed in the preamble to the NPRM, FHWA acknowledges that this action largely reestablishes a measure similar to the measure finalized in 2017 and repealed in 2018. *See* 83 FR 24920. However, as discussed in the preamble to the NPRM, FHWA expects that States and MPOs have no reliance interests resulting from establishment and the repeal of the 2017 GHG measure. *See* 87 FR 42410. The FHWA repealed the 2017 GHG measure before the respective due dates for target setting or reporting, and FHWA is unaware of any State DOTs or MPOs that incurred costs because of the promulgation and prompt repeal of that measure. Nor did the repeal itself impose any compliance costs on State DOTs or MPOs. Accordingly, FHWA does not expect this final rule to result in any increased burden on State DOTs or MPOs by virtue of the fact that FHWA previously established a similar measure that was repealed before any State DOTs or MPOs relied on and implemented its target setting and reporting requirements. This measure is a new one, which State DOTs and MPOs have not previously implemented. As a result, FHWA expects that States and MPOs would not have any reliance interests based on the repeal of the 2017 GHG measure. After reviewing the comments on the proposal, FHWA reaffirms that any potential reliance interest would be outweighed by the benefits of this action, to the extent those interests exist.

IV. Basis & Benefits of These Regulations

The FHWA believes that the performance management requirements are a powerful tool for achieving all seven of the statutory national transportation goals, including the Federal-aid highway program's national goal for environmental sustainability identified under 23 U.S.C. 150(b)(6), and establishing a GHG measure in FHWA's TPM Program will provide a consistent basis for addressing the environmental sustainability of the transportation system and estimating on-road GHG emissions. In addition, the GHG measure will result in a consistent set of data that can be used to inform the future investment decisions of the Federal Government, State DOTs, and MPOs towards achieving their targets or goals.

By establishing the GHG performance measure, FHWA is taking action to address the largest source of U.S. CO_2 emissions. In 2021, the transportation sector accounted for 34.8 percent of total U.S. CO_2 emissions, with 82.7 percent of the sector's total CO_2 emissions coming from on-road sources.[7] The transportation sector is expected to remain the largest source of U.S. CO_2 emissions through 2050, increasing at an average annual rate of 0.3 percent per year despite improvements in the energy efficiency of light-duty vehicles, trucks, and aircraft.[8] Factors such as population growth, expansion of urban centers, a growing economy, and increased international trade are expected to result in growing passenger and freight movement. These changes can make GHG reductions and environmental sustainability both more challenging to implement and more important to achieve.[9]

In addition to being the largest source of U.S. CO_2 emissions,[10] the transportation sector is increasingly vulnerable to the effects of climate change including higher temperatures, more frequent and intense precipitation, and sea level rise. Much of existing transportation infrastructure was designed and constructed without consideration of these changes. The Sixth Assessment Report by the IPCC, released on August 7, 2021, confirms that human activities are increasing GHG concentrations that have warmed

[7] U.S. Environmental Protection Agency, 2023: Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2021, *available at https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks-1990-2021.*

[8] U.S. Energy Information Administration, 2021: Annual Energy Outlook 2021, *available at https://www.eia.gov/outlooks/aeo/tables_ref.php.*

[9] Jacobs, J.M., M. Culp, L. Cattaneo, P. Chinowsky, A. Choate, S. DesRoches, S. Douglass, and R. Miller, 2018: Transportation. In Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, pp. 479–511. doi: 10.7930/NCA4.2018.CH12, *available at https://nca2018.globalchange.gov/chapter/12/.*

[10] See EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990–2021, at 2–28.

the atmosphere, ocean, and land at a rate that is unprecedented in at least the last 2000 years.[11] According to the report, global mean sea level has increased between 1901 and 2018, and changes in extreme events such as heatwaves, heavy precipitation, hurricanes, wildfires, and droughts have intensified since the last assessment report in 2014.[12] These changes in extreme events, along with anticipated future changes in these events because of climate change, threaten the reliability, safety and efficiency of the transportation system. At the same time, transportation contributes significantly to the causes of climate change[13] and each additional ton of CO_2 produced by the combustion of fossil fuels contributes to future warming and other climate impacts.

The first step toward reducing GHG emissions involves inventorying and monitoring those emissions. By establishing a consistent method for estimating GHG emissions and reporting on trends, the GHG measure aligns with E.O. 13990, E.O. 14008, and supports a U.S. target of reducing GHG emissions economy-wide 50 to 52 percent below 2005 by 2030, on a course toward reaching net-zero emissions economywide by no later than 2050.[14] Section 1 of E.O. 13990, ''Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,'' (86 FR 7037), articulates national policy objectives, including listening to the science, improving public health and protecting the environment, reducing GHG emissions, and strengthening resilience to the impacts of climate change. The E.O. 14008, ''Tackling the Climate Crisis at Home and Abroad,'' (86 FR 7619), recommits the U.S. to the Paris Agreement and calls on the U.S. to begin the process of developing its nationally determined contribution to global GHG reductions. *See* E.O. 14008, § 102. The E.O. 14008 also calls for a government-wide approach to the climate crisis and acknowledges opportunities to create well-paying, union jobs to build a modern, sustainable infrastructure, to provide an equitable, clean energy future, and to put the U.S. on a path to achieve net-zero emissions, economywide, no later than 2050. *See id.,* § 201.

As a matter of transportation policy, FHWA considers the GHG measure essential not only to improve transportation sector performance and work toward achieving net-zero emissions economy-wide by 2050, but also to demonstrate Federal leadership in the assessment and disclosure of climate pollution from the transportation sector. Measuring and reporting complete, consistent, and timely information for on-road mobile source emissions is necessary so that all levels of government and the public can monitor changes in GHG emissions over time and make more informed decisions about the role of transportation investments and other strategies in achieving GHG reductions.

After reviewing the comments provided on the NPRM, FHWA has decided to finalize the measure proposed in the NPRM, which is the percent change in tailpipe CO_2 emissions on the NHS relative to the reference year. In choosing this measure, FHWA considered the measure's sensitivity to strategies and policies of interest to transportation agencies, as well as its simplicity, ease of calculation, and reliance on data States already report to FHWA. In particular, the GHG measure will utilize fuel use estimates collected by FHWA very shortly after these data are finalized, providing a consistent and timely data source that is better suited for setting targets and monitoring trends in mobile source CO_2 emissions on the NHS. As a new source of information, the measure has the potential to result in greater public awareness of GHG emissions trends, provide increased transparency and improved decisionmaking at all levels of government, and support better informed planning choices to reduce GHG emissions or inform tradeoffs among competing policy choices. In these capacities, the proposed GHG measure is integral to a whole-of-government approach to address climate change and its effects.

V. Summary of Comments

The FHWA received 39,751 submissions to the docket, including 39,522 from 7 comment campaigns, in response to the NPRM, resulting in 236 unique submissions containing 999 individual comments. The submissions were signed by 105,484 separate groups/individuals. The FHWA received comments from 98 advocacy and interest groups (including advocacy groups for active transportation and public transit, the natural environment, climate change action, clean air, and equity/environmental justice, among others), 31 State DOTs and the District of Columbia DOT, 33 State Attorneys General, one State Governor, 33 MPOs, two State environmental agencies, 10 County/Local government agencies, as well as 57 U.S. Senators from 38 states and 56 U.S. Representatives from 25 states. The FHWA also received comments from 24 industry associations (including the American Association of State Highway Transportation Officials (AASHTO), the Association of Metropolitan Planning Organizations (AMPO), and the American Public Transportation Association (APTA), as well as those representing highway and transportation users, roadway materials producers and roadway builders, and energy companies, among others). The FHWA also received comments from over 104,500 private citizens, the majority of which were submitted as part of comment campaigns.

VI. Summary of Changes Made in This Final Rule

This section provides a summary of the changes made in the rule compared to the NPRM. Section VII provides further discussion on the significant changes and the reasons they were made.

A. Reference Year

In the final rule, FHWA establishes that 2022 will be the reference year for this measure. The FHWA has changed

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[11] See IPCC, 2021: Summary for Policymakers. In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, available at *https://www.ipcc.ch/report/ar6/wg1/#SPM.*

[12] IPCC, 2021: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Pe´an, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Cambridge University Press. In Press.

[13] Jacobs, J.M., M. Culp, L. Cattaneo, P. Chinowsky, A. Choate, S. DesRoches, S. Douglass, and R. Miller, 2018: Transportation. In Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, pp. 479–511. doi:10.7930/NCA4.2018.CH12.

[14] White House Fact Sheet: The Biden-Harris Electric Vehicle Charging Action Plan (December 13, 2021), available at *https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/13/fact-sheet-the-biden-harris-electric-vehicle-charging-action-plan/;* White House Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies (Apr. 22, 2021), available at *https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/;* White House Fact Sheet: President Biden's Leaders Summit on Climate (Apr. 23, 2021), available at *https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/23/fact-sheet-president-bidens-leaders-summit-on-climate/.*

the definition in 23 CFR 490.505 and updated the calculation of the measure in 23 CFR 490.513(d) [15] accordingly.

B. Net-Zero

The definition of net-zero was removed from 23 CFR 490.101, and 23 CFR 490.105(e)(10) was revised so targets must be declining for reducing tailpipe CO_2 emissions on the NHS, but they are not required to demonstrate reductions toward net-zero targets.

C. State DOT Targets & Reports

In the final rule, FHWA establishes that State DOTs will establish initial targets for the GHG measure and report them no later than February 1, 2024. 23 CFR 490.105(e)(1) and 490.107(d). The February 1, 2024, date required changes to several sections of existing regulation. Below is a general summary of the initial target establishment requirements, the reporting process for the State Initial GHG Report due February 1, 2024, and the significant progress determinations that will be completed after the State biennial reports submitted by October 1, 2024, and 2026.

State DOT Target Establishment & Reporting Related to February 1, 2024

The performance period for the GHG measure will begin January 1, 2022 and extend 4 years. 23 CFR 490.105(e)(1). By February 1, 2024, State DOTs will establish initial targets for the GHG measure. 23 CFR 490.105(e)(1)(ii). Initially, State DOTs will establish 4-year targets; 2-year targets will not be established. 23 CFR 490.105(e)(1), 490.105(e)(4)(iii), and 490.105(e)(10)(i). For the initial 4-year target, the reference year will be used as the baseline. 23 CFR 490.105(e)(10)(i)(C).

State DOTs will report their 4-year targets to FHWA in the State Initial GHG Report by no later than February 1, 2024. 23 CFR 490.107(d). The State Initial GHG Report shall include the State DOT's 4-year target for the GHG measure, the basis for the target, a discussion of how the target relates to other longer-term performance expectations, and the metric information for the reference year. 23 CFR 490.107(d)(1). The metric reported will be calculated using the data specified in 23 CFR 490.107(d)(2). Because of the 2024 State Initial GHG Report, State DOTs will not include additional GHG information in the 2024 Mid Performance Period Progress Report, due October 1, 2024. 23 CFR 490.107(b)(2)(i). Biennial reporting related to the GHG measure will begin with the 2026 Full Performance Period Progress Report and the 2026 Baseline Performance Period Report. 23 CFR 490.107(b)(1)(i), 490.107(b)(2)(i), and 490.107(b)(3)(i).

Significant Progress Determination on Initial Targets

After the 2026 Full Performance Period Progress Report, FHWA will determine whether a State DOT has made significant progress toward the achievement of the 4-year target for the GHG measure. The FHWA will use the data described in 23 CFR 490.109(d)(1) when calculating the actual performance and making the significant progress determination. The performance for the reference year will be used as the baseline performance in the 2026 significant progress determination. 23 CFR 490.105(e)(10)(i)(C).

The significant progress determination requirements related to the GHG measure will be phased in as described in 23 CFR 490.109(e)(6). The FHWA will not determine significant progress toward 2-year targets for this measure after the 2024 Mid Performance Period Progress Report since 2-year targets will not have been established, and information related to the GHG measure will not have been included in the 2024 Mid Performance Period Progress Report. Therefore, in 2024, FHWA will classify the assessment of progress toward the achievement of 2-year targets for the GHG measure as ''progress not determined'' and they will not be subject to any additional reporting requirements. 23 CFR 490.109(e)(6).

Biennial Reporting

FHWA revised proposed changes to section 490.107(b)(1), (b)(2), and (b)(3) to require biennial reporting related to the GHG measure to begin with the 2026 Full Performance Period Progress Report. And, consistent with 23 CFR 490.105(e)(5), the State DOT's 2- and 4-year targets will be reported in the 2026 Baseline Performance Period Report. See the discussion under ''State DOT Data for the GHG Metric Calculation'' for more information on the State DOT biennial reporting associated with the GHG metric.

D. State DOT Data for the GHG Metric Calculation

State DOTs are required to calculate and report both the GHG measure and the GHG metric, the latter of which is defined as the calculation of tailpipe CO_2 emissions on the NHS for a given year computed in million metric tons (mmt) and round to the nearest hundredth. 23 CFR 490.511(c). State DOTs use the metric to calculate the measure, which is the percent change between the current year and the reference year. To calculate the metric, State DOTs require several data inputs, and they are defined in 23 CFR 490.511(c). To ensure consistent calculation of the metric, the data requirements are defined in 23 CFR 490.509. To provide transparency and consistency, FHWA defines the specific data sources it will use when it calculates the metric and measure for the significant progress determination in 23 CFR 490.109(d).

In this final rule, proposed 23 CFR 490.509(h) was revised so that the State DOT will be able to use their best available vehicle miles traveled (VMT) data when establishing targets, reporting baseline and actual performance and discussing progress. This change addresses a comment that stated VMT data might not be finalized within the Highway Performance Monitoring System (HPMS) for all States by August 15th. The VMT data used by State DOTs will represent the prior calendar year and should be consistent with the final VMT data submitted by the State DOT to HPMS, to the maximum extent practicable. 23 CFR 490.509(h). The HPMS data as of November 30, 2023, will be used to calculate the metric for the reference year. 23 CFR 490.509(h).

Because FHWA will not necessarily have the VMT data the State DOT used, the biennial reporting requirements in proposed 23 CFR 490.107(b)(1)(ii)(H), (b)(2)(ii)(J), and (b)(3)(ii)(I) were revised in this final rule to require the State DOT to report the GHG metric value they calculated, the individual values used to calculate the GHG metric, and a description of the data source(s) used for the VMT information. This final rule removes the proposed requirement for the State DOT to report CO_2 emissions on all public roads as part of reporting the metric information since the values used to calculate the GHG metric can be used to calculate the all-roads value. A corresponding change was made to 23 CFR 490.511(f)(2) to align with the metric reporting requirements in the State DOT's biennial reports.

Section 490.109(d)(1)(vi) and (d)(1)(vii) were revised to require the significant progress determination to calculate the GHG metric and measure for the baseline and actual performance using the HPMS data available on November 30th of the year the significant progress determination is made. For the reference year, FHWA will use the HPMS data as of November 30, 2023. 23 CFR 490.109(d)(1)(vi)–(vii).

[15] In this section, the citations to 23 CFR part 490 refer to provisions as amended by this final rule.

Section 490.109(d)(1)(viii) was added to specify that the significant progress determination will use the CO_2 factors specified in section 490.509(f).

In the final rule, FHWA has added the requirement for State DOTs to submit the State Initial GHG Report, as described in VI.C. For that report, the State DOT will use the data specified in 23 CFR 490.107(d)(2) to calculate the metric.

Please note, 23 CFR 490.511 includes different requirements for State DOTs and MPOs when calculating the metric used to calculate the GHG measure. The State DOT's method is defined in 23 CFR 490.511(c) and the method will be the same for all states. The MPOs are granted flexibility in how they calculate the metric, as described in 23 CFR 490.511(d). This section only discusses the changes made in the final rule in relation to the data the State DOT will use when calculating the GHG metric. The changes made related to the MPO metric requirements are summarized below in Section VI.E.

E. Initial MPO Targets & Reports

The final rule, in 23 CFR 490.511(d), retains the additional flexibility granted to MPOs in how they calculate the GHG metric. The final rule removes the proposed requirement for MPOs and State DOTs to mutually agree upon a method for calculating the metric, and instead requires MPOs to report a description of their metric calculation method(s). When that method is not one of the ones specified in 23 CFR 490.511(d), the MPO will include information demonstrating the method(s) has valid and useful results for measuring transportation related CO_2. 23 CFR 490.107(c)(2)(ii). While MPOs are not required to select a metric calculation in coordination with their State DOT, they are encouraged to coordinate with the State DOT on the data used to the maximum extent practicable.

The final rule removes the proposed requirement for the MPO to report CO_2 emissions on all public roads.

F. Severability

The final rule adds a new section 23 CFR 490.515 that contains a severability clause applicable to the amendments to 23 CFR part 490 made by this final rule. FHWA believes that the amendments to part 490, including establishment and calculation of the GHG performance measure and declining targets, are capable of operating independently of one another. If one or more aspects of the GHG measure are determined to be invalid, the remaining provisions should remain unaffected and in force.

G. Other Changes

The final rule contains several technical changes from the proposed rule. These changes are described in Table 1.

TABLE 1—TECHNICAL EDITS TO THE FINAL RULE

CFR section	Description of change
23 CFR 490.101	Corrects the abbreviated name for the *Fuels and Financial Analysis System—Highways* (Fuels & FASH) database. Corresponding changes were made throughout the rule.
23 CFR 490.105(c)(5)	Clarifies language describing the GHG measure.
23 CFR 490.105(d)(4)	Clarifies the applicability of the joint targets.
23 CFR 490.105(e)(4)(i)(C)	Moves information about the performance period from the location proposed in the NPRM to here to align with references to the performance period throughout 23 CFR part 490.
23 CFR 490.105(f)(10)	Clarifies rule language.
23 CFR 490.107(a)(1)	Updates language to capture the edition of Section 490.107(d) in the final rule.
23 CFR 490.107(c)(2)	Revises the structure and organization of the paragraph to improve readability.
23 CFR 490.109(d)(1)(v) and (d)(1)(vii)	Clarifies that the reference year data will not be updated each time the data for the previous year is compiled.
23 CFR 490.109(d)(1)(viii)	Clarifies that the CO_2 factor specified in Section 490.509(f) will be used.
23 CFR 490.109(e)(4)(vi)	Substitutes "accepted" instead of "cleared."
23 CFR 490.109(e)(4)(vii)	Adds the HPMS data extraction date. Listing this date is consistent with Section 490.109(e)(4)(vi) and does not change the intended approach.
23 CFR 490.109(f)(1)(v)	Revises rule language to use consistent terminology.
23 CFR 490.505	Clarifies that approximately 97 percent of on-road tailpipe GHG emissions are CO_2.
23 CFR 490.509(f)	Clarifies rule language.
23 CFR 490.509(f)(2)	Revises rule language to use consistent terminology.

VII. Section-by-Section Discussion

This final rule was developed in response to comments received on the NPRM. Section VII summarizes major comments received and any substantive changes made to each section in this final rule. Editorial or minor changes in language are not addressed in this section. For sections where no substantive changes are discussed, the substantive proposal from the NPRM has been adopted in this final rule.

Questions Posed in the NPRM

The FHWA requested comment on a number of items in the NPRM. The FHWA invited comments on the following:

- How should FHWA structure improving targets for the GHG measure, as well as the associated reporting and significant progress requirements, and how could these targets align with and inform existing transportation planning and programming processes?
- Besides requiring targets that reduce GHGs over time, are there any specific ways the proposed GHG measure could be implemented within the framework of TPM to better support emissions reductions to achieve national policies for reductions in total U.S. GHG emissions?
- What changes to the proposed measure or its implementation in TPM could better the impact of transportation decisions on CO_2 emissions, and enable States to achieve tailpipe CO_2 emissions reductions necessary to achieve national targets?
- In instances that MPOs are establishing a joint UZA target, should FHWA require that the individual MPO-wide targets be the same as the jointly established UZA target?
- Should MPOs that establish a joint UZA target be exempt from establishing individual MPO-level targets, and instead only be required to adopt and support the joint UZA target?

• In cases where there are multiple MPOs with boundaries that overlap any portion of an UZA, and that UZA contains NHS mileage, should each of those MPOs establish their own targets, with no requirement for a joint UZA target?

• Are there other approaches to target setting in UZAs served by multiple MPOs that would better help MPOs reach net-zero emissions?

The FHWA also requested comment on assumptions that were developed as part of the RIA, as well as information on other benefits or costs that would result from implementation of the rule, as follows:

• The RIA includes assumptions regarding the applicability, level of effort and frequency of activities under proposed 23 CFR 490.105, 490.107, 490.109, 490.511, and 490.513. Are these assumptions reasonable? Are there circumstances that may result in greater or lesser burden relative to the RIA assumptions?

• Would the staff time spent implementing this measure reduce the burden of carrying out other aspects of State DOT and MPO missions, such as forecasting fuel tax revenues? If so, please describe and provide any information on programs that would benefit from this measure and estimate any costs that would be reduced by implementing this measure.

• Would the proposed rule result in economies of scale or other efficiencies, such as the development of consulting services or specialized tools that would lower the cost of implementation? If so, please describe such efficiencies and provide any information on potential cost savings.

• Would the proposed rule result in the qualitative benefits identified in the RIA, including more informed decisionmaking, greater accountability, and progress on National Transportation Goals identified in MAP–21? Would the proposed rule result in other benefits or costs? Would the proposed measure change transportation investment decisions and if so, in what ways? For State DOTs and MPOs that have already implemented their own GHG measure(s), FHWA welcomes information on the impact and effectiveness of their GHG emissions measure(s).

The FHWA received many comments on these items, and thanks commenters for their useful input. The FHWA considered these comments in developing this final rule and responds to significant adverse comments related to these questions and other comments in the following section.

General Comments

FHWA's Legal Justification for the GHG Measure

Comment: A large number of commenters addressed FHWA's legal authority for this measure. Many commenters affirmed FHWA's legal authority to establish the measure under 23 U.S.C. 150. These commenters note that under MAP–21, FHWA is required to establish ''performance'' measures to assess performance of the Interstate and non-Interstate NHS, *see* 23 U.S.C. 150(c)(3)(A)(ii)(IV)–(V), and FHWA's interpretation of ''performance'' to include environmental performance is consistent with the express statutory goals of the Federal-aid highway program, which include environmental sustainability under 23 U.S.C. 150(b)(6). In contrast, many commenters disputed FHWA's legal authority to establish the proposed measure. Several commenters stated that, contrary to FHWA's statements, this action will in fact set performance targets for the States and MPOs by requiring State DOTs and MPOs with NHS mileage to establish declining CO_2 emissions targets that align with the Administration's net-zero targets, while FHWA's authority is limited to establishing measures for States to use to measure performance. These commenters largely characterized the measure as a requirement that State DOTs and MPOs reduce GHG emissions. Notably, a large number of commenters stated that FHWA does not have the authority to regulate GHGs, as Congress has not assigned such authority to the Agency, and such authority would be more appropriately assigned to the Environmental Protection Agency (EPA). Similarly, several commenters claim that FHWA should not focus on regulating GHGs, and instead should work with the EPA to reduce CO_2 emissions. A commenter also asserted that the proposed rule inappropriately seeks to rebalance Congress's funding priorities.

Response: As discussed in Section III of this preamble, FHWA affirms that the Agency has the requisite statutory authority to adopt the GHG measure. A significant number of commenters questioning FHWA's authority to adopt the GHG measure have mischaracterized this rulemaking. The FHWA is not regulating GHG emissions via this measure, is not mandating any reductions, is not forcing States to select specific projects, and is not asserting authority through this rulemaking over GHG emissions from the transportation sector. Rather, this measure is designed to provide State DOTs and MPOs with the information necessary to make informed transportation decisions. Although FHWA is requiring that State DOTs and MPOs set targets—consistent with the rest of the TPM program—FHWA is not mandating specific targets and is not setting those targets for State DOTs and MPOs. The FHWA is also neither approving nor disapproving individual targets. Thus, FHWA is applying the Agency's authority under 23 U.S.C. 150(c) and is not extending beyond that authority. However, upon examining comments and the preamble to the NPRM, FHWA recognizes that the language regarding aligning with net-zero targets could be clarified to better indicate FHWA's intent. Therefore, FHWA is clarifying that the Agency is not requiring that declining targets align to the Administration's net-zero targets as outlined in the national policy established under E.O. 14008. Rather, FHWA recommends that State DOTs and MPOs consider the Administration's targets when setting their declining targets.

Comment: Several commenters asserted that FHWA has not sufficiently justified changing its approach. Commenters assert that FHWA is merely reinstating a previous action and is changing the Agency's position based on policy preferences provided in E.O.s rather than technical expertise, such as by stating that the emissions measure would result in substantial benefits, while also stating that the benefits are not easily quantifiable. Several commenters assert that FHWA has failed to adequately justify this measure by relying on general reports on CO_2 emissions and climate change harms. In addition, commenters asserted that FHWA may not merely reexamine previous assertions in rulemakings and must instead provide technical analysis in support of the rulemaking. Commenters asserted that FHWA failed to consider whether declining targets will interfere with other statutory schemes by encouraging States to adopt electric vehicles to reduce GHGs while not focusing on reducing criteria pollutants under CMAQ. In addition, commenters assert FHWA failed to consider whether the rulemaking will disadvantage States with a range of different conditions, such as extreme climates and freight traffic.

Response: The FHWA disagrees with these commenters' assertions. The FHWA has reexamined the rationale for the 2018 repeal and has determined that FHWA has the authority to adopt this GHG measure and has provided updated analyses identifying why the GHG measure is appropriate and reasonable in light of FHWA's statutory mandate to adopt performance measures. The

FHWA's legal authority, technical justification, and reasoned analysis for this measure are detailed in the NPRM and in Sections III. and IV. of this preamble. FHWA has acknowledged that it is changing the position the Agency put forward in the 2018 repeal final rule and provided detailed legal, technical, and policy reasons for doing so. Commenters' assertion that FHWA must do more to justify changing its approach has no basis in law. *See FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515–16 (2009). The FHWA also disagrees with the commenters' assertions about FHWA's failure to consider whether declining targets will disadvantage States or cause any potential harm through the adoption of electric vehicles. These comments are predicated on a misconception that FHWA is requiring any specific behavior by State DOTs and MPOs to reduce GHG emissions. The FHWA is not mandating reductions, and this rulemaking does not require or purport to require State DOTs or MPOs to select GHG reducing projects. Rather, State DOTs and MPOs will determine appropriate declining targets based on the conditions relevant to the State DOTs and MPOs. The FHWA expects—but does not require—that this measure will help State DOTs and MPOs select projects that will reduce GHG emissions.

Comment: Several commenters assert that FHWA lacks the authority to adopt the GHG measure based on the recent decision of *West Virginia* v. *EPA,* 142 S. Ct. 2587 (2022), related to the Major Questions Doctrine.

Response: The FHWA disagrees with the assertion that this measure is inconsistent with recent Supreme Court precedent. This rulemaking is not an extraordinary case. It does not involve a novel interpretation of longstanding FHWA authority, nor does it represent an unheralded assertion of regulatory authority with the significant economic and political impacts that implicate a major questions case under *West Virginia* v. *EPA.* The FHWA's approach is in line with FHWA's prior requirements for performance measures related to the national goals in 23 U.S.C. 150(b). This rulemaking also does not require State DOTs and MPOs to change their approach to selecting projects. Rather, the measure will provide them with additional information to inform their decisionmaking. As described in the RIA, this rulemaking has minimal costs for State DOTs and MPOs. Additionally, there is clear congressional authorization to establish performance measures under 23 U.S.C. 150(c). Contrary to inaccurate statements made by commenters, FHWA is not regulating GHG emissions, but rather is setting forth an approach by which to measure GHG emissions related to transportation on the Interstate System and non-Interstate NHS, using publicly available data, which States and MPOs can use to make better-informed transportation investment decisions. Therefore, FHWA disagrees with the commenters' assertions related to the Major Questions Doctrine.

Comment: A number of commenters stated that FHWA does not have the authority to issue this GHG measure under 23 U.S.C. 150(c) because the statute limits performance measures only to those described in that subsection.

Response: As described in the NPRM and discussed in Section III of this preamble, FHWA has reconsidered its previous interpretation that this provision limits FHWA's authority to establish measures States use to assess performance on the NHS to measures that focus on the physical condition of the system and the efficiency of transportation operations across the system. FHWA now concludes that 23 U.S.C. 150(c) limits FHWA to establishing measures to carry out 23 U.S.C. 119 to measures that assess performance on the Interstate System and the NHS. However, the provision does not otherwise limit the meaning of ''performance.'' Thus, FHWA has concluded that the ''performance'' of the Interstate and non-Interstate NHS includes environmental performance, and FHWA disagrees with the commenters' conclusion that FHWA does not have authority to adopt this GHG measure.

Comment: Commenters noted that although FHWA is not proposing any penalties, FHWA would be able to influence the selection of projects by States that rely on formula funds that Congress requires FHWA to distribute to States.

Response: The FHWA did not propose, and is not finalizing, any requirements for specific use of funds related to the GHG measure. The measure and the associated targets established through the final rule are intended to help State DOTs and MPOs consistently and transparently monitor the current performance of the NHS, and plan transportation projects in a way that protects the long-term performance of the NHS. The final rule does not direct any action on the part of the State DOT or MPO with respect to selecting projects under the Federal-aid highway program. As per 23 U.S.C. 145, State DOTs determine which eligible projects are federally funded, and FHWA reaffirms that nothing in this final rule should be construed to affect that bedrock principle. Therefore, FHWA disagrees with the commenters' assertion that FHWA may influence project selection through this measure.

Comment: Commenters note that BIL did not provide FHWA with new authority to regulate GHGs, but rather BIL established new programs to incentivize and reward State DOTs and MPOs for implementing emissions reduction strategies. Commenters also note that BIL and the Inflation Reduction Act (IRA) (Pub. L. 117–169) did not authorize FHWA to mandate GHG performance targets that States would be required to meet. One commenter asserts that the legislative history of BIL indicates that Congress considered but did not pursue climate change policy for FHWA. Commenters assert that Congress specifically chose not to address GHG emissions under 23 U.S.C. 150(c), and thus FHWA lacks authority to issue this measure. Commenters also assert that since Congress addressed GHG emissions in programs like the CRP under 23 U.S.C. 175 but did not add them to the performance measures in 23 U.S.C. 150(c), Congress intended to set performance measures for some programs and not set performance measures for other programs.

Response: As described in Section III of this preamble, FHWA's authority for this measure arises under 23 U.S.C. 150(c), and FHWA's interpretation of that authority is informed in part by new changes from BIL. Additionally, FHWA did not propose—and is not finalizing—any FHWA-mandated performance targets that States would be required to meet. The BIL contains a number of programs that aim to reduce GHG emissions from transportation sources, and collection and analysis of the GHG measure can support implementation of those programs. However, FHWA did not propose, and is not finalizing, any requirements related to those programs. In addition, FHWA disagrees with the assertion that BIL does not address climate change. As discussed in this preamble, there are a number of GHG emissions-related provisions in BIL, such as those found in division A, title I, subtitle D, titled ''Climate Change.'' These provisions include both the CRP under 23 U.S.C. 175 and the Promoting Resilient Operations for Transformative, Efficient, and Cost-Saving Transportation (PROTECT) program under 23 U.S.C. 176. The FHWA recognizes that these programs do not mandate reductions in GHG emissions, and as such, FHWA

does not assert authority over GHG emissions. However, FHWA disagrees with the commenters regarding congressional intent as related to the measurement of GHGs under 23 U.S.C. 150(c). Congress did not provide exact parameters for performance measures under 23 U.S.C. 150(c), and it did not clarify, let alone impose restrictions on, these parameters in BIL. Rather, FHWA must—based on the Agency's expertise—determine how to structure performance measures. As described in this preamble and in the preamble to the 2022 NPRM, FHWA has determined that measuring environmental performance is vital to assessing performance on the Interstate and non-Interstate NHS.

In addition, FHWA disagrees with the commenters' assertion that Congress's designation of mandatory performance measures for some programs but not others prohibits FHWA from exercising Agency expertise to define performance of the Interstate and non-Interstate NHS. Although Congress did not include a specific performance measure for GHG-related programs in enacting 23 U.S.C. 150, Congress also decided not to define performance under 23 U.S.C. 150(c)(3)(A)(ii)(IV)–(V) and, in the decade since enactment of MAP–21, Congress has not qualified FHWA's authority to define performance on the NHS, even after FHWA promulgated a GHG measure in the PM3 rule. For the same reasons, FHWA also disagrees with the commenters' statements regarding legislative history of BIL and IRA, and in particular, the significance that can be attributed to GHG and environmental performance-related language not being included in the enacted legislation. By itself, congressional inaction on a subject is an unreliable indicator of legislative intent because ''several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.'' *Pension Benefit Guaranty Corp.* v. *LTV Corp.,* 496 U.S. 633, 650 (1990) (quoting *United States* v. *Wise,* 370 U.S. 405, 411 (1962)) (internal quotation marks omitted). In this instance, there is no contemporaneous legislative record to explain why language relating to measuring GHG emissions with respect to performance of the NHS was not included in BIL. Moreover, BIL was passed long after the PM3 rulemaking was proposed and finalized. If anything, the fact that Congress was aware of FHWA's prior action to promulgate a GHG performance measure and did not use the opportunity in BIL to amend existing statutory language on performance measures or the definition of performance on the NHS more likely indicates that Congress intended to leave such determinations to Agency expertise to be handled via regulatory authority. *See id.* Therefore, FHWA rejects the commenters' interpretation of congressional intent to restrict FHWA's authority to establish measures to assess performance of the NHS.

Comment: Commenters disagreed with FHWA's approach to supporting resilience through this measure. Commenters assert that both the NHPP under 23 U.S.C. 119 and BIL are focused on the physical condition of the highway system, and FHWA must focus on addressing physical issues with the roads, rather than CO_2 emissions. Commenters assert that, likewise, resilience deals with impacts on the transportation system, rather than impacts from emissions from the transportation system. Commenters also contend that CO_2 regulation is the purview of the EPA, not FHWA.

Response: The FHWA disagrees with the commenters' limited view of 23 U.S.C. 119's substantial focus on resilience and their characterization of FHWA's action to establish the GHG measure. As discussed in section III above, the NHPP is not solely focused on the physical performance of highways. For example, the requirements for State asset management plans include strategies supporting the progress toward the achievement of all national goals identified in 23 U.S.C. 150(b), including the goal to enhance the performance of the transportation system while protecting and enhancing the natural environment at 23 U.S.C. 150(b)(6). *See* 23 U.S.C. 119(e)(2). In addition, the BIL amended the requirements for asset management plans' lifecycle cost and risk management analyses so that they now must specifically take into consideration extreme weather and resilience. *See* 23 U.S.C. 119(e)(4)(D). In explicitly stating that both the purpose of the NHPP under 23 U.S.C. 119 is to increase the resiliency of the NHS and that environmental sustainability is an express national goal of the Federal-aid highway program under 23 U.S.C. 150(b), Congress clearly spoke to the importance of addressing environmental impacts related to the transportation system. Assessing environmental performance will support State and MPO efforts to increase the resiliency of the NHS to mitigate the cost of damages from sea level rise, extreme weather events, flooding, wildfires, or other natural disasters. By addressing the performance of the transportation system related to the largest source of U.S. CO_2 emissions, FHWA is implementing Congress's express direction regarding NHPP goals. Measuring environmental performance though the GHG performance measure will assist States to consider CO_2 emissions from transportation in the performance management framework and help frame responses to the growing climate crisis. Reducing GHG emissions that are causing increases in temperature, sea level, extreme weather events, flooding, wildfires, and other natural disasters should then decrease the severity and impact of those conditions in the future. The FHWA has applied its expertise related to the transportation system and found that mitigating the cost of damage from natural disasters also requires helping State DOTs and MPOs address the cause of those disasters. However, and as discussed above, FHWA is not regulating CO_2 emissions or otherwise mandating specific reductions.

Comment: One commenter asserted that FHWA's action is a broad attempt to regulate GHGs, and Congress must speak more clearly before FHWA may assert it has authority to mandate that all of the States and Puerto Rico decrease on-road CO_2 emissions in furtherance of the Administration's emissions goals.

Response: The FHWA is not mandating that States or MPOs decrease emissions or compelling States to undertake projects that reduce GHGs. Consistent with the rest of the TPM program, FHWA is setting forth a program to measure performance on the Interstate and non-Interstate NHS, as directed by Congress.

Comment: One commenter stated that FHWA should develop an Environmental Impact Statement (EIS) for this action because of the rule's wide-ranging potential impacts.

Response: The FHWA disagrees that an EIS is appropriate for this rulemaking. The FHWA has analyzed this rule pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and has determined that it is categorically excluded under 23 CFR 771.117(c)(20), which applies to the promulgation of rules, regulations, and directives. As discussed further in Section VIII of this preamble, FHWA does not anticipate any adverse environmental impacts from this rule, the purpose of which is to inform decisionmaking about the transportation sector's contribution to GHG emissions, and thereby contribute to environmental sustainability. Therefore, a categorical exclusion is appropriate for this rulemaking and no further NEPA approvals are required.

Comments on the Appropriateness of the Proposed Measure

Comment: A large number of commenters questioned the appropriateness of the proposed measure to assess GHG emissions. A small number of these commenters asserted the proposed measure is not appropriate for rural States since rural residents need to drive further to access essential goods and services and alternative transportation modes are limited. In addition, several other commenters asserted the proposed measure does not account for exogenous factors beyond the control of State DOTs and MPOs, including population growth, economic growth, goods movement, and State and local policies, among others. Relatedly, many commenters recommended using a per-capita measure in addition to or instead of a measure of total emissions. A smaller number of commenters recommended using a measure of VMT to demonstrate the impact of transportation decisions on changes in travel behavior. Some commenters stated that the measure places an unequal burden on rural States and States with growing populations.

Other commenters addressed technical considerations underlying the suitability of the proposed measure. A couple of commenters indicated the measure does not account for fluctuations to NHS mileage resulting from roadway reclassifications, and one commenter asserted the measure does not account for regional variations in vehicle fleet efficiency or roadway speeds. Several commenters recommended the proposed measure consider lifecycle processes, such as electricity used by electric vehicles and embodied carbon associated with vehicle manufacture and transportation infrastructure. One commenter recommended that the measure account for excess fuel consumption associated with poor pavement condition.

Response: The FHWA has retained the GHG performance measure proposed in the NPRM, the percent change in tailpipe CO_2 emissions on the NHS compared to the reference year, because of its simplicity, ease of calculation, and reliance on data States already report to FHWA. The FHWA acknowledges commenters' observations that the GHG footprint of on-road transportation extends beyond tailpipe CO_2 emissions and includes lifecycle processes supporting to generation of electricity used by EVs, the production of transportation fuels, the manufacture of vehicles, and the construction and maintenance of transportation infrastructure. However, FHWA believes that addressing these factors in a GHG measure would lead to more complicated and potentially less reliable calculations.

In addition, FHWA believes that the measure sufficiently accounts for several of the factors cited by commenters, such as the effect of roadway speed, changes vehicle fleet efficiency, and the effect of pavement condition on fuel efficiency, all of which are represented through State-reported fuel sales that are used to calculate the measure. The FHWA also believes that a GHG measure is preferable to a VMT-only measure, which would serve an indirect proxy for GHG emissions that would not account for the benefits of highway operations and pavement strategies implemented by State DOTs, electrification of the vehicle fleet, or other improvements in vehicle efficiency. The GHG measure FHWA is establishing also supports tracking of progress toward GHG reduction goals. This would not be the case with a measure that normalizes the effect of population or economic growth or excludes truck CO_2 emissions. The FHWA notes that regulation does not prevent State DOTs and MPOs from using additional performance measures at the local level.

The FHWA rejects the concept that this measure places an unequal burden on rural States and States with rapidly growing populations, as States with various conditions can implement this measure to help evaluate performance. The FHWA also reiterates that this rulemaking does not set any specific targets or require any GHG reductions. The commenters' assertions about disadvantaging rural areas falsely assume that this measure mandates GHG reductions and penalizes States and MPOs that fail to achieve reductions. Neither the proposal, nor the final rule, do any such thing. Therefore, FHWA disagrees with the commenters' assertions about unequal burden on rural States and States with rapidly growing populations.

Comments on Transportation Agencies' Influence on GHG Emissions

Comment: Several commenters addressed State DOTs' and MPOs' ability to reduce GHG emissions year over year through planning and programming of transportation projects. Several commenters asserted State DOTs and MPOs have limited ability to materially reduce GHG emissions. These commenters noted that performance against the GHG measure is affected by many different factors outside the control of State DOTs and MPOs, including a State government's policies, population and economic growth, and fuel prices, among others. They also assert that transportation planning and programming is a multiyear process and State DOTs and MPOs cannot have a meaningful impact on GHG emission reductions year over year.

In contrast, a large number of commenters asserted that transportation agency decisions influence GHG emissions, and that a GHG measure is important for evaluating the impact of these decisions. Many commenters asserted that establishing a nationwide, uniform performance measure would ensure consistency in tracking progress and help State DOTs, MPOs, and FHWA to identify the most effective programs, strategies, and projects for carbon reduction. The commenters also asserted that the proposed performance measure would inform State DOT and MPO efforts to carry out performance-based planning and project selection, consistent with statutory requirements. Several commenters asserted that the decisions that State DOTs make in terms of designing infrastructure and constructing the built environment have a profound influence on travel behavior. A large number of comment campaign letters also asserted that a GHG measure is important for understanding the long-term impact of transportation investments on GHG emissions and to better connect transportation decisions with climate goals.

Response: Upon review of the comments, FHWA has retained the measure as proposed. The FHWA agrees with commenters asserting that a GHG measure is useful for evaluating the impact of transportation investments and other policies on GHG emissions. The FHWA also agrees that transportation investments have a meaningful impact on travel behavior, and that transportation agencies' policies and programs involving vehicle electrification, highway operations, and roadway maintenance practices provide further opportunities to reduce GHG emissions in absence of changes to travel behavior. The BIL provides more than $27 billion in Federal funding to help State DOTs and MPOs achieve their GHG reduction targets. This total includes $6.4 billion in formula funding to State DOTs and local governments through the CRP to support a range of projects designed to reduce on-road CO_2 emissions; $5 billion to State DOTs through the National Electric Vehicle Infrastructure Formula Program to build out a national electric vehicle charging network; $2.5 billion in competitive funding to State DOTs and local governments to deploy electric vehicle

and alternative fuel infrastructure, $7.2 billion for the Transportation Alternatives Set-Aside that State DOTs and local governments can use to carry out pedestrian and bicycle infrastructure projects, and more than $5 billion to ensure the nation's transit systems are tackling the climate crisis.[16] In addition, transportation agencies have for decades been able to use Federal-aid Highway Program funds to support projects that reduce GHG emissions, including transit improvements, congestion reduction and traffic flow improvements, freight and intermodal initiatives, idle reduction technologies, travel demand management, carsharing, carpooling and vanpooling, and bike and pedestrian facilities. Given the range of options available to transportation agencies to reduce GHG emissions and the significant financial resources provided by BIL, FHWA rejects the premise that transportation agencies have limited capacity to influence GHG emissions.

The FHWA also believes that it is important for the measure to address total tailpipe CO_2 emissions on the NHS rather than normalizing this value by population or other factors, since atmospheric CO_2 concentrations are ultimately influenced by the total quantity of CO_2 emissions produced. The FHWA believes a measure addressing total emissions supports a whole-of-government approach to addressing climate change by implementing a consistent measure of CO_2 emissions on the NHS at the National, State, and metropolitan levels. The FHWA is requiring State DOTs and MPOs to establish declining GHG emissions targets. Contrary to the commenters' assertions FHWA is not requiring States to set specific declining target levels or achieve actual reductions in GHG emissions. State DOTs and MPOs have flexibility to set targets that are appropriate for their communities and that work for their respective climate change and other policy priorities, as long as the targets are declining.

Comments on Incentives and Disincentives

Comment: A large number of commenters addressed the creation of incentives or disincentives to strengthen the proposed GHG measure. The vast majority of these comments stated that the proposed rule would be strengthened by including clear and specific incentives for those States and regions that meet their targets, such as providing extra points in competitive grant programs, favorable local match requirements, or expediated project/application review processes. Other commenters recommended restricting use of Federal transportation funds to projects that reduce GHG emissions in States and regions that did not meet their targets. A couple of commenters opposed creation of incentives or disincentives.

Response: Under 23 U.S.C. 145, the Federal-aid highway program is a federally assisted, State-administered program; FHWA does not determine which eligible projects, as selected by States, shall be financed. The FHWA cannot broadly limit the use of transportation funds in the manner recommended by commenters, and FHWA does not have the authority to restrict transportation funding for States that fail to meet their targets. However, BIL includes new programs that will help States and MPOs fund projects that reduce GHG emissions, which in turn, could assist them in meeting the targets that they set. This topic is further discussed in Section III this preamble. States and MPOs can additionally leverage their own programs to reduce GHG emissions by accounting for expected GHG impacts in the analysis and selection of transportation projects.

Comments on Penalties

Comment: Several commenters addressed the possibility of penalties being associated with the proposed measure. A few of these commenters sought clarification on whether FHWA intends to apply a penalty (including penalties associated with failure to comply with Federal requirements under 23 CFR 1.36). Other commenters requested the final rule include a section specifying that no penalties would be applied for not meeting a target. Other commenters asserted that FHWA is in fact providing a penalty for failing to reduce GHGs based on the Agency's authority under 23 CFR 1.36.

Response: There are no specific penalties for failing to achieve GHG targets. Rather, consistent with existing NHPP performance measures, if significant progress is not made for the target established for the GHG measure in 23 CFR 490.507(b), the State DOT must document the actions it will take to achieve that target no later than in its next biennial report, but is encouraged to do so sooner. Significant progress toward achieving NHPP performance targets is further described in 23 CFR 490.109. The FHWA did not propose specific penalties for failure to achieve performance targets, and is not finalizing any such penalty. Failure to achieve significant progress for this measure, as defined in 23 CFR 490.109, will also not trigger any penalties. State DOTs and MPOs that set a declining target but fail to achieve their targets can satisfy regulatory requirements by documenting the actions they will take to achieve that target in their next biennial report. The FHWA does not set or approve the State DOT's or MPO's targets.

Comments on Exemptions

Comment: Several commenters recommended various entities be exempt from the proposed measure for various reasons. The majority of these commenters asserted that rural States have limited options to reduce transportation GHG emissions through transit and other strategies that reduce VMT and should accordingly be exempted from the measure. A few commenters recommended that States and MPOs in attainment with the National Ambient Air Quality Standards be exempted from the GHG measure. One commenter asserted that the GHG measure does not recognize that rural States produce fewer GHG emissions than urban areas.

Response: The FHWA considered the comments suggesting certain entities be exempt from the GHG measure and declines to do so. Greenhouse gas emissions are produced on all NHS facilities. Once released, CO_2 and other GHGs take many years to leave the atmosphere, resulting in increasing global atmospheric concentrations of CO_2 emissions regardless of where they are produced. Urban and rural areas both contribute to increased carbon pollution in the atmosphere, and FHWA believes this rule will provide both with the tools to reduce carbon pollution. This is different from criteria pollutants, which last no more than weeks in the atmosphere and only impact local or regional air quality.

The FHWA also rejects commenters' suggestion that rural States have limited options to reduce transportation GHG emissions. If these States determine that transit and other measures to reduce VMT are not effective means of influencing GHG emissions, they have a wide range of alternative strategies and funding programs available. This includes both formula funding and discretionary grants to deploy electric vehicle charging infrastructure and thereby increase EV adoption, funding to improve roadway operations, and asset management practices to maintain

[16] *See* Biden-Harris Administration Takes Step Forward to Combat Climate Change, Announces Proposed Transportation Greenhouse Gas Emission Reduction Framework, *available at https://highways.dot.gov/newsroom/biden-harris-administration-takes-step-forward-combat-climate-change-announces-proposed.*

roads and reduce excess fuel consumption from poor road condition surface. The FHWA reiterates that the final rule does not require rural States, or any State, set targets at a specific level or to reduce GHG emissions. The final rule also does not impose any penalties on a State for failing to meet its GHG targets. Therefore, there is no justification to exempt rural States, and doing so would run counter to the purpose of this rule, which is to provide consistent and timely information about on-road mobile source emissions on the NHS to support better informed planning choices to reduce GHG emissions or inform tradeoffs among competing policy choices.

Comments on Benefits of a GHG Measure

Comment: A large number of commenters addressed potential benefits from the proposed GHG measure. Several commenters, including State DOTs, that have independently measured and reported GHG emissions asserted that a GHG performance measure can inform planning and decision making, including project prioritization and statewide transportation planning processes. A few of these commenters additionally asserted that implementation of the proposed GHG measure as part of TPM would complement existing GHG reduction efforts. Additional benefits identified by commenters included: empowering State and local leaders to better align their transportation decisions with climate goals, enhancing transparency and accountability of investment decisions, supporting a consistent and coordinated approach to reducing GHG emissions across all levels of government, and supporting national GHG emission reduction goals in accordance with E.O. 13990 and E.O. 14008.

By contrast, several commenters questioned the benefits of the proposed measure. Several commenters asserted that DOTs and MPOs have limited influence over GHG emissions. One commenter asserted that the proposed measure would not help agencies identify projects to reduce GHG emissions and a couple of commenters asserted that the measure would not impact transportation decisions. Another commenter stated this is because the proposed rule does not propose a method for requiring continually decreasing GHG emissions and does not penalize noncompliance.

Response: The FHWA is establishing a GHG emissions performance measure in response to an increasingly urgent climate crisis and to improve the transportation sector's GHG performance, which has lagged behind other major U.S. sectors. The EPA estimates of GHG emissions date back to 1990, and over that time the transportation sector has gone from being the third largest to the largest source of U.S. GHG emissions. The FHWA agrees with commenters that establishing a GHG performance measure is a critical step in improving transportation system performance and supporting national GHG reduction goals. A key premise underlying the GHG measure is that measuring and reporting complete, consistent, and timely information on CO_2 emissions from on-road mobile sources will provide opportunities for all levels of government and the public to make more informed decisions that consider transportation's contribution to climate change and opportunities to reduce GHG emissions. The FHWA believes that by establishing a uniform GHG measure, it is more likely that GHG emissions will be consistently and collaboratively considered by State DOTs and MPOs through transportation planning and performance management. The FHWA also agrees with the comments enumerating the benefits of establishing the GHG measure.

The FHWA disagrees that State DOTs and MPOs have limited influence over GHG emissions. As noted earlier, BIL provides more than $27 billion in Federal funding to help State DOTs and MPOs achieve their GHG reduction targets, and States have additional ability to influence GHG emissions through highway operations and roadway maintenance. The FHWA also disagrees with commenters asserting that a GHG measure would not inform planning and investment decisions. As noted in comments from agencies that have implemented their own GHG measures, performance-based approaches that include GHG emissions have been successfully used to guide planning and investment decisions.

Comments on Burden Posed by a GHG Measure

Comment: Several commenters identified concerns about the impact of the proposed rule on State DOTs and MPOs. Several commenters asserted that the proposed rule would duplicate established and effective programs such as fuel economy standards established under the Corporate Average Fuel Economy (CAFE) Program, and transportation CO_2 estimates published by EPA and the Department of Energy (DOE). Other commenters asserted the implementation of calculating and tracking GHG emissions would be overly burdensome, and that the costs of complying with declining targets would be significant for some States. A few commenters additionally asserted that the proposed GHG measure would not be sufficient for making program- and project-level investment decisions.

Response: FHWA disagrees that the measure established under this rule would place undue burden on States and MPOs. The FHWA also disagrees that the GHG measure would duplicate other Federal programs addressing transportation GHG emissions. A key purpose of the GHG measure is to provide an information source to help State DOTs, MPOs and other agencies set targets, monitor trends, and evaluate the impact of transportation investments and other strategies to reduce on-road GHG emissions. This is a different function from the CAFE program, which regulates GHG emissions rates for new vehicles and is not intended to account for factors such as changes in travel demand, congestion, and other factors affecting total on-road GHG emissions. While Federal agencies such as EPA and DOE publish estimates of total transportation CO_2 emissions, these data are not disaggregated to reflect on-road activity, and also lag the publication of FHWA fuel use data by up to a year. Since FHWA's GHG measure specifically addresses CO_2 on-road activity and utilizes FHWA's data for the estimated fuel volumes distributed shortly after its publication, it will serve as a comprehensive and timely information source to support transportation decision making and to track progress toward national goals.

Several State DOTs that have independently implemented their own on-road tailpipe CO_2 measure observed that all State DOTs already compile the necessary data as part of existing reporting obligations. These commenters asserted that the labor hour assumptions from the RIA are reasonable, that neither the estimation of the measure nor target setting would result in significant burdens for State DOT staff.

Lastly, FHWA disagrees that the cost of complying with declining targets will be burdensome to transportation agencies. The BIL provides over $27 billion in Federal funding to help State DOTs and MPOs achieve the declining GHG targets that they will set under this rule. The rule does not impose compliance costs associated with achieving declining targets since the rule does not require that emissions actually decrease or establish any penalties in the event that declining targets are not achieved.

§ 490.101 Definitions

Comments on the Measure's Relationship to National GHG Goals

Comment: A large number of commenters addressed the proposed performance measure's relationship to the national GHG goals. Several commenters asserted that the proposed performance measure would support the national GHG goals and expressed support for this connection. A smaller number of commenters asserted that the proposed performance measure would not support the national goals, as meeting them through the targets is unattainable/unrealistic, would require actions beyond State DOT/MPO authority, and would not match the timeline needed to see improvements from BIL-funded projects.

In addition, several of these commenters asked for clarifications related to the Administration's national goals for reducing GHG emissions. One commenter asked whether the declining targets must demonstrate a 50–52 percent reduction in on-road CO_2 emissions relative to 2005 levels by 2030 and net-zero on-road CO_2 emissions by 2050, or whether the targets must only aid in meeting the Administration's goals. One commenter requested additional guidance on how to set targets consistent with the national GHG goals for 2030 and 2050, and another requested guidance on how to translate the proposed GHG targets, which would be expressed relative to 2021 levels, to the Administration's goals, which are expressed relative to 2005 levels. Another commenter requested clarification on the meaning of net-zero, and asked whether FHWA will provide mechanisms to offset remaining emissions to achieve net-zero by 2050.

Response: Upon considering public comments, FHWA recognizes that the reference to net-zero targets and national GHG goals in the NPRM may have caused confusion, and FHWA has removed the definition of net-zero from 23 CFR 490.101 and the requirement in 23 CFR 490.105(e)(10) that targets for the GHG measure ''demonstrate reductions toward net-zero targets.'' In the final rule, FHWA is not requiring State DOTs and MPOs to set any specific declining targets or achieve national GHG goals. Declining targets are not required to align with the Administration's goal for the U.S. to reduce CO_2 emissions 50–52 percent below 2005 levels by 2030 and achieve net-zero emissions economywide by 2050, in accordance with national policy established under E.O.s 13990 and 14008. Rather, FHWA believes these national goals can provide a useful roadmap for State DOTs and MPOs as they consider how their targets fit into a longer timeframe of emission reductions.

§ 490.105 Establishment of Performance Targets

Comments on Establishing Declining Targets

Comment: A large number of commenters addressed the requirement to establish declining targets. The majority of these commenters were opposed to this requirement. Most of these commenters asserted that a declining target is inconsistent with 23 U.S.C. 150, which provides States with discretion in setting performance targets. Commenters asserted that States should set data-driven targets based on their own circumstances and analysis, which is not possible when declining targets are required. Commenters also asserted that a requirement for declining targets would reflect FHWA's influencing the selection of projects, with States facing pressure to select projects to support declining targets without commensurate funding through BIL to implement this type of change.

One commenter noted this would be the only measure to which MPOs would be expected to aid States in documenting declining targets, and requested that FHWA provide MPOs a 5-year grace period before requiring the declining targets to be established.

In contrast, several commenters supported the requirement to establish declining targets. These commenters asserted that such a requirement would require States to set targets that will result in improvement, as opposed to other performance measures, and support urgent progress on reducing GHG emissions from transportation. These commenters also asserted that the declining target requirement would not impinge on States' authority to set their own targets.

A few commenters recommended that FHWA require State DOTs and MPOs to provide their underlying assumptions and rationale for vehicle emissions rates and VMT, as well as to clarify in the final rule that targets should be based not only on projections for improvement in vehicle efficiency, but also on projections for reductions in emissions because of VMT-reducing investments, system efficiency enhancements, and/or other strategies.

Response: After considering these comments, FHWA has retained the requirement for State DOTs and MPOs to set declining targets as proposed in the NPRM and as further discussed in this final rule. State DOTs and MPOs that have NHS mileage within their State geographic boundaries and metropolitan planning area boundaries, respectively, are required under the rule to establish declining targets for reducing CO_2 emissions generated by on-road mobile sources. Given the urgency of responding to the climate crisis, FHWA believes it is inappropriate for State DOTs and MPOs to delay establishing targets. The FHWA also believes States and MPOs have the tools necessary to meet these timelines. State DOTs will establish targets no later than February 1, 2024, and MPOs are required to establish targets no later than 180 days after the State DOT establishes their targets. *See* 23 CFR 490.105(e)(1)(ii) and 490.105(f)(1).

The requirement for State DOTs and MPOs to establish declining targets for tailpipe CO_2 emissions on the NHS is vital given the urgency of the climate crisis. Declining targets will help State DOTs and MPOs plan toward reductions in GHG emissions and make Federal infrastructure investment decisions that reduce climate pollution, a principle set forth in E.O. 14008 (86 FR 7626). As discussed in the NPRM, FHWA is not prescribing what declining targets would look like in each State or MPO. State DOTs and MPOs have the flexibility to set targets that work for their respective policies and priorities, so long as the targets are declining. Under the rule, State DOTs and MPOs have discretion in setting an appropriate declining target as informed by complete, consistent, and timely State and local information on GHG emissions from on-road mobile source emissions. The rule provides State DOTs and MPOs with the tools to consider GHG emissions in making transportation decisions and imposes no penalties on States and MPOs that do not meet their targets; therefore, FHWA rejects the characterization that State DOTs and MPOs are being pressured or otherwise required to select any specific project based on this measure.

The FHWA disagrees with the assertion that States and MPOs cannot set data-driven targets based on their own circumstances and analyses when the targets must be declining. States and MPOs will use the appropriate data to set declining targets, as informed by their policies and priorities. State DOTs and MPOs will use the data to evaluate current performance and predict future performance when establishing declining targets.

In addition, FHWA has removed the proposed requirement for declining targets to demonstrate reductions toward net-zero targets. For additional

information on FHWA's decision not to include net-zero in the final rule, see the discussion under Comments on the Measure's Relationship to National GHG goals, in the Section-by-Section Discussion of § 490.101.

Comments on Alternative Target Setting Frequencies

Comment: A large number of commenters provided feedback related to a question raised in the NPRM about introducing a new requirement for State DOTs and MPOs to establish 8- and 20-year targets at the beginning of each 4-year performance period. Many commenters favored adding long-term targets. Commenters in favor of the requirement noted that long-term targets can function as policy goals to allow for more forward-looking evaluation of emissions trajectories. The other commenters supporting this change asserted that long-term targets better align with FHWA planning requirements (Long Range Transportation Plan (LRTP), Metropolitan Transportation Plan (MTP), State Transportation Improvement Program (STIP), Transportation Improvement Program (TIP)), and would create greater visibility and accountability.

In contrast, a small number of commenters opposed adding long-term targets. A few of these commenters noted that they support establishing long-term targets as a best practice, but not as a requirement. Others responded that long-term targets would be too burdensome to develop and would lead to speculative results that will not add value to the target setting process.

Response: The FHWA considered the comments citing the benefits of establishing long-term targets but declines to do so at this time to remain consistent with the existing TPM framework used for the other NHPP measures. Providing consistency with other measures minimizes the complexity of the TPM requirements. It also allows the measures with biennial targets to be considered in relation to each other, which can help illustrate how these measure areas are part of a single transportation system. State DOTs and MPOs can voluntarily establish longer-term targets in the manner that best aligns with their individual policies and plans.

Comments on MPO Joint Targets

Comment: Several commenters expressed concern about the proposed requirement for joint UZA targets. Almost all of these commenters otherwise supported the proposed measure but recommended removing the joint UZA target from the final rule. They identified a variety of concerns, particularly that a joint UZA target would be duplicative of the requirement for metropolitan planning area targets, thereby adding administrative burden for both MPOs and State DOTs. They also asserted that a joint UZA target would be overly complex, especially for planning agencies that are part of multiple UZAs or for those that share borders with a planning agency that serves a different population, such as rural and urban. A few commenters suggested alternatives to the joint UZA target: removing the target based on MPO boundaries and only requiring targets based on UZA; only requiring targets on either MPO boundaries or those based on UZAs; or limiting the targets based on MPO boundaries and on UZA boundaries only to MPOs and UZAs of a certain size, regardless of if there is a joint target or only metropolitan planning area targets.

Response: The FHWA has considered these comments and decided to retain the requirement for joint UZA targets. The FHWA disagrees with comments suggesting a joint UZA target is duplicative of the requirement for metropolitan planning area targets. The FHWA believes the requirement to establish a joint UZA target would encourage collaboration across MPO boundaries through coordinated systems and region-based approaches to reducing GHG emissions. The FHWA believes this collaboration is useful regardless of the MPO or UZA size. Therefore, FHWA has retained the requirement for MPOs to collectively establish a single joint 4-year target for each UZA that contains NHS mileage and that is overlapped by the boundaries of two or more metropolitan planning areas. As provided in 23 CFR 490.105(f)(10), joint targets are also required to be declining targets for reducing CO_2 emissions from on-road mobile sources, and these targets are established in addition to each MPO's individual target for their metropolitan planning area. The targets established are required to be a quantifiable target, which means a value must be used.

To support implementation of this final rule, FHWA is publishing in the docket applicability tables with the MPOs required to establish joint targets in accordance with 23 CFR 490.105(d)(4) and 490.105(f)(10). As with all other MPO targets, and consistent with 23 CFR 490.105(f)(1), joint targets are to be established no later than 180 days after the MPOs' respective State DOT(s) establish their targets. For additional information on the timeline for establishing joint targets, see the discussion under Comments on MPO Target Setting Frequency in this section.

Comments on MPO Target Setting Frequency

Comment: A small number of commenters provided feedback on the frequency of MPO targets. A couple of these commenters recommended that the final rule only include 4-year targets for MPOs. Another requested that the final rule add 2-year targets for MPOs to increase coordination with States on the same schedule. In addition, one commented that the final rule should leave out both the 2- and 4-year targets, and instead adopt 8- and 20-year targets.

Response: Upon consideration of the comments, FHWA has retained the requirement for MPOs to establish 4-year targets as previously established in 23 CFR 490.105(f). The FHWA believes the benefits associated with requiring MPOs to establish additional 2-year targets for the GHG measure would not exceed the additional burden to MPOs. The FHWA believes that introducing 8- and 20-year targets that would only apply to the MPOs and would only apply to a single measure would add confusion and complexity that would not be offset by meaningful benefits.

The final rule makes no changes to the MPO target establishment schedule, and MPOs will continue to report their baseline performance and progress toward their targets in their system performance report. *See* 23 CFR 490.107(c)(2). An MPO will establish targets for this measure, including any required joint targets, no later than 180 days after their respective State DOT(s) establishes their 4-year target for the measure. *See* 23 CFR 490.105(f)(1). The MPOs will report their established GHG targets, including any joint targets, to the State DOT in a manner that is documented and mutually agreed upon by both parties. *See* 23 CFR 490.107(c)(1).

Comments on Technical Assistance

Comment: A large number of commenters requested technical assistance from FHWA to assist in the implementation of the proposed performance measure. Examples cited by these commenters included tools and best practices for modeling the emissions impacts of various types of projects; strategies/pathways/roadmaps to reduce tailpipe CO_2 emissions (especially those with other social and economic impacts, including for disadvantaged communities); factors to consider in setting targets; and recommended targets to meet national GHG reduction goals.

Response: The FHWA believes the existing technical assistance, technical tools, and guidance available through FHWA's TPM and Energy and Emissions Websites, as well as resources provided by the National Highway Institute (NHI), AASHTO, AAMPO, and other publicly available sources provide the information necessary for State DOTs and MPOs to establish targets for the GHG measure. In addition to these existing resources, FHWA recently launched an Every Day Counts (EDC) innovation to help transportation agencies quantify GHG emissions and set targets for reducing GHG emissions through transportation planning. As this measure is implemented, FHWA will continue to consider how best to support State DOTs and MPOs in implementing all the TPM requirements in 23 CFR part 490 and will provide technical assistance on an ongoing basis.

Comments on Benchmarks

Comment: A few commenters suggested that FHWA provide intermediate benchmarks for States to use to ensure they are on track to meet the 2030 national GHG reduction goal.

Response: As noted earlier, while FHWA encourages State DOTs and MPOs to consider the Administration's GHG emissions reduction and net-zero goals when establishing targets, FHWA has removed the proposed requirement for State DOTs to align their declining targets with the Administration's GHG reduction goals. State DOTs and MPOs have the flexibility to set targets that work for their respective policies and priorities, so long as the targets are declining. For example, a State DOT might set targets that would result in steady, incremental progress toward net-zero emissions, or that achieve aggressive early GHG emissions reductions, or be more gradual at first and become more aggressive later. Therefore, FHWA declines to provide intermediate benchmarks at this time. However, State DOTs may voluntarily establish longer-term targets to serve as intermediate benchmarks to help them align their short-term emission reduction targets with their long-term GHG reduction goals.

§ 490.107 Reporting on Performance Targets

Comments on Reporting Start Date

Comment: Many commenters provided feedback on the reporting start date of October 1, 2022. All these commenters oppose this date, which they indicated would precede the NPRM public comment period, which closed on October 13, 2022. One commenter recommended that the rule be revised to either (1) not require States to set two-year targets for the 2022–2025 time period, and have States set their four-year targets for the 2022–2025 time period as part of the October 1, 2024 mid-performance period progress report; or (2) delay implementation altogether until the 2026–2029 performance period. Other commenters recommended a reporting start date in 2023, with the expectation that they would have six months to one year from the final rule for target setting/coordination before their first reporting. Other commenters recommended October 1, 2024 or October 1, 2028, indicating that these dates would correspond with other performance measures. A few commenters suggested a phased approach, such as reporting reference year data and their four-year target in the October 1, 2024 Mid Performance Period Progress Report, and then continuing with two- and four-year targets in the next performance period.

Response: Upon consideration of comments, FHWA determined that State DOTs and MPOs will establish or adjust targets every two years beginning in 2024. Targets will first be established for this measure by State DOTs and reported to FHWA in a State Initial GHG Report, no later than February 1, 2024. *See* 490.105(e)(1)(ii) and 490.107(d). The information provided by State DOTs in the 2024 State Initial GHG Report will be considered the 2024 Mid Performance Period Progress Report. *See* 490.107(b)(2)(i). State DOT reporting will follow an October 1st cycle beginning in 2026 to align with other measure reporting requirements. Recognizing the urgency of addressing the climate crisis, FHWA is establishing an initial date that is as early as practicable and will reflect the best available data. The FHWA is also establishing a February 1, 2024 reporting date for the first GHG targets to increase the opportunities for the targets to be used to help guide overall Federal investments available through the many programs available in BIL that can reduce CO_2 emissions. The February 1, 2024 reporting date is supportive of a 2022 GHG measure reference year since the 2022 VMT data are expected to be finalized by November 30, 2023.

The FHWA made changes throughout the regulation in response to the February 1, 2024 target establishment and reporting date, and they are summarized here. Consistent with all other NHPP measures, the GHG measure will have a 4-year performance period that will begin January 1, 2022. *See* 23 CFR 490.105(e)(4)(i) and 490.105(e)(4)(i)(C). The mid-point of the performance period is 2024, and the end of the performance period is 2026. The FHWA acknowledges that this date is in advance of this final rule's effective date. However, the start of the performance period merely serves as the benchmark that begins the TPM schedule. This measure does not generate any requirements for State DOTs or MPOs in advance of the effective date. The first GHG targets will be due on February 1, 2024, after the effective date of this rulemaking. The FHWA believes it is appropriate to begin the performance period on January 1, 2022 to align with the TPM program and to facilitate a mid-point of the performance period in 2024, and to align with TPM's existing 4-year performance period.

Since initial targets will be established so close to the mid-point, FHWA determined that 2-year targets would not be required. *See* 23 CFR 490.105(10)(i)(A) and 490.105(e)(4)(iii). Section 490.105(e)(10)(i)(B) requires that 4-year targets for this measure be established, and section 490.105(e)(1)(ii) requires they be established no later than February 1, 2024. Section 490.107(d) was added to create the State Initial GHG Report to receive the State DOT's initial 4-year GHG target.

The State Initial GHG Report requirements are similar to the Baseline Performance Period Report. In the State Initial GHG Report, State DOTs will provide the 4-year target, the basis for the target, the baseline data, which is the reference year for this performance period only, the relationship with other performance expectations, the data points used to calculate the GHG metric, described in 23 CFR 490.511(c), and the value calculated. The data used to calculate the metric for the reference year for the Initial GHG Report is specified in section 490.107(d)(2). Information on the GHG measure will be submitted as part of the biennial reports starting with the 2026 Full Performance Period Progress Report. *See* 23 CFR 490.107(b)(1), (b)(2), and (b)(3).

For additional information on how the initial target establishment requirements associated with February 1, 2024 will impact the significant progress determination done after the 2024 Mid Performance Period Progress Report, see the discussion under Comments on Significant Progress Timing, in the Section-by-Section Discussion of section 490.109.

Comments on MPO Reporting Frequency and Process

Comment: Many commenters responded to the MPO reporting requirements and many proposed revisions to the requirements. Many of these commenters noted that the final rule should require MPOs to report every two years on progress towards the performance measure, asserting that MPOs have a significant impact on transportation investment decisions in metropolitan planning areas, and therefore, should be as transparent as States in this regard. Similarly, another commenter suggested that the final rule could encourage but not require MPO reporting every two years given the additional burden of biennial reporting.

A couple of commenters requested that the final rule not require additional reporting by MPOs outside of the system performance report so as not to increase the reporting and tracking burden on MPOs and State DOTs.

Response: The FHWA considered the comments and determined the existing reporting requirements for MPOs in 23 CFR 490.107(c), which FHWA has successfully implemented for other performance measures, are appropriate for reporting on the GHG measure. The MPOs are required to report on performance within their metropolitan transportation plan (MTP), which are developed every 4 or 5 years. *See* 23 CFR 450.324(d). Biennial reporting by MPOs would necessitate an additional report outside of the MTP. At this time, FHWA does not believe that adding a new process for reporting on performance specifically for the GHG measure would provide benefits that would exceed the increased burden from additional reporting requirements. Therefore, FHWA has not made any changes in the final rule based on the comments. The FHWA has retained the requirement for MPOs to report progress toward their GHG target in their system performance report in the metropolitan plan.

For related information on the MPO target establishment timeline, see the discussion under Comments on MPO Target Setting Frequency in the Section-By-Section Discussion for section 490.105.

For additional information related to MPO reporting, see the discussion under Comments on MPO Report Content in this section.

Comments on MPO Report Content

Comment: One commenter noted that there does not appear to be a requirement for the MPO to report the value of the measure (percent reduction in tailpipe CO_2 emissions on the NHS) for their MPA or any required joint UZA targets (for those UZAs that overlap multiple MPOs). In addition, a commenter asked for clarification that reporting of the MPO metric calculation method is not required when an MPO supports the State targets. Another commenter noted that if an MPO chooses to support the State targets, reporting the MPO region total appears unnecessary. Commenters noted that for all the other performance measures (*e.g.,* safety measures bridge and pavement condition measures, and system performance and reliability measures), there is no requirement for MPOs to calculate and report metric or measure values to the State DOT(s).

Response: The FHWA has not made any changes in the final rule based on these comments. The FHWA believes that the requirement for MPOs to report the metrics used to calculate the measure and the metric calculation method is justified because MPOs can use a range of different approaches to calculate the metric, even if they choose to adopt State targets. For this measure, MPOs are required to report all targets they are required to establish, including any joint targets, to the State DOT in a manner that is documented and mutually agreed upon by both parties. *See* 23 CFR 490.107(c)(1). In the system performance report, MPOs will report baseline performance for this measure and progress toward the achievement of their targets. They will also report the calculation of annual tailpipe CO_2 emissions for the NHS for the period between the reference year and the first system performance report that includes the GHG measure information. Subsequent reports will cover the period between the current report and the last report. In addition, the MPO will report a description of their metric calculation method(s).

The FHWA has removed the proposed requirement for MPOs to report tailpipe CO_2 emissions on all roads. The reason for removing this requirement is described in response to the comments on MPO metric reporting, in the discussion for section 490.511.

As a new requirement of the rule, in the system performance report, FHWA is requiring MPOs using metric calculation methods not specified in section 490.511(d) to include information demonstrating the method(s) has valid and useful results for measuring transportation related CO_2. The reason for this requirement is provided in the discussion under Comments on Mutual Agreement of Metric Calculation Method by State DOTs and MPOs, in the Section-by-Section Discussion for section 490.511.

Consistent with 23 CFR 450.226 and 23 CFR 450.340, the MPO's MTP and TIP must meet the Performance-Based Planning and Programming (PBPP) requirements of the planning rule for this performance measure by no later than 2 years after the effective date of this rule.

Comments on Biennial Reporting Cycle

Comment: A few commenters provided general feedback on the State DOT biennial reporting cycle and recommended that the final rule not require two-year reporting for State DOTs.

Response: The FHWA has not made any changes in the final rule based on the comments. Section 150(e) of Title 23, U.S.C., requires State DOTs to report on performance to FHWA on a biennial basis. The FHWA considered the comments and determined the existing biennial reporting cycle established in 23 CFR 490.107(b), which FHWA has successfully implemented for other performance measures, will support State DOTs as they implement the new GHG measure within the context of the overall TPM program. This two-year reporting for State DOTs is consistent with other performance measures, which minimizes the incremental burden since State DOTs do not need to develop an additional reporting process and cycle for this one measure. Two-year reporting is also useful in helping State DOTs progress toward a longer-term goal and can reflect short-term actions such as operational improvements. Such short-term actions are typically outside the control of MPOs, which consequently have 4-year reporting requirements.

Comments on Alternative Progress Reporting Requirements

Comment: A couple of commenters suggested additions to the reporting requirements. One requested a provision for qualitative reporting to describe progress on the measure, to be able to report trends and overall actions and strategies that contribute to lower sales of fossil fuel used for on-road vehicles. Another requested requiring State DOTs and MPOs to identify planned actions to reduce emissions and actions that have been implemented to reduce emissions.

Response: The FHWA has not made any changes in the final rule based on the comments. The reporting requirements in 23 CFR 490.107 represent the minimum requirements for State DOTs and MPOs under the TPM regulations. The requirements in the final rule do not prevent State DOTs

and MPOs from providing more detailed qualitative reporting on progress and planned actions at the State and local level.

Comments on Publicizing GHG Reporting Information

Comment: A large number of commenters provided recommendations intended to increase the transparency and accessibility of reporting on performance. Some commenters recommended that FHWA publish a regular report on State DOT and MPO progress, with a couple of these commenters suggesting that such a report should be issued within three months of FHWA receiving the data and be made available in an interactive format that allows viewers to see both detailed and summary data. Commenters noted that having the data publicly available would also help stakeholders to hold State DOTs and MPOs accountable for progress toward their GHG targets.

Response: The FHWA has not made any changes in the final rule based on the comments. As part of FHWA's commitment to transparency, FHWA regularly publishes the State DOT's biennial reports and FHWA's significant progress determinations on its website as part of the publicly available TPM Dashboards, and the GHG measure will be included in the TPM Dashboards. The State performance dashboards and reports are available at *https://www.fhwa.dot.gov/tpm/reporting/state/.*

State DOTs and MPOs are required to report on progress as outlined in this final rule and described in 23 CFR 490.107. External reporting by the U.S. DOT on funds spent in specific areas is outside the scope of this rulemaking.

§ 490.109 Assessing Significant Progress Toward Achieving the Performance Targets for the National Highway Performance Program and the National Highway Freight Program

Comments on Consequences of Not Achieving Significant Progress

Comment: A small number of commenters addressed the requirement that State DOTs document the actions they will take should they fail to demonstrate significant progress toward their targets. Some of the commenters asserted such a requirement would not influence future target achievement. Some of these commenters recommended the final rule include requirements for State DOTs to provide more detailed information on projects or programs to reduce emissions. Such information would identify future actions to reduce emissions, and include estimated emissions reductions, timelines for implementation and funding sources. One commenter recommended the requirement be revised to require a State DOT to document actions that have been taken in support of targets and identify barriers preventing target achievement. One commenter asked for clarification on whether the documented actions would be binding for MPOs.

Response: The FHWA has not made any changes in the final rule based on the comments. The FHWA does not intend to use the significant progress determination process to be punitive or to encourage State DOTs to establish easy-to-achieve targets. Establishing targets and assessing progress is intended to encourage State DOTs and MPOs to establish data-supported targets that consider anticipated resources and potential uncertainties and to provide data-supported explanations of performance changes. If a State DOT does not make significant progress, FHWA expects the State DOT to provide data-supported explanations for not achieving significant progress, and their plan to achieve said progress in the future.

The FHWA determined that creating additional requirements related to the consequences of not achieving significant progress toward achieving GHG performance targets would create potential burdens that outweigh the potential benefits of such efforts. The documentation requirements in 23 CFR 490.109(f)(1)(v) represents the minimum information State DOTs are federally required to provide. State DOTs can provide additional information in their biennial reports if they feel it supports their discussion of target achievement, or significant progress.

Information provided by the State DOT in response to the requirement in 23 CFR 490.109(f)(1)(v), does not, on its own, require that an MPO within that State select a specific project.

Comments on Significant Progress Criteria

Comment: A small number of commenters recommended that significant progress be defined more narrowly. Commenters suggested the significant progress determination be changed to require performance better than the level that would be achieved through reductions in vehicle emission rates alone, define a minimum percentage of a target that must be reached, use a trend based on multiple performance periods, or use some combination of such factors.

Response: The FHWA considered these comments and declines to apply a narrower definition of significant progress. The existing criteria at 23 CFR 490.109(e)(2) for determining significant progress are well understood and have been applied successfully for the other NHPP and NHFP measures identified in 23 CFR 490.105(c)(1)–(6). Maintaining consistency with the existing significant progress determination criteria will ensure consistency with the other measures and simplify the process. Accordingly, FHWA will determine that a State DOT has made significant progress toward the achievement of each 2-year or 4-year applicable GHG target if (1) the actual performance level is better than the baseline performance, or (2) the actual performance level is equal to or better than the established target, as defined in 23 CFR 490.109(e)(2).

Comments on Significant Progress Timing

Comment: One commenter recommended that FHWA not require a significant progress determination for the first performance period since transportation emissions in initial years would reflect planning and investment decisions made prior to the final rule.

Response: In response to this and other comments and in line with 4-year targets being reported February 1, 2024, FHWA will not assess significant progress toward the achievement of 2-year targets for the GHG measure following the 2024 Mid Performance Period Progress Report. State DOT planning and investment decisions follow a cyclical process and should be informed by State DOT progress toward achieving its GHG targets. As a result, FHWA believes it to be beneficial to begin significant progress determinations for the GHG measure as early as is reasonable. The FHWA will first assess significant progress toward the achievement of targets for the GHG measure after the 2026 Full Performance Period Progress Report (due October 1, 2026).

In response to the initial target establishment requirements related to February 1, 2024, when conducting the significant progress determination after the 2026 Full Performance Period Progress Report, the performance for the reference year shall be used as the baseline performance, as described in 23 CFR 490.105(e)(10)(i)(C).

For additional information on the target establishment requirements associated with February 1, 2024, see the discussion under Comments on Reporting Start Date, in the Section-by-Section Discussion of section 490.107.

§ 490.503 Applicability

Comments on Roadway Applicability

Comment: A large number of commenters recommended that State DOTs and MPOs be required to set targets and track GHG emissions from travel on all public roads and not just the NHS. These comments asserted that the NHS represents only about 5 percent of total U.S. roadways, and just over 50 percent of vehicle miles traveled. They also asserted that setting targets and tracking emissions from travel on all public roads would provide a more comprehensive understanding of transportation emissions and allow for more comprehensive solutions.

Response: The FHWA is finalizing as proposed that this measure will assess performance on the NHS. The FHWA acknowledges that the NHS only represents a limited set of U.S. roadways, and a measure for all public roads would capture more emissions from the transportation sector. However, as detailed in Section III of this preamble, FHWA is promulgating this rulemaking under 23 U.S.C. 150(c)(3)(A)(ii)(IV)–(V), which requires that the Secretary establish measures for States to use to assess the performance of the Interstate System and the non-Interstate NHS. The statute does not provide authority to measure performance on public roads other than the Interstate and non-Interstate NHS. Thus, the GHG measure under 23 CFR 490.105(c)(5), and associated requirements, must be based on performance on the Interstate System and non-Interstate NHS. However, State DOTs and MPOs can choose to implement other measures to support their programs, including measures that apply to all roads, in a manner that best aligns with their individual policies and plans.

§ 490.505 Definitions

Comments on Reference Year

Comment: Many commenters, including those both supporting and opposed to the proposed measure, provided feedback on the use of calendar year (CY) 2021 as the reference year, with all asserting that it would not be appropriate because of the lingering effects of the COVID–19 pandemic on travel in 2021. Commenters noted that using CY 2021 would set the baseline artificially low as VMT and fuels sales continue to rebound and would make it difficult for States to meet declining targets. Commenters provided one or more of the following suggestions as an alternative to using CY 2021 as the reference year: 2022 or a year further in the future; 2019 as a pre-pandemic year; 2005 as a reference to the national GHG targets; or the 5-year average as the baseline.

Response: The FHWA agrees with the commenters' observation that the COVID–19 pandemic reduced travel demand, motor fuel consumption, and CO_2 emissions in 2021 as compared to pre-pandemic levels, and that using 2021 as a reference year would establish a lower-than-normal basis for evaluating future performance. In response to these concerns, FHWA is establishing 2022 as the reference year for the GHG measure. In 2022, travel activity is estimated to have nearly rebounded to pre-pandemic levels, with FHWA's December 2022 Traffic Volume Trends report showing cumulative mileage of 3.17 trillion miles in 2022, compared with 3.27 trillion miles in 2019.[17] 2022 is also the most recent year for which finalized VMT estimates will be available to use in calculating the State DOTs' GHG metric and measure.

Comments on Definition of GHG Emissions

Comment: Several commenters requested clarification on the definition of GHG emissions provided in the NPRM. These commenters asserted that definition proposed at 23 CFR 490.505 goes beyond tailpipe CO_2 emissions to include methane, nitrous oxides, and hydrofluorocarbons. Commenters asserted that this broader definition could open the door to further regulation without a rulemaking.

Response: The definition of GHG included in the NPRM is a common, scientific definition of GHG emissions, which include CO_2 in addition to other gases such as methane (CH_4), nitrous oxide (N_2O), and hydrofluorocarbons (HFCs). According to EPA data, CO_2 accounts for approximately 97 percent of on-road GHG emissions when weighting the 100-year global warming potential of CO_2 and other greenhouse gases.[18] The FHWA concluded that because approximately 97 percent of on-road GHG emissions are from CO_2, including non-CO_2 gases in the measure would not yield significant benefits. Any changes to the GHG measure, including any expansion to the applicability of this measure beyond tailpipe CO_2 emissions, would follow notice and comment rulemaking.

§ 490.509 Data Requirements

Comments on CO_2 Emissions Factor

Comment: Several commenters provided feedback on the proposal for FHWA to provide a standard CO_2 emissions factor for each fuel type. A few of the commenters said FHWA should establish CO_2 emissions factors, with one recommending that FHWA provide optional supplemental fuel blend information and State-specific carbon intensity values based on Low Carbon Fuel Standards reporting. Several commenters requested that FHWA consider accommodating alternative emissions factors for fuel blends when States and MPOs provide credible alternatives. A few commenters requested additional clarity on CO_2 emissions factors, including what they will look like, how they will change over time, how they will be accessed, whether they will vary based on location, and for some specific examples. One commenter stated there is a need to incorporate the biogenic nature of CO_2 from bioethanol into the emissions factor calculation, with one commenter expressing general concerns about the inputs to EPA's Motor Vehicle Emissions Simulator (MOVES) Model.

Response: As proposed in the NPRM, FHWA will publish uniform CO_2 emissions factors for each fuel type to be used by all States in calculating the State DOT's metric for the GHG measure. The FHWA believes that the requirement for States to use a uniform factor, for each fuel type will ensure consistency and comparability of States' estimates of tailpipe CO_2 emissions.

The FHWA recognizes that some States have implemented or are considering the implementation of low carbon fuels programs to reduce the overall carbon intensity of transportation fuels. However, since these programs often target reductions in the GHG emissions from well-to-pump processes, FHWA believes that including emission factors for alternative fuel blends as part of a tailpipe-only measure would be overly complex. The FHWA recognizes that CO_2 emissions estimates for the transportation sector as reported in the EPA's Inventory of U.S. GHG Emissions and Sinks do not include CO_2 emissions associated with biofuels, such as the ethanol component of E10 and other gasoline blends, since it is assumed that

[17] *See* Office of Highway Policy Information, Federal Highway Administration, Traffic Volume Trends December 2022, *available at https://www.fhwa.dot.gov/policyinformation/travel_monitoring/22dectvt/*; Traffic Volume Trends December 2019, *available at https://www.fhwa.dot.gov/policyinformation/travel_monitoring/19dectvt/*.

[18] See EPA Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2021, table 2–13, *available at https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks-1990-2021*. EPA's estimates weight CO_2 and other greenhouse gases on their 100-year global warming potentials, as specified in the Intergovernmental Panel on Climate Change Fifth Assessment Report.

the combustion of the biogenic component of these fuels is recycled as biofuel crops and forests regenerate. The FHWA will consider EPA's accounting practice for addressing biofuel CO_2 emissions as it develops the standard CO_2 emissions factors to support this final rule. The FHWA will publish these factors on its website by August 15th of each biennial reporting year.

Comments on Data Availability Date

Comment: A small number of commenters requested that FHWA provide data to calculate the system performance earlier than the annual date of August 15, with a few specifying that this should be no later than May 1 of each year or, if no joint UZA target is required, then no later than July 1.

One commenter indicated that the prior year's data in Table VM–3—Annual Vehicle Miles and Table MF–21—Motor-Fuel Use has been published in mid-late October in the past, which would conflict with an October 1 deadline for report submissions.

Response: The FHWA appreciates commenters' interest in having data available as early as possible to support State biennial reporting on October 1 of each even year. While estimates of annual motor fuel volumes distributed are not expected to be finalized by FHWA until August 15th, States and MPOs can develop preliminary estimates and forecasts of GHG emissions using the values in FHWA's *Monthly Motor Fuel Reported by States* publication, available on the website of FHWA's Office of Highway Policy Information, and the State-reported fuel sale information.

In response to the comments requesting data earlier than proposed and FHWA's reexamination of when the VMT data will be available, FHWA revised 23 CFR 490.509(h) as well as 23 CFR 490.109(d)(1)(vi) and (d)(1)(vii) to ensure that State DOTs are able to use their most accurate VMT data to estimate the NHS share of total on-road tailpipe CO_2 emissions when reporting actual performance and discussing progress. These changes were made in response to a comment noting that HPMS VMT data may not be finalized by August 15, as proposed in the NPRM.

The final rule allows State DOTs to use their best available VMT data that represents the prior calendar year when reporting performance and their GHG measure and metric information in the biennial reports. *See* 23 CFR 490.509(h). Related changes were made to the State DOT metric reporting requirements the biennial reports. *See* 490.107(b)(1)(ii)(H), (b)(2)(ii)(J) and (b)(3)(ii)(I). Because the VMT data used by the State DOT when preparing the biennial report may not be known to FHWA, State DOTs are required to provide the values they use to calculate the reported metric, and a description of the data source(s) used for the VMT information they report. Section 490.511(f)(2) was revised to be consistent with the metric reporting requirements in 23 CFR 490.107(b)(1)(ii)(H), (b)(2)(ii)(J), and (b)(3)(ii)(I).

The change to 23 CFR 490.509(h) necessitated changes to the data FHWA will use in the significant progress determination. In 23 CFR 490.109(d)(1)(vi) and (d)(1)(vii) FHWA has specified that for the significant progress determination, baseline performance will be based on data from HPMS as of November 30th of the baseline report year, and the reference year will be based on HPMS data as of November 30, 2023. The FHWA also added section 490.109(e)(4)(vii) to clarify that the data used must be accepted by FHWA by the dates specified in section 490.109(d)(1).

Comments on Accessibility of Fuel Sales Data

Comment: A small number of commenters expressed concern at MPOs' inability to access the Fuels & FASH dataset and requested more guidance on how the data could be accessed. One commenter suggested using publicly available State data instead. Another requested clarification on how a State will calculate the aggregate fuel consumption by fuel type.

Response: States are responsible for submitting preliminary estimated totals of monthly fuel volumes distributed for gasoline and ''special fuel'' (which primarily consists of diesel) which are due to FHWA 90 days following the end of a given month. These estimates are made publicly available for each State as part of FHWA's Monthly Motor Fuel Report, accessible on the Office of Highway Policy Information website. Final estimated fuel for a given year are adjusted to account for: (1) updated monthly fuel volumes distributed for gasoline and ''special fuel'' provided by the States, and (2) non-highway use of fuels. These estimates will be available by August 15 of each reporting year (*i.e.,* the following year).

Comments on Non-Highway Fuel Use

Comment: A couple of commenters asserted a portion of fuel sales are consumed off the roadway network, which is a circumstance that is likely more prevalent in rural areas. These commenters asserted that off-highway use of fuels would not be accounted for in fuel use data provided by FHWA.

Response: The FHWA uses a modeling process to estimate the portion of gasoline that is distributed and used for non-highway purposes. These data are then used to adjust the gasoline volume data submitted by the States to identify the volumes that are used specifically for on-highway purposes. In addition, FHWA instructs all States not to report non-highway use of special fuels, including red dyed diesel and kerosene that is untaxed and intended for non-highway applications.

Comments on GHG Emissions Analysis Techniques

Comment: A commenter asserted that the effectiveness of the proposed rule would be limited by current traffic modeling practices. The commenter asserted that the final rule would benefit from improved data collection and analysis techniques, a more standardized approach to documenting projects within the STIP/TIP and ensuring a requirement that emissions from induced demand be included in modeling.

Response: The FHWA believes the data and methods specified in the NPRM are appropriate to evaluate performance related to the GHG measure. State CO_2 estimates are calculated by multiplying gallons of fuel taxed by each State by the CO_2 emissions for each fuel type. The FHWA's Fuels & FASH database-will serve as the source of fuel use data since it is a national, established, and validated source of fuel use information as reported by States. The FHWA believes that Fuels & FASH provides advantages for estimating fuel consumption and CO_2 emissions compared to model-based approaches, which by necessity are built on simplified mathematical representations of transportation networks, travel choices, vehicle fuel efficiency, and other factors. Fuels sales data implicitly accounts for travel demand and fuel consumption resulting from transportation policies and investments, including behavioral changes following highway construction (sometimes referred to as ''induced demand''). The FHWA recognizes that fuel sales may not precisely align with the amount of fuel combustion and CO_2 emissions within the boundaries of a State, particularly since drivers may cross State lines to purchase fuel. However, FHWA believes the data and methods for the State DOT metric calculation achieve an appropriate balance between simplicity and accuracy and will

provide a useful way to monitor trends over time.

The FHWA recognizes that MPOs lack a data source comparable to Fuels & FASH and therefore must estimate CO_2 emissions using an approach different from the States. The FHWA believes that it is appropriate to leave the data and metric calculation methods to the discretion of MPOs, and that it would be unreasonable to specify data collection standards or modeling practices, particularly since some MPOs do not employ technical staff or support travel and emissions models. However, FHWA has updated the final rule to require MPOs that choose a metric calculation approach not enumerated in section 490.511(d) to demonstrate the method has valid and useful results.

Finally, State DOTs and MPOs may employ travel models, emissions models, and other analytics to support transportation planning, programming, and the development of GHG reduction targets. In so doing, they can consider the degree to which their models are sensitive to the travel and emissions impacts of GHG reduction strategies and other decisions, such as future highway capacity. However, FHWA believes it is not appropriate to specify the models or other practices that States and MPOs use for these purposes as part of the final rule.

For additional information related to the CO_2 factor, see the discussion under Comments on CO_2 Emissions Factor, in this section.

§ 490.511 Calculation of National Highway System Performance Metrics

Comments on State DOT GHG Metric Calculation Method

Comment: Several commenters provided input on the calculation of the proposed GHG performance measure. A few commenters expressed support for using existing national data sets for fuel sales and VMT data, while a few comments offered proposed revisions. Alternatives suggested included allowing States to propose alternative or additional data sets or methodologies and requiring States to use one of the methods offered for MPOs in the proposed rule (*i.e.,* MOVES or FHWA's Energy and Emissions Reduction Policy Analysis Tool (EERPAT)).

Response: The FHWA has retained the State DOT metric calculation method proposed in the NPRM. This approach is based on fuel use data that is already collected by States and reported to FHWA, ensuring comparability between State estimates. As noted in response to the previous comment, FHWA believes this approach provides a more accurate estimate of total fuel use and CO_2 emissions than model-based approaches. The FHWA recognizes that this approach includes some simplifying assumptions, particularly by assuming a similar rate of GHG emissions on NHS and non-NHS facilities per VMT. While it is expected that emissions rates would differ somewhat between NHS- and non-NHS facilities, FHWA believes that this simplifying assumption is justified since the difference between emissions rates on NHS- and non-NHS facilities would be largely constant from year-to-year and similar across States, providing a consistent way to monitor performance.

For additional information on how the MPO's metric calculation method is selected and documented, see the discussion under Comments on Mutual Agreement on MPO Metric Calculation Method by State DOTs and MPOs, which is part of this section.

Comments on MPO GHG Metric Calculation Method

Comment: Several commenters addressed MPO metric calculation methodology and reporting. Approximately half of these commenters supported preserving MPOs' flexibility in calculating the GHG metric. In contrast, a couple of commenters supported requiring MPOs to use the MOVES model to calculate GHG emissions, while one asserted that FHWA should provide the data needed for MPOs to calculate a metric for the GHG measure. In addition, one commenter questioned the requirement for MPOs to calculate and report tailpipe CO_2 emissions on all roads, noting the MPO may choose a methodology that allows for calculating the GHG metric for NHS roads directly.

Response: Upon consideration of comments, FHWA is preserving MPOs' flexibility to use a range of different approaches in calculating the metric for the GHG measure. The FHWA recognizes that technical capabilities vary across MPOs and that some MPOs may not support a travel demand model or be required to use EPA's MOVES model. The FHWA also appreciates the observation that some MPOs may choose to calculate tailpipe CO_2 emissions on the NHS facilities directly. This is inherently different from State DOTs, which are required to calculate CO_2 emissions for all roads before estimating the proportion of emissions associated with the NHS. Accordingly, in the final rule, FHWA has removed the requirement for MPOs to report tailpipe CO_2 emissions for all roads.

Comments on Mutual Agreement on MPO Metric Calculation Method by State DOTs and MPOs

Comment: A small number of commenters addressed the requirement for the MPO metric calculation method to be mutually agreed upon by both the State DOT and the MPO. A few commenters opposed the requirement for the MPO to obtain concurrence on the metric calculation method. Similarly, one commenter recommended that an MPO be allowed to use, without the need to obtain additional approvals, any regional data, models, and methodologies that is already used to measure GHG for purposes of air quality conformity modeling or other GHG performance measures. One commenter recommended the metric calculation method be covered in the ''written provisions'' section of the system performance report.

Response: The FHWA agrees with commenters that the requirement for MPOs and States to agree on the MPO's metric calculation method creates burden for both groups. In response to the comments, FHWA is not requiring the MPO's metric calculation method to be mutually agreed upon by the State DOT and MPO, but MPOs are encouraged to coordinate with the State DOT on the data used to the maximum extent practicable.

The FHWA has instead added a requirement to section 490.107(c)(2)(ii) that if the metric calculation method used by the MPO is not specified in section 490.511(d), the MPO must demonstrate the method's validity and usefulness in measuring transportation-related CO_2 emissions in the system performance report. The FHWA believes that this change will be sufficient to ensure accountability in the methods MPOs use to calculate the GHG metric, absent the requirement for mutual agreement on the method with State DOTs. Consistent with FHWA's collaboration and coordination requirements in 23 CFR part 450, FHWA encourages MPOs and the State DOTs to work together in identifying methods, tools, and data the MPO's can use to calculate the MPO's metric for the GHG measure.

For additional information related to reporting of the MPO's metric, see the discussion under Comments on MPO Report Content, in the Section-by-Section Discussion for section 490.107.

Comments on the RIA

Comments on the Estimated Cost of the Regulation

Comment: Many commenters discussed cost estimates from the RIA. Many commenters asserted that the RIA underestimated direct implementation costs of the measure and provided examples of costs that they believe were underestimated. Examples cited include the time and level of expertise needed to establish targets, conduct biennial reporting, conduct stakeholder engagement, develop and maintain models, and achieve coordination between DOTs, MPOs, and State agencies. Several commenters also asserted that achieving national GHG reduction goals would require significant changes to transportation investments that would carry significant monetary costs and would require significant time to implement. A few commenters also asserted that achieving GHG reductions through strategies to reduce on-road travel activity would create further social and economic costs including increased congestion and travel times. Another commenter asserted that reducing on-road GHG emissions would reduce the consumption of traditionally taxed fuels and require the establishment of a different highway finance revenue model that is not based on the consumption of fossil fuels.

In contrast, several commenters asserted that the burdens of the proposed performance measure would be negligible. These commenters noted that States and MPOs have already established processes and partnerships under the TPM framework and that staff efforts to quantify and report GHG emissions on the NHS would not be expected to create significant cost burden and are in line with existing performance measures.

Other commenters noted that work performed in support of the GHG measure would not support other aspects State DOTs' and MPOs' missions in ways that would mitigate net costs of the proposed rule. One State DOT also asked for clarification on how the total costs of compliance in time and cost is calculated.

Response: The FHWA has reexamined the RIA considering public comments and any updated information, and FHWA has determined that the RIA cost estimates should be primarily unchanged from the RIA in support of the NPRM, with a small reduction in estimated burden based on the elimination of the NPRM requirement for States and MPOs to estimate CO_2 emissions for all roads in addition to the NHS. The FHWA recognizes commenters' observations that many State DOTs and MPOs will need to develop capacity to address GHG emissions through interagency coordination, stakeholder engagement, and the consideration of strategies to support GHG reduction targets. The FHWA believes that these examples of costs were addressed through the NPRM RIA labor hour estimates for section 490.105, which assume that the level of effort for setting targets in the first reporting period will be approximately twice that of subsequent reporting periods. The FHWA has included in the RIA a break-even analysis of the CO_2 reductions from the rule that would be necessary to equal its costs. This analysis determined that the required reductions would represent a very small proportion of total transportation CO_2 emissions.

In addition, FHWA reiterates State DOTs and MPOs will not experience costs from achieving GHG reduction targets since FHWA is not requiring specific declining target values be established, nor is it mandating penalties for failing to meet the targets established.

The FHWA recognizes that changes in fuel use may impact highway funding. However, as this rulemaking does not require any reductions in fuel use, this issue is outside of the scope of this rulemaking, nor does FHWA have any authority to change the statutory funding scheme established by Congress.

Comments on the Use of the Social Cost of Carbon

Comment: Several commenters raised concerns about the use of the social cost of carbon dioxide (SC–CO_2) to conduct a ''break-even'' analysis of CO_2 reductions required for the proposed measure to equal its costs. These commenters asserted that use of the Interagency Working Group (IWG) on Social Cost of Greenhouse Gases [19] ''interim'' social costs of GHGs overstate damages from GHG emissions. In contrast, several commenters noted the social cost of carbon likely significantly underestimates the actual cost of climate damages caused by GHG emissions because important categories of climate damages cannot be quantified.

Response: As discussed further in the RIA for the final rule, the IWG on Social Cost of Greenhouse Gases published interim estimated for the SC–CO_2 per ton of carbon emissions for each year from 2020 to 2050. As noted by the IWG's technical support document prepared under E.O. 13990, the SC–CO_2 framework in principle can capture all climate change impacts, including (but not limited to) changes in net agricultural productivity, human health effects, property damage from increased flood risk natural disasters, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services. The SC–CO_2 estimates used in the break-even analysis for this rule were developed over many years, using transparent process, peer-reviewed methodologies, the best science available at the time of that process, and with input from the public. However, many important categories of climate damages cannot currently be fully quantified and monetized, and so the SC–CO_2 values very likely underestimate the climate damages caused by GHG pollution. The IWG's technical support document further notes that the SC–CO_2 as estimated should reflect the societal value of reducing CO_2 emissions by one metric ton, and that the SC–CO_2 is the theoretically appropriate value to use in conducting economic analyses of policies that affect CO_2 emissions.[20] The DOT is an IWG member, and FHWA has reviewed the technical support document and has determined that the recommended values are appropriate for use in the break-even analysis in the RIA.

VIII. Rulemaking Analyses and Notices

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

The Office of Management and Budget (OMB) has determined that this rulemaking is a significant regulatory action within the meaning of E.O. 12866, as amended by E.O. 14094 (''Modernizing Regulatory Review''), because it raises legal or policy issues for which centralized review would meaningfully further the President's

[19] Interagency Working Group on Social Cost of Greenhouse Gases, U.S. Government. ''Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990'' (February 2021), *available at https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.*

[20] Interagency Working Group on Social Cost of Greenhouse Gases, U.S. Government. ''Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990'' (February 2021), *available at https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.*

priorities or the principles set forth E.O. 12866. The rule will not have an annual effect on the economy of $200 million or more. The rule will not adversely affect in a material way the economy, any sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities. In addition, the changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. As described above, FHWA estimates that total costs associated with this rule, between 2023 and 2032, will be $10.8 million, discounted at 7 percent, and $12.7 million discounted at 3 percent (these figures are estimated in 2020 dollars). On an annual basis, the total costs would be $1,535,045 discounted at 7 percent and $1,494,406 discounted at 3 percent. The FHWA is unable to quantify the benefits of the rulemaking; consequently, FHWA describes the expected benefits qualitatively in the preamble and the RIA. These benefits include potentially significant reductions in GHG emissions resulting from decisions and actions based on greater consideration of GHG emissions in transportation planning, public awareness of GHG emissions trends, and better information on the impact of transportation decisions on GHG emissions. While many of the benefits in the proposed rule are difficult to quantify, FHWA believes that the benefits justify the costs. As discussed in greater detail in the RIA, FHWA estimates that benefits of this rule would exceed its costs with a reduction of less than 0.01 percent of the average annual amount of CO_2 emissions from U.S. transportation sources in 2019, based on a range of discount rates used to estimate the social cost of CO_2 and the 7 and 3 percent discount rates used to estimate the total costs of the final rule. The full RIA is available in the docket.

B. Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), FHWA has evaluated the effects of this rule on small entities and has determined that it is not anticipated to have a significant economic impact on a substantial number of small entities. The rule will affect two types of entities: State governments and MPOs. State governments are not included in the definition of small entity set forth in 5 U.S.C. 601. Metropolitan planning organizations are considered governmental jurisdictions, and to qualify as a small entity they would need to serve fewer than 50,000 people. *See* 5 U.S.C. 601(5). Metropolitan planning organizations are designated to serve UZAs with populations of 50,000 or more. *See* 23 U.S.C. 134(d)(1). Therefore, FHWA certifies that the rule will not have a significant economic impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act of 1995

This rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48). The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes estimates of anticipated impacts, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $177 million, using the most current (2022) Implicit Price Deflator for the Gross Domestic Product. This rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $177 million or more in any one year (2 U.S.C. 1532). In addition, the definition of ''Federal Mandate'' in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal-aid highway program permits this type of flexibility.

D. Executive Order 13132 (Federalism Assessment)

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

E. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from OMB for each collection of information they conduct, sponsor, or require through regulations. The FHWA has determined that this rule contains collection of information requirements for the purposes of the PRA. This rule introduces a GHG performance measure that will be implemented as part of the overarching TPM regulations in 23 CFR part 490, which includes State DOT reporting on performance. The collection of State DOT reports in support of 23 CFR 490.107 is covered by OMB Control No. 2125–0656.

The FHWA has analyzed this rule under the PRA and has determined the following:

Respondents: 52 State DOTs.

Frequency: Single State Initial GHG Report, and ongoing biennial reporting.

Estimated Average Burden per Response: Approximately 88 hours to complete and submit the required report, or 44 hours annually.

Estimated Total Annual Burden Hours: Approximately 2,288 hours annually.

In addition, MPO coordination and reporting activities are covered by OMB Control No. 2132–0529, Metropolitan and Statewide and Nonmetropolitan Transportation Planning.

F. National Environmental Policy Act

The FHWA has analyzed this rule pursuant to the NEPA and has determined that it is categorically excluded under 23 CFR 771.117(c)(20), which applies to the promulgation of rules, regulations, and directives. Categorically excluded actions meet the criteria for categorical exclusions under the Council on Environmental Quality regulations and under 23 CFR 771.117(a) and normally do not require any further NEPA approvals by FHWA. This rule will establish in FHWA regulations a performance measure for on-road CO_2 emissions on the NHS for use by States and MPOs in measuring transportation performance. The FHWA does not anticipate any adverse environmental impacts from this rule, the purpose of which is to inform decisionmaking about the transportation sector's contribution to GHG emissions, and thereby contribute to environmental sustainability; moreover, no unusual circumstances are present under 23 CFR 771.117(b).

G. Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this rule in accordance with the principles and criteria contained in E.O. 13175, ''Consultation and Coordination with Indian Tribal Governments.'' The rule will implement statutory requirements under 23 U.S.C. 150(c)(3)(A)(ii)(IV)–(V) to establish measures for States to assess the performance of the Interstate and

non-Interstate NHS, which FHWA interprets to include environmental performance. This measure establishes requirements only for States and MPOs that receive Title 23 Federal-aid highway funds and have NHS mileage within their jurisdictions; it would not have direct effects on one or more Indian Tribes, would not impose substantial direct compliance costs on Indian Tribal governments, and would not preempt Tribal laws. Accordingly, the funding and consultation requirements of E.O. 13175 do not apply and a Tribal summary impact statement is not required.

As noted above, FHWA anticipates the benefits from this rulemaking include potentially significant reductions in GHG emissions resulting from decisions and actions based on greater consideration of GHG emissions in transportation planning by States and MPOs, public awareness of GHG emissions trends, and better information on the impact of transportation decisions on GHG emissions. Although this rulemaking does not apply to Tribes, FHWA expects that Tribes would benefit from potential reductions in GHG emissions that result from State and MPO implementation of this rulemaking.

H. Executive Order 12898 (Environmental Justice)

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

I. Regulation Identifier Number

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

List of Subjects in 23 CFR Part 490

Bridges, Highway safety, Highways and roads, Reporting and recordkeeping requirements.

Issued under authority delegated in 49 CFR 1.81 and 1.85.

Shailen P. Bhatt,

Administrator, Federal Highway Administration.

In consideration of the foregoing, FHWA amends Title 23, Code of Federal Regulations by revising part 490, to read as follows:

PART 490—NATIONAL PERFORMANCE MANAGEMENT MEASURES

■ 1. The authority citation for part 490 continues to read as follows:

Authority: 23 U.S.C. 134, 135, 148(i), and 150; 49 CFR 1.85.

■ 2. Amend § 490.101 by adding in alphabetical order the definition of ''Fuels and Financial Analysis System—Highways (Fuels & FASH)'' to read as follows:

§ 490.101 Definitions.

* * * * *

Fuels and Financial Analysis System—Highways (Fuels & FASH) as used in this part means FHWA's system of record for motor fuel, highway program funding, licensed drivers, and registered vehicles data.

* * * * *

■ 3. Amend § 490.105 by:
■ a. Adding paragraph (c)(5);
■ b. Revising paragraph (d) introductory text, and adding paragraphs (d)(1)(v) and (d)(4);
■ c. Adding paragraphs (e)(1)(i), (e)(1)(ii), and (e)(4)(i)(C), revising paragraph (e)(4)(iii), and adding paragraph (e)(10); and
■ d. Revising paragraphs (f)(1)(i) and (f)(3), and adding paragraph (f)(10).

The additions and revisions read as follows:

§ 490.105 Establishment of performance targets.

* * * * *

(c) * * *

(5) 490.507(b) for greenhouse gas (GHG) emissions on the NHS;

* * * * *

(d) *Target scope.* Targets established by State DOTs and MPOs shall, regardless of ownership, represent the transportation network or geographic area, including bridges that cross State borders, that are applicable to the measures as specified in paragraphs (d)(1), (2), and (4) of this section.

(1) * * *

(v) 490.503(a)(2) for the GHG measure specified in § 490.507(b);

* * * * *

(4) MPOs shall establish a joint target for the GHG measure specified in § 490.507(b), for each urbanized area that meets the criteria specified in paragraph (f)(10) of this section. The joint target shall represent the performance of the transportation network specified in § 490.503(a)(2).

(e) * * *

(1) *Schedule.* State DOTs shall establish targets not later than the dates provided in paragraphs (e)(1)(i) and (e)(1)(ii) of this section, and for each performance period thereafter, in a manner that allows for the time needed to meet the requirements specified in this section and so that the final targets are submitted to FHWA by the due date provided in § 490.107(b).

(i) State DOTs shall establish initial targets not later than May 20, 2018, except as provided in paragraph (e)(1)(ii) of this section.

(ii) State DOTs shall establish initial targets for the GHG measure identified in § 490.507(b) not later than February 1, 2024.

* * * * *

(4) * * *

(i) * * *

(C) For the GHG measure in § 490.105(c)(5), the performance period will begin on January 1, 2022 and will extend for a duration of 4-years. Subsequent performance periods will begin as described in paragraph (4)(i)(A) of this section.

* * * * *

(iii) Except as provided in paragraphs (e)(7) and (e)(8)(v), and (e)(10)(i) of this section, State DOTs shall establish 2-year targets that reflect the anticipated condition/performance level at the midpoint of each performance period for the measures in paragraphs (c)(1) through (7) of this section, and the anticipated cumulative emissions reduction to be reported for the first 2 years of a performance period by applicable criteria pollutant and precursor for the measure in paragraph (c)(8) of this section.

* * * * *

(10) *Targets for the GHG measure.* Targets established for the GHG measure in paragraph (c)(5) of this section shall be declining targets for reducing tailpipe CO_2 emissions on the NHS.

(i) The following requirements apply only to the targets established for the State Initial GHG Report, described in § 490.107(d), and 2026 Full Performance Period Progress Report, described in § 490.107(b)(3), for the measure in § 490.507(b):

(A) State DOTs are exempt from the required 2-year target described in paragraph (e)(4)(iii) of this section.

(B) State DOTs shall establish a 4-year target, required under paragraph

(e)(4)(iv) of this section, and report this target in their 2024 State Initial GHG Report, required under § 490.107(d).

(C) The performance for the reference year shall be used as the baseline performance.

(f) * * *

(1) * * *

(i) The MPOs shall establish 4-year targets, described in paragraph (e)(4)(iv) of this section, for all applicable measures, described in paragraphs (c) and (d) of this section. For the GHG measure described in (c)(5) of this section, the targets established shall be declining targets for reducing tailpipe CO_2 emissions on the NHS.

* * * * *

(3) *Target establishment options.* For each performance measure identified in paragraph (c) of this section, except the CMAQ Traffic Congestion measures in paragraph (f)(5) of this section, MPOs meeting the criteria under paragraph (f)(6)(iii) of this section for Total Emissions Reduction measure, the MPOs shall establish targets for the metropolitan planning area by either:

(i) Agreeing to plan and program projects so that they contribute toward the accomplishment of the relevant State DOT target for that performance measure; or

(ii) Committing to a quantifiable target for that performance measure for their metropolitan planning area.

* * * * *

(10) *Joint Targets for the GHG Measure.* Where an urbanized area contains mainline highways on the NHS, and any portion of that urbanized area is overlapped by the metropolitan planning area boundaries of two or more MPOs, those MPOs shall collectively establish a single joint 4-year target for that urbanized area, described in paragraph (e)(4)(iv) of this section. The target established shall be a declining target for reducing tailpipe CO_2 emissions on the NHS. This joint target is in addition to the targets for the metropolitan planning area required in paragraph (f)(1)(i) of this section.

(i) The NHS designations and urbanized area data shall be from the data contained in HPMS 1 year before the State DOT Baseline Performance Period Report is due to FHWA.

(ii) Only one target shall be established for the entirety of each applicable urbanized area regardless of roadway ownership. In accordance with paragraph (f)(9) of this section, each MPO shall report the same joint target for the urbanized area.

(iii) The target established for each urbanized area shall represent a quantifiable target for that urbanized area.

■ 4. Amend § 490.107 by

■ a. Revising paragraphs (a)(1) and (b)(1)(i), and adding paragraph (b)(1)(ii)(H);

■ b. Revising paragraph (b)(2)(i) and adding paragraph (b)(2)(ii)(J);

■ c. Revising paragraph (b)(3)(i) and adding paragraph (b)(3)(ii)(I);

■ d. Revising paragraph (c)(2); and

■ e. Adding paragraph (d).

The additions and revisions read as follows:

§ 490.107 Reporting on performance targets.

(a) * * *

(1) All State DOTs and MPOs shall report in accordance with the schedule and content requirements under paragraphs (b), (c), and (d) of this section, respectively.

* * * * *

(b) * * *

(1) * * *

(i) *Schedule.* State DOTs shall submit a Baseline Performance Period Report to FHWA by October 1st of the first year in a performance period. State DOTs shall submit their first Baseline Performance Period Report to FHWA by October 1, 2018, and subsequent Baseline Performance Period Reports to FHWA by October 1st every 4 years thereafter, except for the GHG measure specified in § 490.105(c)(5). For the Baseline Performance Period Report, State DOTs shall submit information related to the GHG measure in the report due to FHWA by October 1, 2026, and every 4 years thereafter.

(ii) * * *

(H) GHG metric and metric information for the GHG measure. The metric and the individual values used to calculate the GHG metric, as described in § 490.511(c), for the calendar year preceding the reporting year, and a description of the data source(s) used for the VMT information.

* * * * *

(2) * * *

(i) *Schedule.* State DOTs shall submit a Mid Performance Period Progress Report to FHWA by October 1st of the third year in a performance period. State DOTs shall submit their first Mid Performance Period Progress Report to FHWA by October 1, 2020, and subsequent Mid Performance Period Progress Reports to FHWA by October 1st every 4 years thereafter, except for the GHG measure specified in § 490.105(c)(5). For the Mid Performance Period Progress Report, the State DOTs shall submit information related to the GHG measure in the report due to FHWA by October 1, 2028, and every 4 years thereafter.

(ii) * * *

(J) GHG metric and metric information for the GHG measure. The metric and the individual values used to calculate the GHG metric, as described in § 490.511(c), for the calendar year preceding the reporting year, and a description of the data source(s) used for the VMT information.

* * * * *

(b) * * *

(3) * * *

(i) *Schedule.* State DOTs shall submit a progress report on the full performance period to FHWA by October 1st of the first year following the reference performance period. State DOTs shall submit their first Full Performance Period Progress Report to FHWA by October 1, 2022, and subsequent Full Performance Period Progress Reports to FHWA by October 1st every 4 years thereafter, except for the GHG measure specified in § 490.105(c)(5). For the Full Performance Period Progress Report, State DOTs shall submit information related to the GHG measure in the report due to FHWA by October 1, 2026, and every 4 years thereafter.

(ii) * * *

(I) *GHG metric and metric information for the GHG measure.* The metric and the individual values used to calculate the GHG metric, as described in § 490.511(c), for the calendar year preceding the reporting year, and a description of the data source(s) used for the VMT information.

(c) * * *

(2) The MPOs shall report baseline condition/performance and progress toward the achievement of their targets in the system performance report in the metropolitan transportation plan in accordance with part 450 of this chapter. For the GHG measure in § 490.105(c)(5), the MPOs shall also report:

(i) The calculation of annual tailpipe CO_2 emissions for the NHS, and may include all public roads, described in § 490.511(f), for the period between the current and previous system performance report, and the reference year.

(ii) A description of the metric calculation method(s) used, as described in § 490.511(d). When the method(s) used are not specified in § 490.511(d), the MPO must include information demonstrating the method(s) has valid and useful results for measuring transportation related CO_2.

* * * * *

(d) *State Initial GHG Report.* For the GHG measure in § 490.105(c)(5), State DOTs shall submit an Initial GHG Report by February 1, 2024.

(1) The State Initial GHG Report shall include:

(i) *Targets.* The 4-year target for the performance period, as required in § 490.105(e), and a discussion, to the maximum extent practicable, of the basis for the established target;

(ii) *Baseline performance.* Performance derived from the data collected for the reference year, for the 4-year target required under paragraph (d)(1) of this section;

(iii) *Relationship with other performance expectations.* A discussion, to the maximum extent practicable, on how the established target in paragraph (d)(1) of this section support expectations documented in longer range plans, such as the State asset management plan required by 23 U.S.C. 119(e) and the long-range statewide transportation plan provided in part 450 of this chapter; and

(iv) *GHG metric and metric information for the GHG measure.* The metric and the individual values used to calculate the GHG metric, as described in § 490.511(c), for the reference year.

(2) For the State Initial GHG Report, the State DOT shall use the following data to calculate the GHG metric, described in § 490.511(c), for the reference year.

(i) Data published by FHWA for the CO_2 factors for each on-road fuel type associated with the reference year.

(ii) The fuel consumed data shall meet the requirements in § 490.509(g) for the reference year.

(iii) The VMT data shall meet the requirements of § 490.509(h) for the reference year.

■ 5. Amend § 490.109 by adding paragraph (d)(1)(v), revising paragraph (d)(1)(vi), and adding paragraphs (d)(1)(vii) and (viii), (e)(4)(vi) and (vii), (e)(6), and (f)(1)(v) to read as follows:

§ 490.109 Assessing significant progress toward achieving the performance targets for the National Highway Performance Program and the National Highway Freight Program.

* * * * *

(d) * * *

(1) * * *

(v) Data contained within Fuels & FASH on August 15th of the year in which the significant progress determination is made that represents performance from the prior year for targets established for the GHG measure in § 490.105(c)(5), and data from Fuels & FASH that represents performance for the reference year.

(vi) Baseline condition/performance data contained in Fuels & FASH, HPMS, and NBI of the year in which the Baseline Period Performance Report is due to FHWA that represents baseline conditions/performances for the performance period for the measures in §§ 490.105(c)(1) through (5). For the GHG measure, specified in § 490.105(c)(5), the baseline performance data from HPMS shall be the data contained within HPMS on November 30th of the year the Baseline Period Performance Report is due to FHWA.

(vii) Data contained within the HPMS on November 30th of the year in which the significant progress determination is made that represents performance from the prior year for targets established for the GHG measure specified in § 490.105(c)(5), and HPMS data as of November 30, 2023 that represents performance for the reference year.

(viii) The CO_2 factor specified in § 490.509(f) for the baseline performance, prior year, and reference year for targets established for the GHG measure specified in § 490.105(c)(5).

* * * * *

(e) * * *

(4) * * *

(vi) A State DOT's reported data are not accepted in the Fuels & FASH, by the data extraction date specified in paragraph (d)(1) of this section for the GHG measure in § 490.105(c)(5).

(vii) A State DOT's reported data are not accepted in the HPMS by the data extraction date specified in paragraph (d)(1) of this section for the GHG measure in § 490.105(c)(5).

* * * * *

(6) *Phase-in of new requirements for the GHG Measure.* The following requirements shall only apply to the GHG targets, described in § 490.513(d), and the significant progress determination conducted immediately after the submittal of the 2024 Mid Performance Period Progress Report, described in § 490.107(b)(2):

(i) Consistent with § 490.105(e)(10)(i), State DOTs are not required to establish a 2-year target, and, consistent with 490.107(b)(2), State DOTs will not submit information related to the GHG measure in the 2024 Mid Performance Period Progress Report.

(ii) At the midpoint of the performance period, FHWA shall not make a determination of significant progress toward the achievement of 2-year targets for the GHG measure; and

(iii) The FHWA will classify the assessment of progress toward the achievement of targets in paragraph (e)(6)(ii) of this section as ''progress not determined'' and they will be excluded from the requirement under paragraph (e)(2) of this section.

(f) * * *

(1) * * *

(v) If significant progress is not made for the target established for the GHG measure in § 490.105(c)(5), then the State DOT shall document the actions it will take to achieve the GHG performance target.

* * * * *

Subpart E—National Performance Management Measures To Assess Performance of the National Highway System

■ 6. Amend § 490.503 by adding paragraph (a)(2) to read as follows:

§ 490.503 Applicability.

(a) * * *

(2) The Greenhouse Gas (GHG) measure in § 490.507(b) is applicable to all mainline highways on the Interstate and non-Interstate NHS.

* * * * *

■ 7. Amend § 490.505 by adding in alphabetical order definitions of ''Greenhouse gas'', and ''Reference year'' to read as follows:

§ 490.505 Definitions.

* * * * *

Greenhouse gas (GHG) is any gas that absorbs infrared radiation (traps heat) in the atmosphere. Approximately 97 percent of on-road GHG emissions are carbon dioxide (CO_2) from burning fossil fuel. Other transportation GHGs are methane (CH_4), nitrous oxide (N_2O), and hydrofluorocarbons (HFCs).

* * * * *

Reference year is calendar year 2022 for the purpose of the GHG measure.

* * * * *

■ 8. Amend § 490.507 by revising the introductory text and adding paragraph (b) to read as follows:

§ 490.507 National performance management measures for system performance.

There are three performance measures to assess the performance of the Interstate System and the performance of the non-Interstate NHS for the purpose of carrying out the National Highway Performance Program (referred to collectively as the NHS Performance measures).

* * * * *

(b) One measure is used to assess GHG emissions, which is the percent change in tailpipe CO_2 emissions on the NHS compared to the reference year (referred to as the GHG measure).

■ 9. Amend § 490.509 by adding paragraphs (f) through (h) to read as follows:

§ 490.509 Data requirements.

* * * * *

(f) The FHWA will post on the FHWA website, no later than August 15th of each reporting year, the CO_2 factors for each on-road fuel type that will be used to calculate the GHG metric for the GHG measure in § 490.105(c)(5).

(g) Fuel sales information needed to calculate the fuel consumed for the GHG measure in § 490.507(b) shall:

(1) Represent the total number of gallons of fuel consumed by fuel type; and

(2) Be based on fuels sales data for the prior calendar year, and reported to Fuels & FASH.

(h) Annual vehicle miles traveled (VMT) needed to calculate the GHG measure in § 490.507(b) shall come from the best available data that represents the prior calendar year and is consistent, to the maximum extent practicable, with data submitted to HPMS. The VMT data needed to calculate the GHG metric in § 490.511(c) for the reference year, shall be the HPMS data as of November 30, 2023.

■ 10. Amend § 490.511 by adding paragraphs (a)(2), (c), (d), and (f) to read as follows:

§ 490.511 Calculation of National Highway System performance metrics.

(a) * * *

(2) Annual Total Tailpipe CO_2 Emissions on the NHS for the GHG measure in § 490.507(b) (referred to as the GHG metric).

* * * * *

(c) Tailpipe CO_2 emissions on the NHS for a given year shall be computed in million metric tons (mmt) and rounded to the nearest hundredth as follows:

Equation 1 to paragraph (c)

$$(\text{Tailpipe } CO_2\text{Emissions on NHS})_{CY} = \left(\sum_{t=1}^{T} (\text{Fuel Consumed})_t \times (CO_2\text{Factor})_t\right) \times \left(\frac{\text{NHS VMT}}{\text{Total VMT}}\right)$$

Where:

(Tailpipe CO_2 Emissions on NHS)$_{CY}$ = Total tailpipe CO_2 emissions on the NHS in a calendar year (expressed in mmt, and rounded to the nearest hundredth);

T = the total number of on-road fuel types;

t = an on-road fuel type;

(Fuel Consumed)$_t$ = the quantity of total annual fuel consumed for on-road fuel type ''*t*'' (to the nearest thousand gallons);

(CO_2 Factor)$_t$ = is the amount of CO_2 released per unit of fuel consumed for on-road fuel type ''*t*'';

NHS VMT = annual total vehicle-miles traveled on NHS (to the nearest one million vehicle-miles); and

Total VMT = annual total vehicle-miles traveled on all public roads (to the nearest one million vehicle-miles).

(d) For the GHG measure specified in § 490.507(b), MPOs are granted additional flexibility in how they calculate the GHG metric, described in § 490.511(a)(2). MPOs may use the MPO share of the State's VMT as a proxy for the MPO share of CO_2 emissions in the State, VMT estimates along with MOVES [1] emissions factors, FHWA's Energy and Emissions Reduction Policy Analysis Tool (EERPAT) model, or other method the MPO can demonstrate has valid and useful results for CO_2 measurement.

* * * * *

(f) Tailpipe CO_2 emissions generated by on-road sources travelling on the NHS (the GHG metric), and generated by on-road sources travelling on all roadways (the step in the calculation prior to computing the GHG metric) shall be calculated as specified in paragraph (c) of this section. The calculations shall be reported in the State Biennial Performance Reports, as required in § 490.107, and shall address the following time periods.

(1) The reference year, as required in § 490.107(b)(1)(ii)(H); and

(2) The calendar year preceding the reporting year, as required in § 490.107(b)(1)(ii)(H), (b)(2)(ii)(J) and (b)(3)(ii)(I).

[1] MOVES (Motor Vehicle Emission Simulator) is EPA's emission modeling system that estimates emissions for mobile sources at the national, county, and project level for criteria air pollutants, GHGs, and air toxics. See *https://www.epa.gov/moves*. The EMFAC model is used in California for emissions analysis.

■ 11. Amend § 490.513 by adding paragraph (d) to read as follows:

§ 490.513 Calculation of National Highway System performance measures.

* * * * *

(d) The GHG measure specified in § 490.507(b) shall be computed to the nearest tenth of a percent as follows:

Equation 3 to paragraph (d)

$$\frac{(\text{Tailpipe } CO_2\text{Emissions on NHS})_{CY} - (\text{Tailpipe } CO_2\text{Emissions on NHS})_{\text{reference year}}}{(\text{Tailpipe } CO_2\text{Emissions on NHS})_{\text{reference year}}} \times 100$$

Where:

(Tailpipe CO_2 Emissions on NHS)$_{CY}$ = total tailpipe CO_2 emissions on the NHS in a calendar year (expressed in million metric tons (mmt), and rounded to the nearest hundredth); and

(Tailpipe CO_2 Emissions on NHS)$_{\text{reference year}}$ = total tailpipe CO_2 emissions on the NHS in calendar year 2022 (expressed in million metric tons (mmt), and rounded to the nearest hundredth).

■ 12. Add § 490.515 to read as follows:

§ 490.515 Severability.

The provisions of §§ 490.105(c)(5), 105(d), 105(d)(1)(v), 105(d)(4), 105(e)(1)(i), 105(e)(1)(ii), 105(e)(4)(i)(C), 105(e)(4)(iii), 105(e)(10), 105(f)(1)(i), 105(f)(3), 105(f)(10), 107(a)(1), 107(b)(1)(i), 107(b)(1)(ii)(H), 107(b)(2)(i), 107(b)(2)(ii)(J), 107(b)(3)(i), 107(b)(3)(ii)(I), 107(c)(2), 107(d), 109(d)(1)(v), 109(d)(1)(vi), 109(d)(1)(vii), 109(d)(1)(viii), 109(e)(4)(vi), 109(e)(4)(vii), 109(e)(6), 109(f)(1)(v), 503(a)(2), 505, 507(b), 509(f), 509(g), 509(h), 511(a)(2), 511(c), 511(d) 511(f), and 513(d) are separate and severable from one another and from the other provisions of this part. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.

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Part III

Securities and Exchange Commission

17 CFR Part 230

Prohibition Against Conflicts of Interest in Certain Securitizations; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 33–11254; File No. S7–01–23]

RIN 3235–AL04

Prohibition Against Conflicts of Interest in Certain Securitizations

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''SEC'' or ''Commission'') is adopting a rule to implement Section 621 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act'') prohibiting an underwriter, placement agent, initial purchaser, or sponsor of an asset-backed security (including a synthetic asset-backed security), or certain affiliates or subsidiaries of any such entity, from engaging in any transaction that would involve or result in certain material conflicts of interest.

DATES: *Effective date:* This final rule is effective on February 5, 2024.

Compliance date: See Section II.I.

FOR FURTHER INFORMATION CONTACT: Brandon Figg, Special Counsel, or Kayla Roberts, Special Counsel in the Office of Structured Finance, Division of Corporation Finance at (202) 551–3850, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adopting the following rule under 15 U.S.C. 77a *et seq.* (''Securities Act''):

Commission reference	CFR citation (17 CFR)
General Rules and Regulations, Securities Act of 1933:	
Rule 192	§ 230.192.

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I. Introduction

A. Background

On January, 25, 2023, the Commission proposed new Rule 192 to implement the prohibition in Securities Act Section 27B [1] (''Section 27B''),[2] which was added by Section 621 of the Dodd-Frank Act.[3] Section 27B(a) provides that an underwriter, placement agent, initial purchaser, or sponsor, or affiliates or subsidiaries of any such entity, of an asset-backed security (''ABS''), including a synthetic asset-backed security, shall not, at any time for a period ending on the date that is one year after the date of the first closing of the sale of the asset-backed security, engage in any transaction that would involve or result in any material conflict of interest with respect to any investor in a transaction arising out of such activity.[4] Section 27B(b) further requires that the Commission issue rules for the purpose of implementing the prohibition in Section 27B(a).[5] Section 27B(c) provides exceptions from the prohibition in Section 27B(a) for certain risk-mitigating hedging activities, liquidity commitments, and bona fide market-making activities.[6]

B. Summary of the Proposed Rule

Proposed Rule 192 would implement the prohibition in Securities Act Section 27B(a) and, consistent with Section 27B(c), provide exceptions from the prohibition for certain risk-mitigating hedging activities, liquidity commitments, and bona fide market-making activities.[7] The proposal was intended to target transactions that effectively represent a bet against a securitization and focus on the types of transactions that were the subject of regulatory and Congressional investigations following the financial crisis of 2007–2009.[8]

[1] 15 U.S.C. 77z–2a.

[2] *Prohibition Against Conflicts of Interest in Certain Securitizations,* Release No. 33–11151 (Jan. 25, 2023) [88 FR 9678 (Feb. 14, 2023)] (''Proposing Release'' or ''proposed rule''). In Sept. 2011, the Commission proposed a rule designed to implement Section 27B, but no further action was taken on that proposal. *See Prohibition against Conflicts of Interest in Certain Securitizations,* Release No. 34–65355 (Sept. 19, 2011) [76 FR 60320 (Sept. 28, 2011)].

[3] Sec. 621, Public Law 111–203, 124 Stat. 1376, 1632.

[4] 15 U.S.C. 77z–2a(a).

[5] 15 U.S.C. 77z–2a(b).

[6] 15 U.S.C. 77z–2a(c).

[7] *See* Proposing Release Section II.

[8] *See* Proposing Release Section I.

In response to the Proposing Release, the Commission received over 900 comment letters from a variety of commenters, including institutional investors, issuers, and various other market participants, professional, policy, and trade associations, Members of Congress, former Federal Government officials, academics, and unaffiliated individuals.[9] Commenters generally supported the Commission's statutorily-mandated goal of protecting investors by preventing the sale of ABS tainted by material conflicts of interest,[10] but many commenters expressed concern that the scope of the proposed rule was overly broad and could have unintended consequences on securitization markets as a whole.[11] While acknowledging that adopting a rule to address conflicts of interest in securitizations is still appropriate, some commenters also stated that the rule as proposed was not appropriately balanced to the current state of securitization markets in light of the evolution of those markets since the enactment of the Dodd-Frank Act.[12] Section 27B mandates that the Commission issue rules with regard to conflicts of interest in securitizations. While we recognize that securitization markets have evolved in the years since the financial crisis of 2007–2009, we continue to believe that the adopted rule is necessary to prevent the resurgence of the types of transactions that were prevalent leading up to that time.[13] Additionally, we believe that the changes we have made in response to comments regarding the breadth of the proposed rule, which are discussed in detail below, take into account the current state of securitization markets, while still providing strong investor protection against material conflicts of interest in securitization transactions. As discussed in greater detail below, many commenters sought clarification or limitations with respect to the types of transactions and financial products that would be subject to the rule,[14] as well as the activities of various market participants that would or would not result in such entities being securitization participants subject to the final rule.[15] Many commenters also expressed concerns that the proposed commencement point of the prohibition timeframe was insufficiently clear to allow market participants to conform their activities for compliance with the rule.[16] Most significantly, commenters expressed general opposition to the proposed definition of ''conflicted transaction'' as overly broad and stated that it would unnecessarily capture a wide range of activities that are essential to the functioning and issuance of ABS and the routine risk management of securitization participants.[17] Commenters also requested that the final rule include an alternative materiality standard[18] and an ''anti-evasion'' provision rather than the ''anti-circumvention'' provision that was proposed.[19] Some commenters also requested that the final rule include a foreign transaction safe harbor to provide clarity with respect to the rule's cross-border application.[20] Finally, the Commission received comments suggesting certain revisions to the proposed exceptions for risk-mitigating hedging activities, liquidity commitments, and bona fide market-making activities.[21] As we discuss in greater detail below, we have made certain revisions in response to the comments received.

C. Summary of the Final Rule

New Rule 192 implements Section 27B to the Securities Act. Fundamentally, the rule is intended to prevent the sale of ABS that are tainted by material conflicts of interest by prohibiting securitization participants[22] from engaging in certain transactions that could incentivize a securitization participant to structure an ABS in a way that would put the securitization participant's interests ahead of those of ABS investors. By focusing on transactions that effectively represent a ''bet'' against the performance of an ABS, Rule 192 will provide strong investor protection against material conflicts of interest in securitization transactions while not unduly hindering routine securitization activities that do not give rise to the risks that Section 27B is intended to address.

To achieve these objectives, Rule 192:

- *Prohibits, for a specified period, a securitization participant from engaging in any transaction that would result in a material conflict of interest between the securitization participant and an investor in the relevant ABS.* A securitization participant may not, for a period beginning on the date on which

[9] Comment letters received by the Commission are available on our website at *https://www.sec.gov/comments/s7-01-23/s70123.htm*. The comment period for the Proposing Release was open for 60 days from issuance and publication on *SEC.gov* and ended on Mar. 27, 2023. Several commenters said that the comment period was insufficient. *See, e.g.,* letters from American Investment Council dated Mar. 27, 2023 (''AIC''); Investment Company Institute dated Mar. 27, 2023 (''ICI''); National Association of Bond Lawyers et al. dated Mar. 27, 2023 (''NABL et al.''); U.S. Representatives Ann Wagner and Bill Huizenga dated Mar. 24, 2023 (''Representatives Wagner and Huizenga''); U.S. Senator John Kennedy dated Mar. 30, 2023 (''Senator Kennedy''). In stating that the comment period was insufficient, some commenters requested an extension (*see, e.g.,* letters from Alternative Investment Management Association and Alternative Credit Council dated Mar. 27, 2023 (''AIMA/ACC''); Association for Financial Markets in Europe dated Mar. 27, 2023 (''AFME''); American Property Casualty Insurance Association et al. dated Feb. 16, 2023 (''APCIA et al.''); Loan Syndications and Trading Association dated Mar. 1, 2023 (''LSTA I'')) and others indicated that they would submit multiple comment letters, some of which were received after the close of the comment period (*see* letters from Loan Syndications and Trading Association dated Mar. 27, 2023 (''LSTA II''); Loan Syndications and Trading Association dated May 2, 2023 (''LSTA III''); Loan Syndications and Trading Association dated Oct. 30, 2023 (''LSTA IV''); Managed Funds Association dated May 16, 2023 (''MFA II''); Structured Finance Association dated July 13, 2023 (''SFA II''); Securities Industry and Financial Markets Association, the Asset Management Group of SIFMA, and the Bank Policy Institute dated June 27, 2023 (''SIFMA II''). Some commenters requested that the Commission re-propose the rule after reviewing the comment letters. *See* letters from American Bar Association dated Apr. 5, 2023 (''ABA''); Andrew Davidson Co. dated Mar. 27, 2023 (''Andrew Davidson''); LSTA III; Securities Industry and Financial Markets Association, the Asset Management Group of SIFMA, and the Bank Policy Institute dated Mar. 27, 2023 (''SIFMA I''). Also, after the close of the comment period, one commenter submitted a letter referencing several of the Commission's proposals and stating that the number of outstanding proposals, together with insufficient time to respond, operated to deprive the public of the ability to meaningfully comment on all of the proposals. *See* letter from Managed Funds Association dated July 24, 2023 (''MFA III''). We have considered comments received since the issuance of the proposed rule, including those received after Mar. 27, 2023, and do not believe an extension of the comment period or a re-proposal of the rule is necessary.

[10] *See, e.g.,* letters from ABA; Americans for Financial Reform Education Fund dated June 7, 2023 (''AFR''); Better Markets dated Mar. 27, 2023 (''Better Markets''); Structured Finance Association dated Mar. 27, 2023 (''SFA I'').

[11] *See, e.g.,* letters from ABA, CRE Finance Council dated Mar. 27, 2023 (''CREFC I''); ICI; Arch Capital Group Ltd., Enact Holdings Inc., Essent Group Ltd., MGIC Investment Corporation, NMI Holdings, Inc., and Radian Group Inc. dated Mar. 27, 2023 (''PMI Industry I''); SFA I; SIFMA I.

[12] *See, e.g.,* letters from ABA; SIFMA I. These commenters cited the following as examples of the changes in securitization markets in that time period: the adoption and implementation of 17 CFR 246 (''Regulation RR''), 17 CFR 255 (''the Volcker Rule''), rules regulating swaps and security-based swaps, and changes in the regulation of nationally recognized statistical rating organizations (''NRSROs'') to enhance transparency and address conflicts of interest in connection with the issuance of ABS.

[13] *See, e.g.,* Wall Street and The Financial Crisis: Anatomy of a Financial Collapse, Majority and Minority Staff Report, Permanent Subcommittee on Investigations, United States Senate (Apr. 13, 2011) (''Senate Financial Crisis Report'').

[14] *See* Section II.A.

[15] *See* Section II.B.

[16] *See* Section II.C.

[17] *See* Section II.D.

[18] *See* Section II.D.3.d.

[19] *See* Section II.H.

[20] *See* Section II.A.3.c.

[21] *See* Sections II.E. through II.G.

[22] The definition of ''securitization participant'' for purposes of new Rule 192 includes a sponsor, underwriter, placement agent, initial purchaser, and certain affiliates and subsidiaries of such entities, as discussed in detail in Section II.B.

such person has reached an agreement to become a securitization participant with respect to an ABS and ending on the date that is one year after the date of the first closing of the sale of such ABS,[23] directly or indirectly engage in any transaction that would involve or result in a material conflict of interest between the securitization participant and an investor in such ABS. Under the final rule, such transactions are ''conflicted transactions'' and include (i) engaging in a short sale of the relevant ABS, (ii) purchasing a credit default swap or other credit derivative that entitles the securitization participant to receive payments upon the occurrence of specified credit events in respect of the ABS, or (iii) purchasing or selling any financial instrument (other than the relevant ABS) or entering into a transaction that is substantially the economic equivalent of the aforementioned transactions, other than, for the avoidance of doubt, any transaction that only hedges general interest rate or currency exchange risk.[24] Transactions unrelated to the idiosyncratic credit performance of the ABS, such as reinsurance agreements, hedging of general market risk (such as interest rate and foreign exchange risks), or routine securitization activities (such as the provision of warehouse financing or the transfer of assets into a securitization vehicle) are not ''conflicted transactions'' as defined by the rule, and thus are not subject to the prohibition in 17 CFR 230.192(a)(1) (''Rule 192(a)(1)''); [25]

• *Defines the persons that are subject to the rule.* A securitization participant includes any underwriter, placement agent, initial purchaser, or sponsor of an ABS (each as defined by 17 CFR 230.192(c) (''Rule 192(c)'') and also includes any affiliate or subsidiary that acts in coordination with an underwriter, placement agent, initial purchaser, or sponsor or that has access to, or receives information about, the relevant ABS or the asset pool underlying or referenced by the relevant ABS prior to the first closing of the sale of the relevant ABS. The final rule includes functional definitions for the terms ''underwriter,'' ''placement agent,'' ''initial purchaser,'' and ''sponsor,'' which are based on the person's activities in connection with a securitization and are generally based on existing definitions of such terms under the Federal securities laws and the rules thereunder.[26] The definition of ''sponsor'' in the final rule excludes: (i) a person that acts solely pursuant to such person's contractual rights as a holder of a long position in the ABS; (ii) any person that performs only administrative, legal, due diligence, custodial, or ministerial acts related to the structure, design, assembly, or ongoing administration of an ABS or the composition of the underlying pool of assets; [27] and (iii) the United States or an agency of the United States with respect to any ABS that is fully insured or fully guaranteed as to the timely payment of principal and interest by the United States; [28]

• *Defines asset-backed securities that are subject to the prohibition.* Under the final rule, an ''asset-backed security'' subject to the prohibition is defined, consistent with Section 27B, to include asset-backed securities as defined in Section 3 of the Exchange Act of 1934 (''Exchange Act'') [29] and also includes synthetic ABS and hybrid cash and synthetic ABS; [30]

• *Provides exceptions to the prohibition for risk-mitigating hedging activities, liquidity commitments, and bona fide market-making activities.* These exceptions, which are specified in Section 27B, permit certain market activities, subject to satisfaction of the specified conditions, that would otherwise be prohibited by the rule; [31]

• *Addresses evasion of the exceptions.* Under 17 CFR 230.192(d) (''Rule 192(d)''), if a securitization participant engages in a transaction or series of related transactions that, although in technical compliance with the exception for risk-mitigating hedging activities, liquidity commitments, or bona fide market-making activities, is part of a plan or scheme to evade the prohibition in Rule 192(a)(1), that transaction or series of related transactions will be deemed to violate the prohibition; [32] and

• *Provides a safe harbor for certain foreign transactions.* Pursuant to 17 CFR 192(e) (''Rule 192(e)''), the prohibition will not apply to an asset-backed security if it is not issued by a U.S. person (as defined in 17 CFR 902(k) (''Rule 902(k) of Regulation S'') and the offer and sale of the asset-backed security is in compliance with 17 CFR 203.901 through 905 (''Regulation S'').[33]

We discuss in greater detail below the securitization transactions and participants subject to Rule 192's prohibition, the timeframe during which the prohibition applies, the types of transactions that are prohibited by Rule 192 and the related exceptions, and the compliance date by which securitization participants must conform their activities with the requirements of the final rule. As adopted, Rule 192 will complement the existing federal securities laws that specifically apply to securitization, as well as the general anti-fraud and anti-manipulation provisions of the Federal securities laws,[34] by explicitly protecting ABS investors against material conflicts of interest.

II. Discussion of Rule 192

A. Scope: Asset-Backed Securities

1. Proposed Definition of Asset-Backed Security

The Commission proposed to prohibit a securitization participant, for a specified period of time with respect to an asset-backed security, from engaging in any transaction that would involve or result in a material conflict of interest between such securitization participant and an investor in such asset-backed security. Consistent with Section 27B, the Commission proposed that the term ''asset-backed security'' would include ABS as defined in Section 3 of the

[23] *See* Section II.C.

[24] *See* Section II.D.

[25] *Id.*

[26] Rule 192(c) also defines ''distribution'' as used in the definition for ''underwriter'' and ''placement agent.'' *See* Section II.B.

[27] As discussed in greater detail below, this exclusion includes accountants, attorneys, and credit rating agencies with respect to the creation and sale of an ABS and the activities customarily performed by trustees, custodians, paying agents, calculation agents, and other contractual service providers, including servicers. *See* Section II.B.3.b.iii.

[28] As discussed in greater detail below, we are not adopting proposed paragraph (ii)(B) of the ''sponsor'' definition, which would have captured any person that directs or causes the direction of the structure, design, or assembly of an asset-backed security or the composition of the pool of assets underlying the asset-backed security. *See* Section II.B.3.b.ii. We are also not adopting the proposed exclusion from the definition of ''sponsor'' for the Federal National Mortgage Association (''Fannie Mae'') or the Federal Home Loan Mortgage Corporation (''Freddie Mac'' and, together with Fannie Mae, the ''Enterprises'') while operating under the conservatorship or receivership of the Federal Housing Finance Agency (''FHFA'') with capital support from the United States with respect to any ABS that is fully insured or fully guaranteed as to the timely payment of principal and interest by such entity. *See* Section II.B.3.b.iv.

[29] 15 U.S.C. 78a *et seq.*

[30] For purposes of this rule, we use the term ''cash ABS'' to refer to ABS where the underlying pool consists of one or more financial assets. We use the term ''hybrid cash and synthetic ABS'' to refer to ABS where the underlying pool consists of one or more financial assets as well as synthetic exposure to other assets. *See* Section II.A.

[31] *See* Sections II.E. through II.G.

[32] *See* Section II.H.

[33] *See* Section II.A.3.c.

[34] *See, e.g.,* Section 17(a) of the Securities Act of 1933 (15 U.S.C. 77q), Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j) and 17 CFR 240.10b–5.

Exchange Act[35] (''Exchange Act ABS'') (which encompasses both registered and unregistered offerings), as well as synthetic ABS and hybrid cash and synthetic ABS.[36] The Commission did not propose a definition of ''synthetic ABS'' due to concerns that any such definition could be potentially overinclusive or underinclusive, and that a securitization participant might attempt to evade the prohibition by structuring transactions around a particular definition, despite creating a product that is substantively a synthetic ABS, as that term is commonly understood in the market.[37]

2. Comments Received

Commenters generally supported the proposal to define ''asset-backed security'' for purposes of Rule 192 to include Exchange Act ABS, synthetic ABS, and hybrid cash and synthetic ABS,[38] though several commenters requested additional clarification regarding certain types of financial products and securities,[39] or that certain securities be excluded from the definition,[40] which we discuss in greater detail below. With respect to the proposed rule's inclusion of Exchange Act ABS in the definition of ABS, commenters generally supported the decision to incorporate the Exchange Act definition,[41] with some agreeing that market participants are familiar with analyzing whether a given security meets the definition and that there is common market understanding of whether Commission rules that use the Exchange Act ABS definition apply to them.[42] Other commenters disagreed, however, stating that it remains unclear to them whether certain securities would be captured by the definition as proposed.[43] Additionally, several commenters requested that the final rule include definitions for ''synthetic ABS''[44] and ''hybrid cash and synthetic ABS''[45] to provide clarity regarding the scope of transactions that are subject to the prohibition in Rule 192. The Commission also received comments suggesting that we adopt a safe harbor for ABS transactions offered and sold outside of the United States.[46] Finally, while some commenters agreed that Rule 192's prohibition should not be limited to ABS transactions that are intentionally ''designed to fail,''[47] others expressed the view that Section 27B targets only ABS that are intentionally ''designed to fail.''[48]

3. Final Rule

We are adopting, as proposed, a definition of ''asset-backed security'' for purposes of the prohibition in Rule 192(a)(1). As discussed below, under the final rule, ''asset-backed security'' will be defined to mean an Exchange Act ABS, a synthetic ABS, and a hybrid cash and synthetic ABS.[49] Rule 192, therefore, will apply to offerings of asset-backed securities as defined in Rule 192(c), regardless of whether the offerings are registered or unregistered. Consistent with the proposal, we are not adopting a definition for ''synthetic ABS'' or ''hybrid cash and synthetic ABS.'' In response to comments received, final Rule 192 includes a safe harbor for certain foreign securitizations, which is discussed in greater detail in Section II.A.3.c. Finally, Rule 192 does not require that an ABS was intentionally ''designed to fail'' for the ABS to be subject to the prohibition against engaging in conflicted transactions. Section 27B does not contain language referencing an intent element and provides, in relevant part, that securitization participants ''of an asset-backed security . . . shall not . . . engage in any transaction that would involve or result in any material conflict of interest.''[50] The statutory text refers plainly to asset-backed securities (as defined in Section 3 of the Exchange Act and including synthetic ABS); it does not indicate that the ABS must have been intentionally designed to fail to be subject to the prohibition. As discussed below, further narrowing the scope in this way could reduce the effectiveness of the rule to prophylactically prevent these types of material conflicts of interest with investors.[51] This, in turn, would frustrate the statutory mandate of Section 27B.

a. Exchange Act ABS

Section 27B imposes a prohibition on transactions that would involve or result in a material conflict of interest, *i.e.,* a conflicted transaction under 17 CFR 230.192(a)(3) (''Rule 192(a)(3)''), and specifies that the prohibition applies to Exchange Act ABS. As a general matter, asset-backed securities differ from other types of securities because the securities are issued by a special purpose entity that has no business activities other than holding or owning the assets supporting the ABS and other activities reasonably incidental thereto.[52] As specified in the Exchange Act ABS definition, an asset-backed security is a security collateralized by any ''self-liquidating financial asset.''[53]

The Commission received various comments requesting clarification about whether certain products and securities would be captured by the Rule 192 ABS definition and further requesting that, for the avoidance of doubt, certain products and securities be exempt from the definition.[54] For example, several

[35] 17 U.S.C. 78c(a)(79). An Exchange Act ABS is defined as ''a fixed-income or other security collateralized by any type of self-liquidating financing asset (including a loan, a lease, a mortgage, or a secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the asset . . .''

[36] *See* Proposing Release Section II.A.

[37] *See* Proposing Release Section II.A.

[38] *See, e.g.,* letters from ABA; AFR; Better Markets; ICI.

[39] *See, e.g.,* letters from ABA (seeking, *e.g.,* clarification with respect to reliance on existing guidance regarding a transaction's status as an asset-backed security); NABL et al. (indicating confusion regarding whether certain municipal securities are Exchange Act ABS); PMI Industry I (seeking clarification that mortgage insurance-linked notes are not synthetic ABS).

[40] *See, e.g.,* letters from AFME (urging that the final rule include a safe harbor for ABS transactions that are not offered or sold to U.S. investors as part of the primary issuance); National Association of Health and Educational Facilities Finance Authorities dated Mar. 27, 2023 (''NAHEFFA'') (requesting that single-asset conduit bonds be excluded from the definition of asset-backed security); NABL et al. (requesting that municipal securities be excluded from the definition of asset-backed security); SIFMA I (requesting that the Commission exclude corporate debt, insurance products, and Section 4(a)(2) private placement transactions from the definition of asset-backed security).

[41] *See, e.g.,* letters from ABA; ICI; SIFMA I.

[42] *See, e.g.,* letters from ABA; ICI. For example, one commenter expressed the view that common market understanding is that investment funds registered under the Investment Company Act of 1940 do not issue ABS and that their securities are not considered Exchange Act ABS. *See* letter from ICI. Whether such securities are Exchange Act ABS will depend on the characteristics and structure of the security.

[43] *See, e.g.,* letters from NAHEFFA; NABL et al.

[44] *See* letters from ABA; AFME; AIMA/ACC; ICI; SFA I; SFA II; SIFMA I; SIFMA II.

[45] *See* letter from AIMA/ACC.

[46] *See, e.g.,* letters from ABA; AFME; AIC; SFA I; SFA II; SIFMA I; SFA II.

[47] *See* letters from AFR; Better Markets.

[48] *See, e.g.,* letters from AIC; American Securities Association dated Mar. 23, 2023 (''ASA'').

[49] 17 CFR 230.192(c).

[50] 15 U.S.C. 77z–2a(a).

[51] *See also* Sections II.B.3. and II.D. for additional discussions about why the final rule does not include a knowledge- or intent-based standard for securitization participants or conflicted transactions.

[52] *See* Section III.A.2. of *Asset-Backed Securities,* Release No. 33–8518 (Dec. 22, 2004) [70 FR 1506 (Jan. 7, 2005)] (''2004 Regulation AB Adopting Release'').

[53] 17 U.S.C. 78c(a)(79).

[54] As discussed in greater detail below, one commenter stated that it was unclear whether certain municipal securities meet the definition of Exchange Act ABS. We also note that municipal market participants are already required to analyze whether such a security meets the Exchange Act ABS definition and whether other Commission rules implementing various provisions of the Dodd-Frank Act that use the Exchange Act ABS definition, such as Regulation RR, 17 CFR 240.15Ga-1(a) (''Exchange Act Rule 15Ga-1''), and

Continued

commenters requested that the rule exempt certain municipal securities from being ABS subject to the prohibition in 17 CFR 230.192(a) (''Rule 192(a)'').[55] These commenters generally stated that certain municipal securities, including single-asset conduit bonds,[56] are structured and sold to achieve certain policy goals for the benefit of the government entity's citizens and that municipal issuers of such securities are subject to strict investment policies and federal and state statutes that limit their ability to engage in speculative investments, making it unlikely that relevant securitization participants could engage in conflicted transactions, therefore rendering the application of Rule 192 to municipal transactions unnecessarily burdensome.[57] Municipal securitizations that are collateralized by any type of self-liquidating financial asset and that allow the holder of the security to receive payments that depend primarily on the cash flow from such self-liquidating financial asset fall within the Exchange Act ABS definition. While it may be the case, as discussed above, that a municipal issuer is subject to restrictions that may limit their ability to engage in conflicted transactions, other parties to the securitization may not be subject to such restrictions and would therefore have the opportunity to engage in transactions that bet against the municipal ABS. For example, as one commenter stated, persons involved in municipal securitizations, such as the underwriter, may enter into swaps to mitigate risk associated with the security.[58] Such swaps or other transactions could be conflicted transactions if they meet the definition in Rule 192(a)(3).[59] We see no reason, therefore, why municipal securities that meet the definition of Exchange Act ABS (and are consequently subject to other federal securities laws), and which, like other Exchange Act ABS, involve securitization participants, such as an underwriter, that would have an opportunity to engage in conflicted transactions, should be exempted from the definition of ABS—and, thus, the prohibition against conflicts of interest—for purposes of this rule.[60]

With respect to single-asset conduit bonds, one commenter stated that the market (both municipal and non-municipal) does not consider a conduit bond backed by a single loan to be an asset-backed security.[61] This commenter further stated that, by referencing Exchange Act ABS instead of the definition of ABS included in Regulation AB, the Commission was using a broader definition and ''eliminating'' the requirement that an asset-backed security include a ''pool'' [62] of financial assets.[63] The commenter described this as a ''novel application'' of the Exchange Act ABS definition.[64] We disagree with the commenter's characterization of the proposed definition. Section 27B, which was added by Section 621 of the Dodd-Frank Act, specifically states that the prohibition shall apply to ABS as defined in Section 3 of the Exchange Act, and the definition in Section 3 was added by Section 941 of the Dodd-Frank Act. Defining ''asset-backed security'' for purposes of Rule 192 by referencing Exchange Act ABS, therefore, is consistent with Section 27B. As the Commission has previously stated, an ABS that is backed by a single obligation would meet the definition of Exchange Act ABS.[65] Therefore, referring to Exchange Act ABS in identifying the types of ABS subject to the final rule is consistent with Section 27B and the inclusion of single-asset conduit bonds that meet the definition of Exchange Act ABS is consistent with our prior interpretation of both definitions.[66] Moreover, if we were to adopt an exemption for transactions collateralized by a single, self-liquidating asset, it would provide the opportunity for securitization participants to structure offerings as a series of transactions that would serve to evade the rule. For these reasons, we decline to include such an exemption from the definition of ''asset-backed security.''

One commenter suggested that we exclude direct private placement transactions exempt from registration under Section 4(a)(2) of the Securities Act,[67] stating that the ABS purchasers in such transactions are highly sophisticated investors that participate directly in nearly all phases of the

17 CFR 240.17g–7(a)(1)(ii)(N) (''Exchange Act Rule 17g–7'') are applicable. *See* Proposing Release Section II.A. *See also* Section IV.A.D.6 of *Credit Risk Retention,* Release No. 34–70277 (Aug. 28, 2013) [78 FR 57928 (Sept. 20, 2013)] (''RR Proposing Release'') (explaining why an exemption from risk retention for securitizations of tax lien-backed securities sponsored by municipal entities was not proposed) and *Credit Risk Retention,* Release No. 34–73407 (Oct. 22, 2014) [79 FR 77602 (Dec. 24, 2014)] (''RR Adopting Release'') at 77661 (adopting certain provisions that apply to municipal tender option bonds) and 77680 (explaining why separate loan underwriting criteria for single borrower or single credit commercial mortgage transactions were not adopted). Because participants in this market are already required to consider whether a municipal security meets the definition of Exchange Act ABS to determine whether such offering must comply with other rules and regulations adopted under the Securities Act and Exchange Act, we believe that concerns relating to burdens associated with determining whether or not a municipal security is an Exchange Act ABS for purposes of compliance with Rule 192 will be mitigated.

[55] *See, e.g.,* letters from ASA; NABL et al.; NAHEFFA; SIFMA I; Wulff, Hansen & Co. dated Apr. 14, 2023 (''Wulff Hansen''). *See also* Section II.B. for a discussion of comments received related to municipal issuers and the definition of ''sponsor'' in the final rule.

[56] As described by one commenter, a single-asset conduit bond is a tax-exempt bond issued by state and local governments for the benefit of tax-exempt organizations (as defined under Section 501(c)(3) of the Internal Revenue Code). The proceeds of the bond issuance are used to make a single loan to a single 501(c)(3) borrower, such as a hospital, higher education institution, provider of housing for elderly or low-income populations, museum, or other non-profit entity. The government issuer assigns the loan agreement to the bond trustee, which receives the borrower's loan payments (which mirror the government issuer's payment obligations on the bond) and makes those payments to the bondholders. *See* letter from NAHEFFA.

[57] *See, e.g.,* letters from ASA; NABL et al.; NAHEFFA; letter from National Association of Municipal Advisors dated Mar. 31, 2023 (''NAMA''); SIFMA I.

[58] *See* letter from ASA.

[59] *See* Section II.D.

[60] *See* Section II.B.3.b. for a discussion of the definition of a ''securitization participant'' with respect to municipal securitizations.

[61] *See* letter from NAHEFFA.

[62] The definition of ''asset-backed security'' in Regulation AB Item 1101(c) (''Regulation AB ABS''), which was adopted for the limited purpose of identifying an ABS that is eligible for the specialized registration and reporting regime under Regulation AB, defines an ''asset-backed security,'' in relevant part, as a security that is primarily serviced by the cash flows of a ''discrete pool of receivables or other financial assets. . .'' *See* 17 CFR 229.1101(c). Additionally, the word ''pool'' in the Regulation AB ABS definition does not require that the ABS be collateralized by more than one asset. Instead, it is part of the phrase ''discrete pool'' in the definition, which indicates the general absence of active pool management, and emphasizes the self-liquidating nature of pool assets. *See, e.g.,* Section III.A.2. of 2004 Regulation AB Adopting Release.

[63] *See* letter from NAHEFFA.

[64] *Id.*

[65] *See, e.g.,* Section V.B.2. of the RR Adopting Release (explaining why separate loan underwriting criteria for single borrower or single credit commercial mortgage transactions were not adopted) and Section IV.D.6. of RR Proposing Release (explaining why an exemption from risk retention for securitizations of tax lien-backed securities sponsored by municipal entities was not proposed). *See also* Proposing Release Section II.A., n. 31 (stating that an ABS that is backed by a single asset or one or more obligations of a single borrower (often referred to as ''single asset, single borrower'' or ''SASB'' transactions) meets the definition of an Exchange Act ABS).

[66] Analyzing whether a municipal single-asset conduit bond is an ABS entails a consideration of the nature of the activities of the issuing entity. For example, if the issuing entity is authorized to extend credit or make loans and it engages in activities in addition to holding or owning the underlying single obligation supporting the bonds, or in addition to other activities reasonably incidental to holding or owning the underlying obligation, the securities it issued will not be an ABS.

[67] 15 U.S.C. 77d. Section 4(a)(2) permits, without registration, the offer and sale of securities that do not involve a public offering.

structuring and creation of the ABS.[68] The commenter stated that such investor involvement renders the risk of a securitization participant entering into a separate transaction that gives rise to a material conflict of interest very low.[69] As discussed in the Proposing Release, and as we continue to believe, even if an investor is involved in asset selection or has access to information about those assets, such investor may not be aware of the involvement of other parties, nor does the participation of one investor in asset selection necessarily protect any other investors in the ABS.[70] We see no reason why investors in ABS sold in a Section 4(a)(2) private offering should not receive the protections provided by Section 27B that are available to all investors. Rather, excluding these transactions would place the burden on investors to confirm or otherwise negotiate for transaction terms to require that securitization participants not engage in bets against the ABS. Furthermore, excluding transactions that rely on Section 4(a)(2) would also result in excluding from the rule ABS sold to an initial purchaser in furtherance of resales in compliance with Securities Act Rule 144A.[71] As a result, purchasers of that ABS in the immediately subsequent Rule 144A transaction would not benefit from the protections afforded by the rule. Consequently, we believe that such an exclusion to the ABS definition would not be appropriate. Therefore, any securities that meet the definition of ''asset-backed security,'' as adopted for purposes of Rule 192, will be subject to the prohibition in Rule 192(a), whether registered or unregistered.

The Commission also received comments requesting exclusions or clarifications regarding certain financial products and securities that the Commission has not historically viewed as asset-backed securities.[72] Some commenters sought clarification that insurance policies or contracts (and securities related to those insurance products, such as mortgage insurance linked-notes (''MILNs'')[73]) and corporate debt securities are not Exchange Act ABS.[74] Insurance policies and contracts, such as private mortgage insurance contracts, are not securities,[75] and therefore are not Exchange Act ABS subject to Rule 192. MILNs are reinsurance products used by insurance companies to obtain reinsurance coverage for a portion of their risk related to private mortgage insurance policies, which assist homebuyers in obtaining low-down payment mortgages.[76] The collateral for the MILN are the private mortgage insurance contracts, which are not self-liquidating financial assets.[77] Corporate debt securities are issued by a corporate issuer and represent direct payment obligations of the corporate issuer.[78] The corporate issuer is ultimately responsible for payment on the debt, compared to asset-backed securities that are issued by a special purpose issuing entity where payment depends primarily on the cash flow from an underlying self-liquidating financial asset. In each of these cases, the securities do not meet the definition of Exchange Act ABS and, therefore, are not asset-backed securities as defined in Rule 192(c).[79]

One commenter also requested clarification that, where the Commission or its staff has already provided guidance stating that a financial product or security would not be an asset-backed security, such products or securities would not be asset-backed securities under Rule 192(c) and thus would not be subject to the prohibition.[80] The definition of asset-backed security we are adopting in Rule 192(c) does not change the Exchange Act ABS definition, nor does it impact existing Commission guidance or staff positions regarding that definition. Market participants may, therefore, continue to look to such guidance or staff positions unless and until they are changed, withdrawn, or otherwise superseded, as applicable.

b. Synthetic ABS and Hybrid Cash and Synthetic ABS

As discussed in the Proposing Release, we have previously described synthetic securitizations as transactions that are designed to create exposure to an asset that is not transferred to or otherwise part of the asset pool, generally effectuated through the use of derivatives such as a credit default swap (''CDS'') or a total return swap (or an ABS structure that replicates the terms of such a swap).[81] The Commission received several comment letters requesting that we adopt a definition of ''synthetic asset-backed security''[82] and ''hybrid cash and synthetic asset-backed security''[83] to address what the commenters said was a lack of certainty with respect to the scope of Rule 192. Some of these commenters offered suggestions for a definition of synthetic ABS that they believe represent market understanding of the term and that would appropriately capture the types of transactions that Section 27B and Rule 192 are intended to cover.[84] While the text of the suggested definitions vary, including with respect to the level of specificity, they include a number of common elements, generally identifying synthetic ABS as a security issued by a special-purpose entity, secured by one or more credit derivatives or similar financial instrument that references a self-liquidating financial asset or pool of assets, and for which payment to the investor is dependent primarily on the performance of such reference asset or reference pool.[85]

Given the variation of suggested definitions provided by commenters, we do not believe that adopting any one of these definitions, or a combination thereof, would appropriately capture the scope of the various features of existing

[68] *See* letter from SIFMA I.

[69] *Id.*

[70] *See* Proposing Release Section II.A. Moreover, even if an investor were aware of a potential conflict of interest, Rule 192 does not include an exception based on disclosure of material conflicts of interest because such an exception would be inconsistent with the prohibition in Section 27B. *See* Section II.D. for a discussion of comments received related to the use of disclosure to mitigate conflicts of interest.

[71] 17 CFR 230.144A. For example, collateralized loan obligations (''CLOs'') are typically sold in a private placement to one or more initial purchasers in reliance on Section 4(a)(2) (which is only available to the issuer), followed by resales of the securities to ''qualified institutional buyers'' in compliance with Rule 144A.

[72] *See, e.g.,* letters from ABA; Representative Nickel et al.; SFA I; SIFMA I.

[73] *See also* note 80, and the accompanying text for a discussion regarding funding agreement-backed notes.

[74] *See* letters from AFME; ABA; SIFMA I.

[75] 15 U.S.C. 77c.

[76] *See, e.g.,* letter from ABA.

[77] For additional discussion regarding mortgage insurance-linked notes, and why the existing structures do not satisfy the criteria to be synthetic ABS or ''conflicted transactions,'' see Sections II.A.3.b. and II.D.

[78] *See, e.g.,* letter from SIFMA I.

[79] *See* 17 CFR 230.192(c).

[80] *See* letter from ABA. This commenter provided the example of an existing staff position indicating that funding agreements between an insurance company and a special purpose entity, where the insurance company is directly liable for the funding agreement that backs the notes, is not an Exchange Act ABS. *See* Regulation AB Compliance & Disclosure Interpretation 301.03 (updated Sept. 6, 2016), *available at https://www.sec.gov/corpfin/divisionscorpfinguidanceregulation-ab-interpshtm.* These interpretations, and any other staff statements referenced in this release, represent the views of SEC staff. They are not rules, regulations, or statements of the Commission. The Commission has neither approved nor disapproved their content. Staff statements have no legal force or effect: they do not alter or amend applicable law, and they create no new or additional obligations for any person.

[81] *See* Proposing Release Section II.A. and Section III.A.2. of the 2004 Regulation AB Adopting Release.

[82] *See, e.g.,* letters from ABA; AIMA/ACC; AFME; SFA I; SFA II; SIFMA I; SIFMA II.

[83] *See* letter from AIMA/ACC.

[84] *See* letters from ABA; AFME; SFA II; SIFMA I; SIFMA II.

[85] *See, e.g.,* letters from ABA; SFA II; SIFMA II.

synthetic ABS and possible future structures or designs of synthetic ABS; however, commenters' suggestions are consistent with the characteristics that we have previously identified as features of synthetic ABS.[86] Because of the complexity of these transactions, however, we agree with commenters that guidance regarding synthetic ABS is beneficial. Accordingly, while a synthetic ABS may be structured or designed in a variety of ways, we generally view a synthetic asset-backed security as a fixed income or other security issued by a special purpose entity that allows the holder of the security to receive payments that depend primarily on the performance of a reference self-liquidating financial asset or a reference pool of self-liquidating financial assets.[87]

The Commission also received comments requesting clarification about whether the rule applies to synthetic transactions that have not traditionally been considered synthetic securitizations. Some commenters asked that we clarify that mortgage insurance-linked notes are not synthetic asset-backed securities under Rule 192(c) and that the reinsurance agreements embedded in the MILN transactions are not ''conflicted transactions'' under Rule 192(a)(3).[88] As discussed in Section II.A.3.a., above, while MILNs create synthetic exposure to insurance contracts, they are not covered by this rule because the underlying private mortgage insurance contracts are not self-liquidating.[89] Accordingly, MILNs are not synthetic ABS subject to the prohibition in Rule 192(a)(1), and consequently, neither would the reinsurance agreements executed between the mortgage insurer and the special purpose insurer be conflicted transactions under Rule 192(a)(3).[90]

Some commenters also requested confirmation that synthetic ABS for purposes of Rule 192 does not include equity-linked or commodity-linked products.[91] Because such products do not involve self-liquidating financial assets, they are not synthetic ABS subject to Rule 192's prohibition. Similarly, some commenters requested confirmation that corporate debt obligations and security-based swaps are not synthetic ABS.[92] As described above, we generally view a synthetic asset-backed security as a fixed income or other security issued by a special purpose entity that allows the holder of the security to receive payments that depend primarily on the performance of a reference self-liquidating financial asset or a reference pool of self-liquidating financial assets. In contrast, as discussed above, a corporate debt obligation is issued by, and offers investors recourse to, an operating entity that is not a special purpose entity. Therefore, a corporate debt obligation is not a synthetic ABS for purposes of Rule 192. Similarly, a security-based swap is also not a synthetic ABS for purposes of Rule 192 because it is a financial contract between two counterparties without issuance of a security from a special purpose entity.[93] A security-based swap can represent a component of a synthetic ABS transaction where, for example, the relevant special purpose entity that issues the synthetic ABS enters into a security-based swap that collateralizes the synthetic ABS that it is issuing. However, the standalone security-based swap in such example is not a synthetic ABS; it is only one component of the broader synthetic ABS transaction. Under the final rule, whether a transaction is a ''synthetic ABS'' subject to Rule 192 will depend on the nature of the transaction's structure and characteristics of the underlying or referenced assets.[94] A similar analysis will be necessary to determine whether a transaction constitutes a hybrid cash and synthetic ABS, which would have characteristics of both cash ABS and synthetic ABS.

c. Cross-Border Application of Rule 192

The Commission received several comments relating to the potential cross-border application of Rule 192.[95] Before addressing those comments, we are providing the following guidance as to Rule 192's cross-border scope. As a threshold matter, Rule 192's cross-border scope is co-extensive with the cross-border scope of Securities Act Section 27B(a), which this rule implements pursuant to the mandate in Section 27B(b). It is therefore appropriate to consider Section 27B(a)'s cross-border scope when determining whether Rule 192 applies in a cross-border context.

Our understanding of Section 27B(a)'s cross-border scope is based on the territorial approach that the Commission has applied when adopting rules to implement other provisions of the securities laws.[96] Consistent with that territorial approach, which is based on U.S. Supreme Court precedent, including *Morrison* v. *National Australia Bank, Ltd,*[97] the Commission understands the relevant domestic conduct that triggers the application of Section 27(B)(a)'s prohibition to be the sale in the United States of the ABS.[98] If there are ABS sales in the United

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[86] *See* Proposing Release Section II.A. and Section III.A.2. of the 2004 Regulation AB Adopting Release.

[87] *Id.*

[88] *See, e.g.,* letters from ABA; letter from Housing Policy Council dated Mar. 27, 2023 (''HPC''); Mortgage Bankers Association dated Mar. 27, 2023 (''MBA''); PMI Industry I; Arch Capital Group Ltd., Enact Holdings Inc., Essent Group Ltd., MGIC Investment Corporation, NMI Holdings, Inc., and Radian Group Inc. dated Oct. 20, 2023 (''PMI Industry II'') (suggesting rule text to include an exclusion in the final rule for activities related to the purchase or sale of MILNs); U.S. Representatives Blaine Luetkemeyer and Emmanuel Cleaver dated May 23, 2023 (''Representatives Luetkemeyer and Cleaver''); SFA I; SIFMA I. *See also* Section II.D. for a discussion of the types of transactions that would be ''conflicted transactions'' under the final rule.

[89] In a typical MILN structure, the mortgage insurer enters into a reinsurance agreement with a special purpose insurer, which issues the MILNs to investors and places the proceeds from the sale of those securities in a reinsurance trust to make any required payments to the mortgage insurer under the reinsurance agreement, which requires payments based on certain losses incurred on a specified pool of mortgage insurance policies that are obligations of the mortgage insurer. The premiums paid by the mortgage insurer to the special purpose insurer are used to make interest payments to the holders of the MILNs. Because the reinsurance agreement functions similarly to a swap and the reference mortgage insurance policies are not transferred to the reinsurance trust, commenters requested confirmation that MILNs are not synthetic ABS that would be asset-backed securities as defined for purposes of Rule 192. *See, e.g.,* letters from ABA; HPC; MBA; PMI Industry I; Representatives Luetkemeyer and Cleaver; SFA I; SIFMA I.

[90] *See* Section II.D. for a discussion of ''conflicted transactions'' under the final rule.

[91] *See, e.g.,* letters from SFA II; SIFMA I; SIFMA II.

[92] *See, e.g.,* letters from ABA; SFA II; SIFMA I; SIFMA II.

[93] *See also Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping,* Release No. 33–9338 (July 18, 2012) [77 FR 48208 (Aug. 13, 2012)] (establishing that a credit default swap or total-return swap on a single loan or narrow-based index is a security-based swap).

[94] For example, such transactions generally should be analyzed to determine whether the assets that are transferred to or otherwise part of the asset pool are self-liquidating. Additionally, we note that a synthetic transaction could be effectuated through the use of derivates or swaps but could also use some other feature or structure that replicates the terms of a derivate or swap.

[95] *See, e.g.,* letters from ABA; AFME; AIC; SFA I; SFA II; SIFMA I; SIFMA II.

[96] *See, e.g., Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information,* Release No. 34–74244 (Feb. 11, 2015), [80 FR 14563, 14649 (Mar. 19, 2015)] (''2015 Regulation SBSR Adopting Release'') (discussing the territorial approach to the cross-border application of Title VII requirements for regulatory reporting and public dissemination of security-based swap transactions).

[97] *Morrison* v. *National Australia Bank, Ltd. et al.,* 561 U.S. 247 (2010).

[98] *See generally* 561 U.S. 247. *See, e.g., Abitron Austria GmbH* v. *Hetronix Int'l, Inc,* No. 21–1043, 2023 WL 4239255, at *4 (U.S. June 29, 2023) (stating that ''[the Supreme Court has] repeatedly and explicitly held that courts must ''identif[y] 'the statute's ''focus''' and as[k] whether the conduct relevant to that focus occurred in United States territory'').

States to investors, the prohibition of Section 27B(a)—as implemented through the provisions of Rule 192—applies. Put simply, the existence of domestic ABS sales to investors means that securitization participants are prohibited pursuant to the terms of Rule 192 from engaging in their own separate transactions that would cause a material conflict with the ABS investors.[99] And when domestic ABS sales exist, the prohibition on securitization participants engaging in separate transactions that would cause the material conflicts of interest applies *even if* the securitization participants seek to engage in those prohibited transactions exclusively overseas or if the securitization participant is itself a non-U.S. entity.[100] In this way, Section 27B(a) and Rule 192 further the statutory objective of prophylactically protecting ABS investors in the U.S. securities markets from ABS transactions that would involve material conflicts of interest.[101]

Having provided the foregoing general guidance regarding Rule 192's cross-border scope, we turn to address those comments that raised cross-border considerations. Some commenters expressed concerns that the Commission did not address cross-border application of the proposed rule in the Proposing Release,[102] with some stating that, without guidance regarding cross-border applicability, together with the proposed definition of affiliates and subsidiaries, the proposed rule could potentially apply to all affiliates and subsidiaries of the named securitization participants anywhere in the world, regardless of their knowledge of, or participation in, the transaction.[103] One commenter further stated that such application could have a significant adverse effect on the ability of market participants in non-U.S. jurisdictions to satisfy the prudential and capital requirements regulations related to permissible securitization transactions used for capital optimization and balance sheet management in those jurisdictions.[104] For example, this commenter stated that certain synthetic securitizations are permitted in the European Union and the United Kingdom under the European Banking Authority's Simple, Transparent and Standardized (''STS'') framework.[105] The commenter further stated that, to the extent that such framework could be inconsistent with final Rule 192, cross-border applicability of Rule 192 could result in those transactions being impermissible, which could have undesirable consequences for European markets.[106]

The Commission also received comments requesting that the final rule include a safe harbor for foreign transactions and securitization participants to provide clarity to the market.[107] These commenters stated that such an approach would be consistent with other Commission rules applicable to securitizations that were promulgated under the Securities Act and Exchange Act, such as Regulation RR [108] and Exchange Act Rule 15Ga–2.[109] Some of these commenters further suggested that the final rule include a foreign transaction safe harbor that states specifically that the prohibition in Rule 192 does not apply to an asset-backed security if the offer and sale of the ABS was or is not required to be registered (and is/was not registered) under the Securities Act of 1933, the offer and sale of all of the ABS is or was made outside the United States, and the issuing entity of the ABS is a foreign issuer,[110] which is similar to the safe harbor included in Rule 15Ga–2 and incorporates principles contained in Regulation S.[111]

After considering these suggestions, we are including a foreign transaction safe harbor in final Rule 192 to provide additional certainty with regard to the territorial approach discussed above. Moreover, we agree with commenters that including a foreign transaction safe harbor is consistent with other securitization rules promulgated by the Commission, such as Regulation RR and Exchange Act Rule 15Ga–2, and that commenters' suggestions to rely on the principles contained in Regulation S in adopting such a safe harbor are consistent the Commission's cross-border authority.[112] We also agree with commenters that it is appropriate to model the safe harbor provision in Rule 192 on existing Rule 15Ga–2(e).[113] Therefore, the prohibition in final Rule 192(a)(1) will not apply to an asset-backed security (as defined by this rule) if it is not issued by a U.S. person (as that term is defined in Rule 902 of Regulation S) [114] and the offer and sale of such asset-backed security is in compliance with Regulation S.[115] The inclusion of this safe harbor for certain foreign securitizations will help address commenters' concerns with respect to application of the rule to extraterritorial transactions and securitization participants.

[99] Securitization participants are advised that even if there is no domestic sale to an investor that would trigger Rule 192's regulatory prohibition, the Commission still retains broad cross-border antifraud authority that will apply when securities participants engage in fraudulent or manipulative conduct that has a sufficient nexus to the United States. Specifically, the Commission's antifraud authorities will apply if a securities participant engages in securities fraud that involves: (1) conduct within the United States that constitutes significant steps in furtherance of the fraud, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring entirely outside the United States that has a foreseeable substantial effect within the United States. *See* Section 27(b) of the Exchange Act (15 U.S.C. 78aa). *See also SEC* v. *Scoville,* 913 F.3d 1204, 1215–1219 (10th Cir. 2019) (holding ''that Congress has 'affirmatively and unmistakably' indicated that the antifraud provisions of the federal securities acts apply extraterritorially when the statutory conduct-and-effects test is met'').

[100] *See Abitron Austria GmbH,* 2023 WL 4239255, at *2529 (explaining that ''[i]f the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application of the statute, even if other conduct occurred abroad'' (citations and internal quotation marks omitted)).

[101] *See, e.g.,* Section I.C.

[102] *See, e.g.,* letters from AFME, AIC; SFA I.

[103] *See, e.g.,* letter from AFME. One commenter also stated that it is unclear whether the Commission has authority over foreign entities apart from legal and practical issues regarding supervision and enforcement and that Rule 192 could put U.S. entities at a competitive disadvantage in relation to their international peers. *See* letter from AIMA/ACC. In addition to the changes discussed in this section, we believe that the revisions to the rule's coverage of affiliates and subsidiaries, as discussed in Section II.B.3.c. below, will mitigate such concerns.

[104] *See* letter from AFME.

[105] *Id.*

[106] *Id.*

[107] *See, e.g.,* letters from ABA; AFME; AIC (requesting that the Commission adopt a safe harbor for foreign entities and transactions and suggesting that it could do so by exempting foreign entities from the definition of ''securitization participant'' and excluding securities issued pursuant to Regulation S from the definition of ''asset-backed security''); SFA I; SFA II; SIFMA I (citing *Morrison* v. *Nat'l Austl. Bank Ltd.,* 561 U.S. 247 (2010) as the existing law on the extent of the rule's extraterritorial reach and seeking a safe harbor to provide clarity in order to facilitate compliance); SIFMA II.

[108] *See* 12 CFR 246.20.

[109] 17 CFR 240.15Ga–2. *See, e.g.,* letters from ABA; AIC; AFME; SFA I; SFA II; SIFMA I; SIFMA II.

[110] *See, e.g.,* letters from SFA II; SIFMA II.

[111] *See* 17 CFR 240.15Ga–2(e) (''Rule 15Ga–2(e)'') and 17 CFR 230.901 and 902(e).

[112] *See Morrison* v. *Nat'l Austl. Bank Ltd.,* 561 U.S. 247 (2010).

[113] Rule 15Ga–2(e) generally states that the requirements of Rule 15Ga–2 would not apply to an offering of an asset-backed security if certain conditions are met, including (1) the offering is not required to be, and is not, registered under the Securities Act, (2) the issuer of the rated security is not a U.S. person (as defined in Rule 902 of Regulation S), and (3) all offers and sales of the ABS is in compliance with Regulation S.

[114] 17 CFR 230.902(k).

[115] 17 CFR 230.901 through 905. *See* Rule 192(e). Securitization participants are advised that even if the safe harbor conditions are met, the Commission still retains broad cross-border antifraud authority that will apply when securities participants engage in fraudulent or manipulative conduct that has a sufficient nexus to the United States. *See supra* note 99.

B. Scope: Securitization Participants

1. Proposed Scope of Securitization Participants

Consistent with Section 27B(a), the Commission proposed that the prohibition in Rule 192 would apply to transactions entered into by an underwriter, placement agent, initial purchaser, or sponsor of a covered ABS, as well as any of their affiliates or subsidiaries, each of which would be a ''securitization participant'' as defined in Rule 192(c).[116] The Commission proposed definitions for the terms ''underwriter,'' ''placement agent,'' ''initial purchaser,'' and ''sponsor'' that are generally based on existing definitions and reflect the functions of these market participants in ABS transactions and not merely their formal labels.[117] In addition, the proposed definition of ''sponsor'' was based on the definition of sponsor in Regulation AB as well as, subject to certain exceptions, any person that directs or causes the direction of the structure, design, or assembly of the ABS or the composition of the pool of assets underlying the ABS or that has the contractual right to do so.[118] As explained in the Proposing Release, such a person is in a unique position to structure the ABS and/or construct the underlying asset pool or reference pool in a way that would position the person to benefit from the actual, anticipated, or potential adverse performance of the of the relevant ABS or its underlying asset pool if such person were to enter in a conflicted transaction.[119] The Commission also proposed certain limited exclusions from the definition of ''sponsor'' for persons that perform only administrative, legal, due diligence, custodial, or ministerial acts related to the structure, design, or assembly of an asset-backed security or the composition of the pool of assets underlying the ABS,[120] as well as for certain U.S. Federal Government entities and the Enterprises, subject to certain conditions.[121]

2. Comments Received

Commenters generally supported the proposal to define the securitization participants subject to the prohibition in the final rule.[122] While some commenters agreed with the proposed approach of defining the covered persons with respect to their functions in securitization markets,[123] several commenters expressed significant concerns regarding the scope of the proposed definition of ''sponsor,'' stating that it could potentially capture market participants that Section 27B did not intend to include.[124] For example, several commenters stated that the proposed definition of ''sponsor'' was overly broad and exceeded the intent of Section 27B.[125] As discussed below, some of these commenters stated that including any person that directs or has the contractual right to direct the structure, design, or assembly of an ABS could result in nearly every participant in a securitization transaction being a sponsor, including, for example, investors in the relevant ABS.[126] Many commenters acknowledged that Section 27B specifically identifies affiliates and subsidiaries of other named securitization participants as being subject to the rule's prohibition, but also expressed concern that the inclusion of certain affiliates and subsidiaries would make the rule unworkable.[127] Accordingly, several commenters requested that the rule permit the use of information barriers to address these challenges.[128] The Commission also received comments requesting revisions to the proposed exclusion for persons that perform only administrative, legal, due diligence, custodial, or ministerial acts related to the ABS or its underlying or referenced asset pool [129] and the proposed exclusion for certain U.S. Federal Government entities and the Enterprises, which we discuss in greater detail below.[130] Finally, one commenter stated that a securitization participant should only come within the scope of the prohibition in Rule 192 if such participant intended to profit from the securitization transaction to the detriment of investors or otherwise designed an ABS to fail.[131]

3. Final Rule

As discussed below, we are adopting the definitions of ''underwriter,'' ''placement agent,'' ''initial purchaser,'' and ''distribution'' as proposed. We are modifying the proposed definition of ''sponsor'' to address commenter concerns regarding the scope of the definition with respect to a person who acts solely pursuant to such person's contractual rights as a holder of a long position in an asset-backed security and a person's administrative and ministerial activities related to the ongoing administration of an ABS.[132] Also, as discussed in greater detail in Section II.B.3.b.ii. below, we are not adopting proposed paragraph (ii)(B) of the ''sponsor'' definition, which would have captured any person that directs or causes the direction of the structure, design, or assembly of an asset-backed security or the composition of the pool of assets underlying the asset-backed security. In response to comments received relating to confusion with respect to the proposed rule's treatment of credit risk transfer transactions, we are removing the specific exclusion for the Enterprises in favor of addressing those comments through the risk-mitigating hedging exception, which we discuss in more detail in Sections II.B.3.b.iv. and II.E., below. To address concerns about the rule's applicability to affiliates and subsidiaries, we are

[116] *See* Proposing Release Section II.B.

[117] *Id.* The Commission also proposed that ''affiliate'' and ''subsidiary'' would have the same meaning as set forth in Securities Act Rule 405 (17 CFR 230.405).

[118] *See* Proposing Release Section II.B.

[119] *See* Proposing Release Section II.B.

[120] *See* Proposing Release Section II.B.2.b.

[121] *See* Proposing Release Section II.B.2.c.

[122] *See, e.g.,* letters from AFR; ICI. The Commission also proposed a definition of ''distribution'' as used in the underwriter and placement agent definition but did not receive comment addressing the proposed definition of ''distribution.''

[123] *See, e.g.,* letters from AFR; Better Markets (expressing support for the definition of ''sponsor'' as proposed).

[124] *See, e.g.,* letters from ABA; AIMA/ACC; CREFC I, MBA; MFA II; NAMA; U.S. Representatives Wiley Nickel, Bryan Steil, Josh Gottheimer, Blaine Luetkemeyer, Jim Himes, Michael V. Lawler, Juan Vargas, Scott Fitzgerald, Vicente Gonzalez, Young Kim, Ritchie Torres, Zach Nunn, Gregory W. Meeks, Andy Barr, Steven Horsford, Andrew R. Garbarino, Brittany Pettersen, Ann Wagner, David Scott, Bill Huizenga, Brad Sherman (Ranking Member, Subcommittee on Capital Markets), Byron Donalds, Bill Foster, Emanuel Cleaver, II, and Sean Casten dated Oct. 31, 2023 (''Representative Nickel et al.'') (referring generally to the definition of ''securitization participant''); SFA I; SIFMA I. Some commenters also stated that certain underwriters, placement agents, and initial purchasers that were not part of the design of the ABS could be scoped in as well. *See* Sections II.B.2. and II.B.3.a.

[125] *See, e.g.,* letters from ABA; AIC; AIMA/ACC; AFME; Loan Syndications & Trading Association dated May 2, 2023 (''LSTA III''); MBA; MFA II; NAMA; Representatives Wagner and Huizenga; Senator Kennedy; SFA I; SIFMA I; Wulff Hansen.

[126] *See, e.g.,* letters from ABA; AFME; CREFC I; International Association of Credit Portfolio Managers dated Mar. 27, 2023 (''IACPM''); MBA; SFA I.

[127] *See, e.g.,* letters from ABA; AIC; AFME; ICI; LSTA III; Loan Syndications & Trading Association dated Oct. 30, 2023 (''LSTA IV''); MFA II; SFA I; SIFMA I.

[128] *See, e.g.,* letters from ABA; AIMA/ACC; AFME; AIC; ICI; LSTA II; LSTA III; MFA II; Pentalpha Surveillance LLC dated Mar. 27, 2023 (''Pentalpha''); SFA I; SIFMA I.

[129] *See, e.g.,* letters from CREFC I; LSTA III; SFA I; SIFMA I.

[130] *See, e.g.,* letters from Fannie Mae and Freddie Mac dated Mar. 27, 2023 (''Fannie and Freddie''); Housing Policy Council dated Mar. 27, 2023 (''HPC''); Mark Calabria, Former FHFA Director, dated Mar. 25, 2023 (''M. Calabria'').

[131] *See* letter from HPC.

[132] *See* Section II.B.3.b. for a detailed discussion of the comments received and the revised definition.

adopting revisions to the definition of ''securitization participant'' regarding when an affiliate or subsidiary of an underwriter, placement agent, initial purchaser, or sponsor is subject to the prohibition against engaging in conflicted transactions.[133] Final Rule 192 does not include a requirement that the securitization participant intended to profit from a transaction to the detriment of investors or otherwise designed the ABS to fail. As discussed in greater detail in Sections II.A.3. and II.D., we believe that narrowing the scope of the final rule to add an element of intent is inappropriate and it is not relevant for purposes of the final rule whether the securitization participant makes (or intended to make) a profit. Narrowing the scope of the rule to require knowledge or intent would frustrate the statutory mandate of Section 27B.

a. Placement Agent, Underwriter, and Initial Purchaser

Consistent with the proposal, final Rule 192(c) defines ''placement agent'' and ''underwriter'' as a person who has agreed with an issuer or selling security holder to:

- Purchase securities from the issuer or selling security holder for distribution;
- Engage in a distribution for or on behalf of such issuer or selling security holder; or
- Manage or supervise a distribution for or on behalf of such issuer or selling security holder.[134]

These definitions are focused on the functional role that a person would assume in connection with a distribution of securities.[135] Also consistent with the proposal,[136] final Rule 192(c) defines ''distribution'' as used in the definitions for ''underwriter'' and ''placement agent'' to mean:

- An offering of securities, whether or not subject to registration under the Securities Act, that is distinguished from ordinary course trading transactions by the presence of special selling efforts and selling methods; or
- An offering of securities made pursuant to an effective registration statement under the Securities Act.[137]

The definition of ''initial purchaser'' is similarly focused on a person's function in a securities offering and includes, as proposed, ''a person who has agreed with an issuer to purchase a security from the issuer for resale to other purchasers in transactions that are not required to be registered under the Securities Act in reliance upon Rule 144A or that are otherwise not required to be registered because they do not involve any public offering.'' [138]

Some commenters requested that we limit the definition of ''underwriter,'' ''placement agent,'' and ''initial purchaser'' to capture only those persons who are directly involved in structuring the relevant ABS or selecting the assets underlying the ABS, stating as an example that underwriting syndicate co-managers generally rely on lead managers and have little direct involvement with the aforementioned securitization activities.[139] While it may be the case that underwriters, placement agents, or initial purchasers are involved in the issuance of an ABS in varying degrees, the prohibition in Rule 192(a)(1) only applies to such persons if they have entered into an agreement [140] with an issuer (or, with respect to underwriters and placement agents, a selling security holder) because those persons would likely be privy to certain information about the ABS or underlying assets. Conversely, underwriters, placement agents, and initial purchasers with no such agreement with the issuer or selling security holder (''selling group members''), as applicable, may help facilitate a successful distribution of securities to a wider variety of purchasers, but these selling group members do not have a direct relationship with the issuer or selling security holder and, thus, are unlikely to have the same ability to influence the design of the relevant ABS. Therefore, selling group members who do not have such an agreement are not underwriters, placement agents, or initial purchasers as defined in Rule 192(c).[141] Moreover, such a limitation could have the unintended consequence of creating uncertainty about whether an underwriter, placement agent, or initial purchaser is subject to the rule's prohibition because it would require a determination of whether such person is ''directly involved'' in structuring an ABS or selecting the underlying assets. For purposes of Rule 192, therefore, it is sufficient that a person who otherwise meets the definitions of ''underwriter,'' ''placement agent,'' or ''initial purchaser'' in Rule 192(c) has an agreement with the issuer or selling security holder, as applicable, to perform the enumerated functions because, as stated above, such persons would likely be privy to information about the ABS or underlying assets, giving them the opportunity to influence the structure of the relevant ABS and engage in a bet against it. No factual determination of whether such person actually had ''direct involvement'' in the structure or design of the ABS is required.

b. Sponsor

We are adopting the definition of ''sponsor'' with certain modifications from the proposal in response to comments received. The definition of ''sponsor'' will differ in four ways from the proposal. First, we are not adopting proposed paragraph (ii)(B) of the ''sponsor'' definition, which would have captured any person that directs or causes the direction of the structure, design, or assembly of an asset-backed security or the composition of the pool of assets underlying the asset-backed security. Second, we are revising the text of the final rule to state that persons who act solely pursuant to their contractual rights as holders of a long position in the relevant ABS are excluded from paragraph (ii) of the definition of sponsor, as discussed below. Third, we are revising the text to specifically exclude persons who perform only administrative, legal, due diligence, custodial, or ministerial activities related to the ongoing administration of the ABS or the composition of the pool of assets

[133] *See* Section II.B.3.c.

[134] 17 CFR 230.192(c).

[135] The definition of underwriter for purposes of Rule 192 has no impact on the definition, responsibility, or liability of an underwriter under Securities Act Section 2(a)(11). Additionally, while these definitional prongs are also used for the definition of ''underwriter'' in the Volcker Rule (17 CFR 255.4(a)(4)) and Regulation M (17 CFR 242.100(b)), the definition we are adopting in Rule 192(c) has no impact on the definition of ''underwriter'' in either of those rules. *See also* Proposing Release Section II.B.1.

[136] The Commission did not receive any comments addressing the proposed definition of ''distribution.''

[137] 17 CFR 230.192(c). As the Commission noted in the Proposing Release, activities generally indicative of special selling efforts and methods include, but are not limited to, greater than normal sales compensation arrangements, delivering a sales document (*e.g.,* a prospectus or offering memorandum), and conducting road shows. A primary offering of ABS pursuant to an effective Securities Act registration statement would also be captured because such an offering is a primary issuance by an issuer immediately following the creation of the ABS, which is clearly distinguishable from an ordinary secondary trading transaction. *See* Proposing Release at 9683.

[138] The definition of ''initial purchaser'' in Rule 192(c) has no impact on the application of Rule 144A (17 CFR 230.144A).

[139] *See* letters from SFA I; SIFMA I. Another commenter stated that underwriters and other participants should be defined to include persons who make a ''material contribution'' to the economic structure, composition, management, or sale of an ABS. *See* letter from AFR.

[140] *See* Section II.C.3. for a discussion of what constitutes an ''agreement'' for purposes of Rule 192(a)(1).

[141] *See also* Proposing Release Section II.B.1.

underlying or referenced by the ABS.[142] Fourth, we are deleting the proposed exclusion from the ''sponsor'' definition for the Enterprises while they are operating under the conservatorship or receivership of FHFA with capital support from the United States, which we discuss in Section II.B.3.b.iv., below.[143] Accordingly, for purposes of Rule 192, ''sponsor'' means:

- Any person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the entity that issues the asset-backed security (a ''Regulation AB-based Sponsor''); or
- Any person with a contractual right to direct or cause the direction of the structure, design, or assembly of an asset-backed security or the composition of the pool of assets underlying or referenced by the asset-backed security (a ''Contractual Rights Sponsor''), other than a person who acts solely pursuant to such person's contractual rights as a holder of a long position in the ABS (a ''Long-only Investor'')
- But not including:
  - A person who performs only administrative, legal, due diligence, custodial, or ministerial acts related to the structure, design, assembly, or ongoing administration of an asset-backed security or the composition of the pool of assets underlying or referenced by the asset-backed security (the ''Service Provider Exclusion''); or
  - The United States or an agency of the United States with respect to an asset-backed security that is fully insured or fully guaranteed as to the timely payment of principal and interest by the United States (''U.S. Government Exclusion'').[144]

As with the definitions discussed above, we are adopting a functional definition of ''sponsor'' that will apply regardless of the person's title and that instead focuses on the person's activities with respect to the ABS transaction. Accordingly, a person who organizes and initiates an ABS transaction, or who has a contractual right to direct or cause the direction of the structure, design, or assembly of an ABS or the composition of the pool of assets underlying or referenced by the ABS whether before or after the initial issuance of the relevant ABS, is a sponsor under Rule 192 (unless one of the exceptions described below applies). For example, an ''issuer'' of a municipal securitization will be a ''sponsor'' if its activities meet the definition. This definition also includes, for example, a portfolio selection agent for a collateralized debt obligation (''CDO'') transaction with a contractual right to direct or cause the direction of the composition of the pool of assets on behalf of the CDO or a collateral manager for a collateralized loan obligation (''CLO'') transaction with the contractual right to direct or cause the direction of asset purchases or sales on behalf of the CLO.[145]

i. Regulation AB-Based Sponsor

We are adopting paragraph (i) of the definition of ''sponsor'' as proposed. For purposes of Rule 192, therefore, a sponsor includes, but is not limited to, any person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the entity that issues the asset-backed security.[146] This portion of the definition is derived from the definition of the term ''sponsor'' in Regulation AB and was generally supported by commenters, who stated that it is consistent with the use of the term in both Regulation AB [147] and Regulation RR,[148] as well as market understanding of what a securitization sponsor is.[149]

Some commenters requested that we exclude states and their political subdivisions from the definition of ''sponsor'' under the final rule.[150] These commenters generally stated that application of Rule 192's prohibition to municipal issuers is unnecessary because these issuers engage in transactions pursuant to enabling legislation that is designed specifically to aid in the furtherance of important government functions and other public purposes, are restricted from engaging in speculative investments, and are not driven by a profit motive that would lead to the type of behavior that Section 27B is intended to address.[151] While municipal issuers may be subject to other provisions that regulate their conduct, we are not persuaded that issuers of municipal ABS are uniquely different from other securitization participants such that they should be excluded from the final rule. Similarly, the fact that municipal entities are subject to investment policies that limit the ability of such entities as investors to engage in speculative investments is not a reason to exempt these entities from the definition of ''sponsor.'' While the outcome of such policies may be that the entities may not, for example, take a short position against their municipal ABS, the objectives of those policies are typically focused on protection of the entity's investment portfolio.[152] Being subject to various laws and regulations that may intersect is not a position that is unique to issuers of municipal ABS. Additionally, the prohibition in Rule 192 is designed to prophylactically protect investors in U.S. securities markets from ABS transactions tainted by material conflicts of interest, regardless of whether a securitization participant has a profit motive or actually does profit from such transactions.[153] As such, while it may be unlikely, as some commenters stated, that issuers of municipal ABS would engage in the type of conduct that Section 27B prohibits for the reasons discussed above,[154] we do not believe that an exclusion from the definition of ''securitization participant'' or ''sponsor'' would be appropriate because investors are entitled to the

[142] The inclusion of the language ''or referenced by the asset-backed security'' in the definition of sponsor and other aspects of final Rule 192 is designed to address activities related to the reference pool for a synthetic ABS.

[143] As discussed below, final Rule 192 includes the proposed exclusion from definition of ''sponsor'' for the United States or any agency of the United States with respect to its fully insured or fully guaranteed ABS.

[144] *See* Sections II.B.2. and II.B.3.b.iv. for a discussion of comments received and the final U.S. Government Exclusion.

[145] *See also* Sections II.A.2. and II.A.3. for a discussion of the comments received and the final definition of ''asset-backed security'' as it applies to municipal securitizations.

[146] 17 CFR 230.192(c).

[147] 17 CFR 229.1101(l).

[148] 17 CFR 246.

[149] *See, e.g.,* letters from AIC; SFA I; SIFMA I.

[150] *See, e.g.,* letters from NABL et al.; NAHEFFA (also requesting that 501(c)(3) organizations and the issuers of qualified 501(c)(3) conduit bonds to such organizations be excluded from the definition); NAMA; SIFMA I; Wulff Hansen (expressing support for the comments submitted by NAMA).

[151] *Id.* One of these commenters also stated that application of the prohibition in Rule 192 to State and local governmental issuers would be a breach of the principles of federalism and intergovernmental comity. *See* SIFMA I. The U.S. Supreme Court has held that State and local governments ''must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.'' *See Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985); *South Carolina* v. *Baker,* 485 U.S. 505 (1988). Congress enacted Section 621 of the Dodd-Frank Act, adding Section 27B of the Securities Act. Rule 192 implements Section 27B of the Securities Act with respect to certain activities undertaken by State and local governmental issuers that fall within its proscriptions. It follows, therefore, as provided in *Garcia* and *Baker,* that the application of Rule 192 to State and local governmental issuers is not inconsistent with principles of federalism and intergovernmental comity.

[152] *See* letter from NABL et al. (stating that municipal investment policies are ''centered on preservation of principal or moderate growth.'')

[153] *See* Section II.D.3

[154] *See, e.g.,* letters from NABL et al.; NAHEFFA; NAMA; SIFMA I.

protections afforded by the statute regardless of how likely the securitization participant is to engage in a conflicted transaction.

Some commenters went on to state that, because municipal ABS issuers are unlikely to engage in conflicted transactions for the reasons discussed above, these entities would need to expend administrative and financial resources to ''prove a negative'' (*i.e.,* that they do not engage in conflicted transactions), especially if securitization participants were to be required to have documented policies and procedures in place to prevent violation of the prohibition, adding compliance costs without a clear regulatory benefit.[155] Although the Commission requested comment in the Proposing Release about whether the final rule should include a requirement that a securitization participant have documented policies and procedures reasonably designed to prevent a violation of the rule's prohibition on conflicted transactions,[156] the Commission did not receive any comments in support of such a requirement. Commenters, however, expressed concerns about the potential costs associated with such a provision,[157] and therefore, final Rule 192 does not include a requirement that securitization participants have documented policies and procedures reasonably designed to prevent a violation of the rule's prohibition. As such, while we recognize that compliance with the prohibition against engaging in conflicted transactions may result in increased compliance costs to municipal issuers subject to Rule 192, we expect that such costs will be modest because the final rule does not include a general requirement for policies and procedures.[158]

For these reasons, we continue to believe that any such costs will be justified because investors in municipal securitizations should be entitled to the same legal protections as investors in other types of ABS that meet the definition of ''asset-backed security'' in Rule 192(c). Accordingly, if a municipal security meets the definition of Exchange Act ABS,[159] then the municipal issuer that organizes and initiates such an offering[160] is a sponsor for purposes of Rule 192.[161]

ii. Contractual Rights Sponsor

We are adopting the definition of ''Contractual Rights Sponsor'' that was proposed in paragraph (ii)(A) of the proposed definition of ''sponsor'' with certain modifications in response to comments received. Also, in response to comments received, we are not adopting the definition of ''Directing Sponsor'' that was proposed in paragraph (ii)(B) of the proposed definition of ''sponsor.'' Accordingly, paragraph (ii) of the definition of ''sponsor'' for purposes of Rule 192 captures, subject to certain exceptions discussed below, any person with a contractual right to direct or cause the direction of the structure, design, or assembly of an asset-backed security or the composition of the pool of assets underlying or referenced by the asset-backed security (a Contractual Rights Sponsor), other than a person who acts solely pursuant to such person's contractual rights as a holder of a long position in the asset-backed security (a Long-only Investor).[162] The revision to explicitly exclude Long-only Investors from the definition of sponsor by deleting the proposed ''Directing Sponsor'' definition is consistent with the Commission's stated intent in the Proposing Release that an ABS investor (that does not otherwise meet any of the other definitions of parties covered by the rule) would not be a sponsor under the rule merely because such investor expresses its preferences regarding the assets that would collateralize its ABS investment.[163] Also, Rule 192 is not designed to discourage ABS investors from exercising contractual rights as a holder of a long position in an ABS. As discussed below, the final rule excludes any person who acts solely pursuant to such person's contractual rights as a holder of a long position in the ABS.

The Commission proposed a comprehensive definition of ''sponsor'' that would include a person that is in a unique position to structure the ABS and/or construct the underlying asset pool or reference pool in a way that would position the person to benefit from the actual, anticipated, or potential adverse performance of the relevant ABS or its underlying asset pool if such person were to enter in a conflicted transaction.[164] Some commenters supported this approach, citing the significant role that such parties play in securitization transactions.[165] As discussed in greater detail below, a number of commenters, however, opposed the proposed inclusion of Contractual Rights Sponsors and Directing Sponsors as too broad.[166] Some of these commenters requested that the ''sponsor'' definition be limited to paragraph (i) (*i.e.,* a Regulation AB-based sponsor),[167] while others stated that such a definition would not be sufficient to capture the key transaction parties that have a significant role in asset selection for ABS transactions.[168] Some commenters also stated that defining ''sponsor'' to include functions beyond the scope of the Regulation AB-based Sponsor definition extends beyond the ''ordinary and natural meaning'' of the term, which they state is understood by market participants to be the definition that was codified in Regulation AB.[169] These commenters stated that the Commission codified the ''ordinary and natural meaning'' of the term ''sponsor'' when it adopted the definition in Regulation AB in 2004 and that, because Section 27B uses the term ''sponsor'' without separately defining it, any other definition for purposes of Rule 192 would be inconsistent with Congressional intent.[170]

Regulation AB is a set of disclosure items that form the basis for disclosure in Securities Act registration statements and Exchange Act reports for asset-

[155] *See, e.g.,* letters from NAHEFFA; NAMA.

[156] *See* Proposing Release Request for Comment 59.

[157] *See, e.g.,* letters from NAHEFFA, NAMA.

[158] *See* Section IV for a discussion of the Commission's economic analysis of the impacts of Rule 192 and a discussion of alternatives considered.

[159] *See* Section II.A.3.a.

[160] Or, in the case of a municipal advisor, if the advisor has a contractual right to direct or cause the direction of the structure, design, or assembly of a municipal ABS, such person is a sponsor under paragraph (ii) of the ''sponsor'' definition in final Rule 192(c). *See* Section II.B.3.b.ii.

[161] The same analysis will apply for issuers of single-asset conduit bonds that meet the definition of Exchange Act ABS or otherwise meet the definition of ''asset-backed security'' in Rule 192(c). *See* Section II.A.3.a.

[162] As discussed in more detail below, we are also adopting an exclusion from the ''sponsor'' definition for any person who performs only administrative, legal, due diligence, custodial, or ministerial acts related to the ABS and for the United States or an agency of the United States with respect to ABS that is fully insured or fully guaranteed as to the timely payment of principal and interest by the United States. *See* Sections II.B.3.b.iii. and II.B.3.b.iv.

[163] *See* Proposing Release Section II.B.2.b.

[164] *See* Proposing Release Section II.B.

[165] *See* letters from AFR; Better Markets.

[166] *See, e.g.,* letters from ABA; AIMA/ACC; AFME; CREFC I, CRE Finance Council dated July 5, 2023 (''CREFC II''); NAMA; Representatives Wagner and Huizenga; Senator Kennedy; SFA I; SFA II; SIFMA I.

[167] *See, e.g.,* letters from ABA; AIC; SIFMA I. letters from ABA; AIC; SIFMA I. *See* Section II.B.3.b.i. above for a discussion of paragraph (i) of the ''sponsor'' definition in Rule 192(c).

[168] *See, e.g.,* letters from Better Markets (expressing support for the scope of the definition and stating that collateral managers should be subject to the rule because they play a significant role in selecting and managing the assets underlying an ABS); SFA II (acknowledging the Commission's desire to scope in CLO managers that are not sponsors for purposes of Regulation RR).

[169] *See, e.g.,* letters from ABA; AIC; SIFMA I.

[170] *See, e.g.,* letters from ABA; AIC; SIFMA I.

backed securities and identify the transaction parties responsible for making that disclosure.[171] When the Commission adopted these specialized registration, disclosure, and reporting requirements in Regulation AB for certain types of asset-backed securities, it explained that those requirements were specifically designed for asset-backed securities that have certain characteristics (*i.e.,* ABS as defined in Regulation AB).[172] At that time, the Commission acknowledged that the types of ABS that would meet the definition in Regulation AB were a subset of the full spectrum of ABS in the market.[173] For example, synthetic securitizations are not eligible for registration and reporting under Regulation AB because such securitizations are primarily based on the performance of assets or indices not included in the ABS.[174] As such, the concept of a sponsor ''selling or transferring assets . . . to the entity that issues the [ABS]'' in the ''sponsor'' definition under Regulation AB would not be applicable in a synthetic ABS because, as described in Section II.A.3.b. above, a synthetic ABS is designed to create exposure to an asset that is not sold, transferred to, or otherwise part of the asset pool. Rule 192, consistent with the express language of Section 27B, applies to a wider spectrum of ABS (*i.e.,* Exchange Act ABS, synthetic ABS, and hybrid cash and synthetic ABS) [175] than Regulation AB and—as discussed throughout this section—the characteristics of the structure, assets, and the role of transaction parties involved in those types of ABS may differ significantly from those in Regulation AB ABS. We do not believe the concept of ''sponsor'' in Section 27B is limited to the Regulation AB definition of that term, as that would mean that there is no ''sponsor'' for synthetic asset-backed securities, even though Congress explicitly referenced those participants in the statute. It is therefore appropriate for Rule 192 to define the securitization participants subject to the rule's prohibition to align with the characteristics of that wider spectrum of ABS. Accordingly, we continue to believe that, while it is appropriate for the final rule to incorporate a definition based on the Regulation AB definition of sponsor, defining ''sponsor'' for purposes of Rule 192 as a Regulation AB-based sponsor alone would not be sufficient to address the full range of securitization activities involved in asset-backed securities transactions that Section 27B addresses.

One commenter also cited to the holding of the U.S. Court of Appeals for the District of Columbia Circuit that the application of the term ''securitizer'' [176] to CLO collateral managers in Regulation RR was an overreach of its authority.[177] The Court's analysis was centered around the statutory text that directed the Commission, together with several other Federal agencies, to issue regulations to require any securitizer to ''retain'' an economic interest in a portion of the credit risk for any asset that the securitizer, through the issuance of an asset-backed security, ''transfers, sells, or conveys'' to a third party.[178] The Court held that, because open-market CLO managers do not ''hold'' the securitized loans in a CLO transaction at any point, they can neither ''transfer'' those loans, nor ''retain'' credit risk in the loans because such terms require that the ''securitizer'' has control over the assets via possession or ownership.[179] We believe a different analysis is applicable to Section 27B, which directs the Commission to prohibit securitization participants of Exchange Act ABS and synthetic ABS from engaging in transactions that would involve or result in a material conflict of interest. Section 941 of the Dodd-Frank Act added Section 15G of the Exchange Act,[180] in which Congress provided a statutory definition for the term ''securitizer'' that incorporated from the Regulation AB definition of sponsor the general concept of transferring or selling assets into a special purpose entity. In the case of Section 15G, therefore, the statutory text specified the functions that Congress intended to be captured by the term ''securitizer.'' In Section 27B, however, Congress did not define ''sponsor,'' but it did specify the types of ABS (*i.e.,* Exchange Act ABS and synthetic ABS) that are subject to the prohibition. Moreover, as evidenced by statutory text in other laws, where Congress intended to refer to a portion of Regulation AB, it did so explicitly.[181]

As we discussed above, the characteristics of the structure, assets, and the role of transaction parties involved in the wider spectrum of ABS covered by Section 27B (including synthetic asset-backed securities) differ significantly from those ABS subject to Regulation AB, and therefore the definitions adopted by the Commission in Regulation AB do not capture the types of ABS that Congress determined should be subject to Rule 192's prohibition. Accordingly, we believe that the statutory inclusion of these types of ABS requires that Rule 192 define the market participants and their roles in such ABS in congruence with the structures and characteristics specific to the relevant ABS.

A number of commenters also expressed concern that paragraph (ii) of the ''sponsor'' definition includes activities that could be attributed to a wide variety of transaction parties and could therefore be understood to scope in, as a Contractual Rights Sponsor or Directing Sponsor, almost any party with any role in the structuring of the transaction.[182] Commenters stated that the definition could include entities such as investors,[183] asset managers [184]

[171] *See* Sections III.A.2. and III.B.3. of the 2004 Regulation AB Adopting Release.

[172] *See* Section III.A.2. of the 2004 Regulation AB Adopting Release.

[173] *Id.* (stating, for example, that a default application of the traditional disclosure regime might not be appropriate for some structured securities, but that treating them the same as ABS as defined in Regulation AB may not be appropriate either and that, depending on the structure of the transaction and the terms of the securities, it might be most appropriate to apply some aspects of both regimes in combination). The Commission also acknowledged in that release that there may be securities developed in the future that are not contemplated in Regulation AB, which would similarly require consideration of which regulatory regime would be most appropriate.

[174] *See also* Section III.A.2. of the 2004 Regulation AB Adopting Release.

[175] *See* Section II.A.3.

[176] The statutory term at issue in the case was ''securitizer,'' which was defined by Congress as an issuer of an ABS or a person who organizes and initiates an ABS transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer. *See* Section 15G(a)(3) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*–11(a)(3)), which was added by Section 941 of the Dodd-Frank Act (Pub. L. 111–203).

[177] *See* letter from AIC (citing *The Loan Syndications and Trading Association* v. *Securities and Exchange Commission et al.,* 882 F.3d 220 (D.C. Cir. 2018) (the ''LSTA Decision'') and stating that, by proposing to define ''sponsor'' in Rule 192 to refer to functions beyond the scope of the Regulation AB-based Sponsor definition, the Commission failed to heed the D.C. Circuit's guidance and exceeded the scope of its authority).

[178] *See* LSTA Decision. *See also* 15 U.S.C. 78*o*–11(b)(1).

[179] *See* LSTA Decision, 882 F.3d at 223.

[180] 15 U.S.C. 78*o*–11(a)(3).

[181] *See, e.g.,* Credit Rating Agency Reform Act of 2006 (Pub. L. 109–291) (referring specifically to ''issuers of asset-backed securities (as that term is defined in section 1101(c) of part 229 of title 17, Code of Federal Regulations, as in effect on the date of enactment of this paragraph)''). We also note that the term ''sponsor'' appears in several other places throughout the securities laws with varying meanings. For example, in Item 901 of Regulation S–K, a sponsor is defined in the context of roll-up transactions as ''the person proposing the roll-up transaction.'' *See* 17 CFR 901(d).

[182] *See, e.g.,* letters from ABA; AIMA/ACC; AFME, CREFC I; CREFC II; NAMA; Representatives Wagner and Huizenga; Senator Kennedy; SFA I; SFA II; SIFMA I.

[183] *See, e.g.,* letters from ABA; CREFC I; CREFC II; SFA I; SFA II; SIFMA I.

[184] *See, e.g.,* letter from ABA; LSTA IV.

and other investment advisers,[185] servicers,[186] and warehouse lenders,[187] each of which we discuss below.

Many commenters expressed concern that ABS investors could be captured by the definition of sponsor by virtue of the iterative negotiation process between deal participants and investors.[188] These commenters recognized the stated intent in the Proposing Release [189] that investors acquiring a long position in an ABS would not be Directing Sponsors merely because they express their preferences regarding the structure of the ABS or the underlying assets, but requested that this be codified in rule text to avoid the unintended consequence of discouraging investors from actively participating in discussions about deal structures and underlying asset pools in their ABS investments and to help ensure that they are not unnecessarily subject to additional costs associated with developing compliance programs under Rule 192.[190] In current market practice, investors in ABS transactions may receive information about collateral (including, for example, specific loan data and due diligence results) and may specify preferences or requirements for a given deal structure or terms of the security.[191] Commenters stated, and we agree, that these negotiations are important and beneficial market functions.[192] Consequently, as requested by commenters and to help ensure that Rule 192 is not an impediment to an investor's negotiating power, we are not adopting paragraph (ii)(B) (Directing Sponsor) of the proposed definition of ''sponsor.''

Some commenters suggested that the regulatory text should specify that long investors are also excluded from proposed paragraph (ii)(A) (Contractual Rights Sponsor).[193] Relatedly, some commenters stated that the exercise of contractual rights inherent to the purchase of the ABS should not be conflicted transactions under Rule 192(a)(3).[194] In securitizations, it is often the case that long investors purchasing the most senior or the most subordinated tranche of the relevant ABS negotiate for certain rights that are exercisable over the life of the securitization. A person's contractual rights as a holder of a long position in the ABS could include, for example, consent rights over major decisions such as initiating foreclosure proceedings with respect to assets underlying the ABS, the right to replace the special servicer of the ABS, or the right to direct or cause the direction of an optional redemption of outstanding interests in the ABS. Rule 192 is not designed to impair an ABS investor's ability to negotiate for such contractual rights as a holder of a long position in the ABS. Nor is it designed to discourage investors from exercising such rights as a holder of a long position in the ABS. Therefore, we are adopting paragraph (ii) of the definition of ''sponsor'' to exclude from the definition of Contractual Rights Sponsor any person who acts solely pursuant to such person's contractual rights as a holder of a long position in the ABS.

Whether a long investor is acting ''solely'' pursuant to its contractual rights as a holder of a long position in the relevant ABS will depend on the relevant facts and circumstances, including what other roles the long investor may have in the transaction. For example, some commenters requested that the rule specify that the holders of ''B-piece'' bonds (the ''B-piece buyer'') in commercial mortgage backed securities (''CMBS'') transactions [195] are not ''sponsors'' as defined by the final rule or, alternatively, that the B-piece buyers be otherwise excluded because they should be considered long investors.[196] Whether a B-piece buyer in a CMBS transaction is a ''sponsor'' for purposes of Rule 192 or satisfies the condition of the exclusion for Long-only Investors will depend on the facts and circumstances of a given transaction and B-piece buyer.[197] Generally, the B-piece buyer purchases the most subordinate tranches of the ABS and, in connection with this investment, performs extensive due diligence on the underlying loans and negotiates with the deal sponsor for changes to pool composition and to increase credit quality of the pool. As a holder of a long position in the relevant ABS, a B-piece buyer will generally have additional ongoing rights in an ABS transaction. For example, transaction agreements may dictate that certain actions with respect to the asset pool underlying the ABS (such as releasing a property from a lien) are subject to the approval of the B-piece buyer,[198] giving the B-piece buyer a contractual right to direct or cause the direction of the composition of the pool. As such, absent the exclusion we are adopting for Long-only Investors, a B-piece buyer could be subject to the prohibition of Rule 192(a)(1) as a Contractual Rights Sponsor. Under the final rule, if the B-piece buyer exercises such rights solely pursuant to its contractual rights as a holder of a long position in the ABS, then the B-piece buyer will satisfy the conditions for the Long-only Investor carve-out from the definition of Contractual Rights Sponsor as adopted and, therefore, will not be subject to the prohibition in Rule 192(a)(1).

In some circumstances, however, the B-piece buyer can also act as a special servicer for the securitization (*i.e.,* a contractual party to the transaction) or may be an affiliate or subsidiary of the special servicer. Whether a special servicer's activities satisfy the conditions of the exclusion for persons that perform only administrative, legal, due diligence, custodial, or ministerial acts with respect to the relevant ABS will depend on the nature of the special servicer's activities.[199] Accordingly, if a B-piece buyer is also a special servicer for an ABS transaction, the B-piece buyer will not be acting ''solely'' pursuant to its rights as a holder of a long position in the relevant ABS and will need to then consider whether the performance of its contractual obligations as special servicer will be sufficiently administrative or custodial in nature to be excluded from the

[185] *See, e.g.,* letter from ICI.

[186] *See, e.g.,* letters from MBA; SFA I; CREFC I. We discuss the final rule's applicability to servicers in Section II.B.3.b.iii., below.

[187] *See, e.g.,* letter from ABA.

[188] *See, e.g.,* letters from ABA; AFME; CREFC I; CREFC II; IACPM; ICI; MBA; MFA II; LSTA III; LSTA IV; Representatives Wagner and Huizenga; Senator Kennedy; SFA I; SFA II; SIFMA I; SIFMA II.

[189] *See* Proposing Release Section II.B.2.

[190] *See, e.g.,* letters from ABA; AFME; CREFC I; CREFC II; IACPM; ICI; MBA; MFA II; LSTA III; Representatives Wagner and Huizenga; Senator Kennedy; SFA I; SFA II; SIFMA I; SIFMA II.

[191] For example, investors may specify a certain rating, yield, or maturity on the bonds, require particular levels of subordination or credit enhancement, or may request that assets be added or removed to satisfy preferences with respect to asset quality, concentration levels, etc.

[192] *See, e.g.,* letters from CREFC I; ICI; SFA II.

[193] *See, e.g.,* letters from CREFC I; SFA II; SIFMA II.

[194] *See, e.g.,* letter from CREFC I; SFA I.

[195] As is the case with most ABS, CMBS securities are offered in tranches, with each tranche representing a different risk profile. The top tranche (referred to as ''AAA'') represents the lowest risk investment while the lower tranches (typically non-investment grade) represent the highest risk profile because they are the first to incur losses in the event that there are shortfalls in collections on the underlying assets. In CMBS, the ''B-piece'' bonds are the lowest tranche(s) of the CMBS (*i.e.,* the most subordinate tranche(s), meaning that holders are purchasing the first-loss position) and the holders of those bonds are typically third-party purchasers, commonly referred to as the ''B-piece buyer.'' *See, e.g.,* Section III.B.5. of the RR Adopting Release.

[196] *See, e.g.,* letters from ABA; CREFC I; Fannie and Freddie; MBA.

[197] The same analysis applies for the directing noteholder in a commercial real estate collateralized loan obligation (''CRE CLO''), which functions similarly to the B-piece buyer in CMBS transactions.

[198] *See, e.g.,* letter from CREFC I.

[199] *See* Section II.B.3.b.iii. for a discussion of the final rule's application to special servicers.

definition.[200] Similarly, if the B-piece buyer is an affiliate or subsidiary, as defined by this rule, of another securitization participant in the relevant ABS, then it will also be a securitization participant subject to the prohibition in Rule 192(a)(1).[201] For the foregoing reasons, whether a B-piece buyer is a ''sponsor'' for purposes of Rule 192, or is eligible for the Long-only Investor exclusion, will depend on the facts and circumstances of the particular ABS and the roles of the B-piece buyer and its affiliates and subsidiaries in the ABS transaction.

Some commenters requested that market participants acting subject to a fiduciary duty to a client or customer, such as open-market CLO collateral managers, municipal advisors,[202] or other investment advisers be excluded from the definition of ''sponsor'' because such participants are already subject to various laws and regulations that regulate their conduct and address conflict management.[203] Rule 192 will complement the existing federal securities laws, including those that govern a market participant's Federal fiduciary duties. As discussed earlier, the fact that an entity is subject to other rules, laws, or regulatory policies pertaining to its conduct, including the existence and management of conflicts of interest, does not preclude such entity from satisfying the conditions of other regulatory requirements. Additionally, we recognize, as one commenter stated, that securitization participants in an ABS subject to Rule 192 do not owe a fiduciary duty to the investors in an ABS because the securitization participants' advisory clients are the deal sponsors rather than the ABS investors.[204] In cases where a sale of an ABS does not involve the sale of an interest in a private fund [205] or other vehicle advised by an investment adviser, there is no advisory relationship creating a Federal fiduciary duty owed between a purchaser and seller. In cases where the private fund issues ABS (such as tranches of a CLO), the private fund's adviser owes a Federal fiduciary duty to the fund and the antifraud provisions of the Advisers Act and the rules thereunder (the ''Antifraud Provisions'') apply.[206] Such advisers include CLO collateral managers who will also be subject to Rule 192. Although the application of an adviser's Federal fiduciary duty, which requires the adviser to serve the best interests of its clients,[207] and the Antifraud Provisions provide protections relating to conflicts of interest that act in harmony with Rule 192, these duties and provisions do not necessarily require elimination of conflicted transactions. Accordingly, a fiduciary duty-based exclusion from Rule 192 would frustrate Section 27B's prophylactic investor protection objectives to eliminate certain conflicted transactions.

Some commenters also stated that an adviser's Federal fiduciary duty may address conflicts of interest, including through appropriate disclosure and informed client consent.[208] As the Commission has stated, while full and fair disclosure of all material facts relating to the advisory relationship or of conflicts of interest and a client's informed consent prevent the presence of those material facts or conflicts themselves from violating the adviser's fiduciary duty, such disclosure and consent do not satisfy the adviser's duty to act in the client's best interest.[209] By contrast, Rule 192 sets forth an express prohibition against certain conflicted transactions. The final rule will therefore provide additional prophylactic protections for ABS investors by requiring the elimination of those conflicted transactions. For these reasons, we do not believe it would be necessary, appropriate, or consistent with the investor protection objectives of Section 27B to provide a fiduciary duty-based exclusion from the definition of ''sponsor.''

Some commenters also expressed concern that investment advisers who do not participate in the structuring or distribution of ABS would be captured by the proposed definition of ''securitization participant'' only as a result of being an affiliate or subsidiary of another named securitization participant.[210] One of these commenters stated, however, that permitting the use of information barriers in the final rule would ''solve this problem.'' [211] Our changes to the scope of the affiliates and subsidiaries covered by the rule, including permitting securitization participants and their affiliates and subsidiaries to employ various mechanisms (such as information barriers) to prevent coordination or sharing of information tailored to their organization,[212] will help address commenters' concerns about the rule's applicability to affiliates and subsidiaries. Therefore, a fiduciary duty-based exclusion to address these concerns is unnecessary.[213]

Some of these commenters also requested that municipal advisors be excluded from the definition of ''sponsor.'' [214] These commenters stated that, in addition to the reasons already stated that make it unlikely that a municipal issuer would engage in conflicted transactions, municipal advisors also have a fiduciary duty to their clients, various existing rules and regulations governing their conduct, and that any proprietary bet by a municipal advisor against its client's ABS would already be a violation of the federal securities laws.[215] Municipal advisors

[200] *Id.* As discussed in Section II.D.3.c., however, the exercise of such contractual rights and obligations will not themselves be conflicted transactions under the final rule. Also, if the performance of the B-piece buyer's contractual obligations as special servicer is sufficiently administrative or custodial in nature to rely on the Service Provider Exclusion and the B-piece buyer's only other role in the transaction is as a Long-only Investor, then the B-piece buyer will not be a sponsor under the final rule.

[201] *See* Section II.B.3.c.

[202] *See* Section II.B.3.b.i. for additional discussion about Rule 192's application to municipal advisors.

[203] *See, e.g.,* letters from ABA; ICI; LSTA IV; NAMA; Wulff Hansen.

[204] *See* letter from SIFMA I.

[205] Section 202(a)(29) of the Investment Advisers Act of 1940 (the ''Advisers Act'') defines the term ''private fund'' as an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for section 3(c)(1) or 3(c)(7) of that Act.

[206] *See* 17 CFR 275.206(4)–8 (''Advisers Act Rule 206(4)–8''), which prohibits investment advisers to a pooled investment vehicle from (1) making untrue statements of a material fact or omitting to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle; or (2) otherwise engaging in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle). *See also Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles,* Release No. IA–2628 (Aug. 3, 2007) [72 FR 153 (Aug. 9, 2007)]).

[207] *See Commission Interpretation Regarding Standard of Conduct for Investment Advisers,* Release No. IA–5248 (June 5, 2019) [84 FR 33669 (July 12, 2019)] (''IA Interpretation'').

[208] *See, e.g.,* letters from AIMA/ACC; ICI; SIFMA I. *See also* IA Interpretation at 33676 (noting that an adviser must eliminate or at least expose through full and fair disclosure the conflicts associated with its allocation policies, including how the adviser will allocate investment opportunities between clients, such that a client can provide informed consent.).

[209] *See* IA Interpretation at 33676.

[210] *See, e.g.,* letters from AIC; ICI; LSTA IV. For example, these commenters stated that investment advisers may engage in separate businesses that are unrelated to their securitization activities, and thus those entities and their employees would have no knowledge of, or involvement in, the securitization activity. *See also* letter from SFA II (stating that advisers typically have fiduciary duties to multiple clients and that such advisers must act in the best interest of each client separately).

[211] *See* letter from LSTA IV.

[212] *See* Section II.B.3.c.

[213] *See also* Section II.D. for a discussion of the revised definition of ''conflicted transaction'' and the rule's applicability to transactions undertaken pursuant to a fiduciary duty.

[214] *See* letters from NAMA; Wulff Hansen.

[215] *Id. See also* Sections II.B.3.c. and II.D.3. for additional discussions with respect to fiduciary duties in relation to Rule 192.

participate in structuring the securities, and although municipal advisors may be subject to other provisions that regulate their conduct, we are not persuaded that advisors to municipal ABS are uniquely different from other securitization participants such that they should be excluded from the final rule. The fact that such entities are subject to potential liability for violations of other laws and regulations does not preclude the Commission from subjecting them to other rules with different objectives. In particular, we note that a municipal advisor's fiduciary duty is to its municipal entity clients, not to investors, and therefore would not necessarily require elimination of conflicted transactions.[216] As discussed earlier, Rule 192 will complement the existing federal securities laws, including general anti-fraud and anti-manipulation provisions, as well as those that apply specifically to securitization, by prophylactically protecting against the sale of ABS tainted by material conflicts of interest.[217]

The Commission also received comment requesting that providers of warehouse financing be excluded from the definition of ''sponsor.'' [218] A warehouse financing facility is a secured loan from a warehouse lender to provide capital to sponsors to acquire and aggregate assets for securitization.[219] One commenter stated that, because a warehouse lender bears the risk with respect to any assets that cannot be securitized, it acts pursuant to strict underwriting standards reflective of the lender's risk tolerance.[220] If a lender determines that it is unwilling to lend against certain assets, this commenter stated that such influence over the exclusion of those assets could be construed as directing or causing the direction of the structure, design, or assembly of an ABS or the composition of the asset pool.[221] As stated in the Proposing Release, the rule is not designed to hinder routine securitization activities that do not give rise to the risks that Section 27B was intended to address.[222] Warehouse financing is a routine activity to finance the purchase of assets by a securitization participant in furtherance of the issuance of an ABS. A warehouse lender whose role is to engage in such routine lending activity with respect to the ABS, including the lender's right to determine which assets it is or is not willing to finance pursuant to its underwriting standards, does not meet the definition of ''sponsor'' under the final rule.[223] However, if a securitization participant has an affiliate or subsidiary that is a warehouse lender, and such affiliate or subsidiary meets the definition of securitization participant in Rule 192(c), such person will be subject to the prohibition in Rule 192(a).[224]

In the Proposing Release, the Commission explained that the definition of Contractual Rights Sponsor in paragraph (ii)(A) would not require an actual exercise of contractual rights. Two commenters opposed this approach, stating that such person should only be a sponsor if it actually exercised its contractual rights to direct or cause the direction of the structure, design, or assembly of an ABS or the underlying or referenced assets.[225] One of these commenters requested that, if the definition of ''sponsor'' is not limited to paragraph (i), the final rule should define ''sponsor'' to include a Regulation AB-based Sponsor or *both* a Contractual Rights Sponsor and Directing Sponsor (*i.e.,* a person who both has a contractual right to, and actually does, direct or cause the direction of the structure, design, or assembly of an ABS or the underlying or referenced assets).[226] This commenter stated that any person who does not have the contractual right, but that is actually involved in the structuring of an ABS or the composition of the underlying or referenced asset pool, would have no practical ability to structure the ABS to fail because the Regulation AB-based Sponsor in the deal (who has exposure to the credit risk of the ABS by operation of the risk retention requirement in Regulation RR) would have no reason to take direction from such person, and that any person who has the contractual right but does not exercise it has no real culpability.[227] While the risk retention requirement in Regulation RR does contribute to the alignment of interests between ABS sponsors and investors, not all types of ABS that are subject to the prohibition in Rule 192 are subject to Regulation RR. A sponsor of an ABS that is not subject to Regulation RR would not be required to retain exposure to the credit risk of the ABS, meaning that there may not be an alignment of interests between the sponsor and investors, which could create an opportunity for the sponsor to be influenced by a third party's requests. Moreover, any person with a contractual right to structure, design, or assemble an ABS or the underlying or referenced pool of assets—whether those rights are exercised or not—would have access to information about the ABS or its underlying or referenced assets prior to the sale of the ABS and would therefore have the opportunity to use that information to engage in a conflicted transaction with respect to such ABS or underlying or referenced assets. As discussed above, final Rule 192 is designed to eliminate such opportunity and incentive. As such, a person may be a ''sponsor'' subject to the prohibition in final Rule 192 if it is either a Regulation AB-based Sponsor or a Contractual Rights Sponsor, and the final rule does not require that an actual exercise of contractual rights is necessary to meet the definition of ''sponsor.'' Consequently, a person who meets the definitional criteria in Rule 192(c) can be a ''sponsor'' regardless of whether it is referred to as the sponsor or some other title (*e.g.,* issuer, depositor, originator, collateral manager).

While we understand commenter concerns about the number and types of entities that may be sponsors under the rule, we continue to believe, for the reasons discussed above, that the scope of the definition is necessary to capture the relevant securitization participants that would have the incentive and ability to engage in conflicted transactions as a result of their ability to structure, design, or assemble an ABS or its underlying or referenced asset pool. Moreover, we believe that commenters' concerns will be mitigated by the revisions made to the definition of ''sponsor'' to exclude Long-only Investors and to not adopt the proposed definition of Directing Sponsor, as discussed above, and to the scope of affiliates and subsidiaries captured by the definition of ''securitization participant'' discussed in Section II.B.3.c. below, as well as the guidance that we have provided with respect to certain market participants discussed in this section and in the discussion about the Service Provider Exclusion in Section II.B.3.b.iii. below.

iii. Service Provider Exclusion

Commenters generally supported an exclusion from the definition of

[216] 15 U.S.C. 78*o*–4(c)(1).

[217] *See* Section I.C.

[218] *See* letter from ABA.

[219] *See also* Section II.D.

[220] *Id.*

[221] *Id.*

[222] *See* Proposing Release Section II.D.1.

[223] *See also* Section II.D. below for a discussion of why warehouse financing is not a ''conflicted transaction'' under the final rule.

[224] *See* Section II.B.3.c.

[225] *See* letters from AIC; SIFMA I (stating that such a position would be inconsistent with the ordinary and natural meaning of the term). We discuss the comments related to the ''ordinary and natural meaning'' of sponsor earlier in this section.

[226] *See* letter from AIC.

[227] *Id.*

''sponsor'' for transaction parties performing the enumerated types of activities, but requested certain modifications to clarify the scope of the exclusion.[228] Several commenters stated that the activities performed over the life of the securitization by servicers, special servicers, and other contractual providers are consistent with the activities enumerated in the Service Provider Exclusion in proposed paragraph (ii)(C) and requested that servicers be specifically listed in the exclusion.[229] Some commenters further requested that the rule include an explicit exclusion for credit rating agencies in the final rule text.[230]

Consistent with the view expressed by the Commission in the Proposing Release,[231] we agree with commenters that the activities customarily performed by accountants, attorneys, and credit rating agencies with respect to the creation and sale of an ABS, as well as the activities customarily performed by trustees, custodians, paying agents, calculation agents, and servicers,[232] relating to the ongoing management and administration of the entity that issues the ABS and its related assets, are the types of activities described in the Servicer Provider Exclusion. We understand, however, commenters' concern that, because the proposed text of the exclusion did not refer specifically to activities that constitute ''ongoing administration'' of the ABS or the underlying or referenced asset pool, the scope of the exclusion as proposed could be read to refer only to activities performed in connection with the initial creation of the securitization and therefore was not sufficiently clear.[233]

We are revising the definition of ''sponsor'' to align with the Commission's intent as stated in the Proposing Release and in response to commenter requests to specify in the rule text that the activities performed over the life of the securitization by third-party servicers and other contractual providers [234] are consistent with the activities enumerated in the rule.[235] As adopted, therefore, the definition of ''sponsor''—notwithstanding paragraph (ii)—excludes any person that performs only administrative, legal, due diligence, custodial, or ministerial acts related to the structure, design, assembly, or ongoing administration of the ABS or the composition of the pool of assets underlying or referenced by the ABS (the Service Provider Exclusion).[236] For purposes of the Service Provider Exclusion, ''ongoing administration'' refers to the types of activities typically performed by servicers, trustees, custodians, paying agents, calculation agents, and other contractual service providers pursuant to their contractual obligations in a securitization transaction over the life of the ABS; it does not refer to active portfolio management or other such activity that would be subject to the ''sponsor'' definition.[237]

Some commenters also requested that we replace the qualifier ''only'' in the Service Provider Exclusion with ''primarily,'' [238] stating that the use of ''only'' erodes the exclusion because the administrative, legal, due diligence, custodial, or ministerial acts performed by the service providers discussed above could also be viewed as activities causing the direction of the structure, design, or assembly of an ABS or the composition of the pool assets.[239] As one of these commenters pointed out, such activities could include the drafting and negotiation of the operating and disclosure documents with respect to an ABS, setting fees to be paid to certain transaction parties, reviewing the asset pool, negotiating the priority of payments within an ABS transaction, potentially advising on how to structure an ABS to meet the objectives of the deal parties, collecting payments on underlying assets, and making distributions to bondholders.[240] While we agree that such activities could be understood to be consistent with the activities described in the Contractual Rights Sponsor definition, we also agree that they are consistent with the administrative, legal, due diligence, custodial, and ministerial activities covered by the Service Provider Exclusion. As the Commission stated in the Proposing Release, the Service Provider Exclusion is intended to avoid inadvertently including certain parties to securitization transactions whose contractual rights could be interpreted as consistent with the activities described in paragraph (ii) of the definition of ''sponsor'' but who are otherwise not the parties that Section 27B was intended to cover. For this reason, so long as a person's activities with respect to the relevant ABS are only administrative, legal, due diligence, custodial, or ministerial in nature, the Service Provider Exclusion is available ''notwithstanding'' the fact that such a person's contractual rights could also be understood to be captured by paragraph (ii) of the definition of sponsor. Accordingly, we do not believe that changing ''only'' to ''primarily'' is necessary.

Moreover, we continue to believe that limiting the exclusion in this way is necessary to ensure that it does not inadvertently extend to deal participants with more active participation in the creation and administration of asset-backed securities. For example, a special servicer can potentially have a significant role in the servicing and disposition of troubled assets in an asset pool, such as the ability to determine whether (and when) to negotiate a workout of a loan, take possession of the property collateralizing a loan, and purchase the loan out of the securitization at a discount and, therefore, the special servicer's activities may not be limited to the types of administrative or ministerial functions eligible for the exclusion.[241] As such, whether a special servicer qualifies for the exclusion will depend on the facts and circumstances of the ABS and the activities performed by the special servicer.[242] Similarly, as support for its request that the Service Provider Exclusion include activities relating to ongoing administration of the ABS, one commenter gave the example of a

[228] *See, e.g.,* letters from AIC; CREFC I; LSTA III; LSTA IV; MBA; SFA II; SIFMA I; SIFMA II.

[229] *See, e.g.,* letters from AIC; CREFC I; CREFC II; MBA; SFA II; SIFMA I. One of these commenters noted that its membership was not in agreement with respect to whether a special servicer in CMBS transactions should be included in the Service Provider Exclusion. *See* letter from SFA II.

[230] *See* letters from LSTA III; SFA I; SFA II; SIFMA I.

[231] *See* Proposing Release at 9686.

[232] *See* Section II.D. below for a discussion of servicing activity as it relates to the definition of ''conflicted transaction'' under the rule.

[233] *See, e.g.,* letters from AIC; CREFC I; CREFC II; MBA; SFA I; SFA II.

[234] Servicers and other contractual service providers whose activities meet the criteria specified in the Service Provider Exclusion may nonetheless be securitization participants subject to the prohibition in Rule 192(a)(1) with respect to the relevant ABS if, for example, such person is an affiliate or subsidiary of a named securitization participant. *See* Section II.B.3.c.

[235] *See, e.g.,* letters from AIC; CREFC I; CREFC II; MBA; SFA II; SIFMA I.

[236] Because the types of activities listed in the Service Provider Exclusion rule text already cover the activities of credit rating agencies, no additional revision to the rule text is unnecessary.

[237] *See, e.g.,* the discussion in Section II.D. below related to normal-course servicing activity in a covered transaction not constituting a ''conflicted transaction'' under the final rule.

[238] *See, e.g.,* letters from SFA I; SFA II; SIFMA II.

[239] *See, e.g.,* letters from SFA I; SFA II.

[240] *See* letter from SFA II.

[241] *See* Section II.B.3.b.ii. and Section II.D.1.c.iii.

[242] For example, if the special servicer for a CMBS transaction is also the B-piece buyer (or an affiliate or subsidiary of the B-piece buyer) and can exercise such contractual rights with respect to the asset pool without needing to obtain the consent of any unaffiliated investor or transaction party in the CMBS transaction, then the special servicer's activities are not only administrative, legal, due diligence, custodial, or ministerial in nature with respect to such CMBS transaction.

situation in which a placement agent for a CLO may also be an administrative agent under a loan that underlies a CLO and therefore has various duties that it must perform.[243] This commenter requested, therefore, that the final rule include an exception for actions taken by securitization participants pursuant to their duties under the CLO or underlying loan documents and stated that including ongoing administration activities in the Service Provider Exclusion would achieve that.[244] In the example provided by this commenter, such administrative agent is also the placement agent for the relevant ABS, and therefore will be ineligible to rely on the Service Provider Exclusion because its activities are not ''only'' administrative in nature and because, as placement agent, such person is a securitization participant pursuant to the definition of ''placement agent'' in Rule 192(c).[245] For these reasons we do not believe that it would be appropriate to revise the exclusion as requested.

The Commission also received comment requesting that third-party asset sellers be included in the Servicer Provider Exclusion.[246] A third-party asset seller is a third-party originator who sells loans or other assets to the ultimate ABS sponsor before those assets are transferred into the securitization structure. The purchase of assets from unaffiliated originators to be later transferred into a securitization is a routine capital market function through which the seller would not have the contractual right to direct or cause the direction of the structure, design, or assembly of an ABS or the composition of the underlying or referenced pool of assets. Such persons' activities are limited to merely originating assets that are then transferred to the ABS sponsor in a true sale; they do not have ongoing roles or contractual rights or duties with respect to the assets or the ultimate ABS. Therefore, while we do not believe that the function performed by these third-party asset sellers is consistent with the types of activities enumerated in the Service Provider Exclusion, we do agree that such persons are not ''sponsors'' under the rule.[247]

[243] *See* letter from LSTA IV.

[244] *Id.*

[245] *See* Section II.B.3.a.

[246] *See* letter from SFA II.

[247] An originator that is affiliated with an underwriter, placement agent, initial purchaser, or sponsor of a covered transaction, however, may be a securitization participant subject to the rule's prohibition against engaging in conflicted transactions. *See* Section II.B.3.c. below.

iv. U.S. Government Exclusion

Consistent with the proposal, the United States or an agency of the United States is not a ''sponsor'' for purposes of the final rule with respect to its ABS that are fully insured or fully guaranteed as to the timely payment of principal and interest.[248] However, in a change from the proposal, we are not adopting the proposed exclusion from the ''sponsor'' definition for the Enterprises, which we discuss in greater detail below.

With respect to an ABS that is fully insured or fully guaranteed as to the timely payment of principal and interest by the United States, it is the United States as guarantor that is exposed to the full credit risk related to the underlying assets, rather than the investors in the ABS.[249] This is because investors in such ABS rely on the support provided by the full faith and credit of the United States and not on the creditworthiness of the obligors on the underlying assets, meaning they are not exposed to the credit risk of the underlying assets.[250] Consequently, investors in such ABS are not exposed to the risk that was present in certain ABS transactions at the time of the financial crisis of 2007–2009 where investors suffered credit-based losses due to the poor performance of the relevant asset pool while key securitization parties entered into transactions to profit from such poor performance.

Commenters supported the proposal to exclude the United States Government and its agencies from the definition of ''sponsor,''[251] with one of these commenters specifically agreeing that mortgage-backed securities (''MBS'') guaranteed by the Government National Mortgage Association (''Ginnie Mae'') are fully guaranteed by the United States Government[252] and thus should be excluded from the ''sponsor'' definition.[253] This commenter also stated that, because issuers of Ginnie Mae MBS have ''considerable discretion'' over which loans to include in the MBS, those issuers should be sponsors under the rule.[254] For purposes of the final rule, and as noted in the Proposing Release, the exclusion in paragraph (iv) of the definition of ''sponsor'' applies only to the specified entities (*i.e.,* the United States or an agency of the United States).[255] Any other securitization participant involved with an ABS issued or guaranteed by a specified entity (*e.g.,* an underwriter or a non-governmental sponsor) is subject to the prohibition in Rule 192 against engaging in transactions that effectively represent a bet against the relevant ABS.[256] If, therefore, the issuer of a fully-guaranteed Ginnie Mae ABS meets the definition of ''sponsor'' as adopted,[257] such issuer is prohibited from engaging in conflicted transactions.[258]

[248] 17 CFR 192(c).

[249] *See* Proposing Release Section II.B.2.c.

[250] *Id.*

[251] *See, e.g.,* letters from M. Calabria; SIFMA I.

[252] *See* Title III of National Housing Act, 12 U.S.C. 1716–1723 (2019) (stating that ''[t]he full faith and credit of the United States is pledged to the payment of all amounts which may be required to be paid under any guaranty under this subsection.'') *available at https://www.ginniemae.gov/about_us/what_we_do/Documents/statutes.pdf.*

[253] *See* letter from M. Calabria.

[254] *Id.*

Comments related to the proposed exclusion from the definition of ''sponsor'' for the Enterprises were mixed. Some commenters supported the exclusion of Fannie Mae and Freddie Mac from the ''sponsor'' definition with some modifications to extend the exclusion beyond conservatorship,[259] with one suggesting that the exclusion be conditioned on the Enterprises retaining their current status as government sponsored entities because the Federal Housing Finance Agency's (''FHFA'') oversight sufficiently guards against the types of behavior that Section 27B is intended to prevent.[260] Another commenter suggested that, in addition to the exclusion from the ''sponsor'' definition, the rule should exclude from the definition of ''asset-backed security'' any ABS that is fully insured or fully guaranteed as to the timely payment of principal and interest by the Enterprises while operating under the conservatorship or receivership of the FHFA.[261]

Some commenters, however, opposed including the Enterprises in the exclusion from the ''sponsor''

[255] *See* Rule 192(c) and Proposing Release Section II.B.2.c.

[256] *Id.*

[257] *See* Sections II.B.3.b.i. and II.B.3.b.ii.

[258] *See* Section II.D. for a discussion of what constitutes a ''conflicted transaction'' under the final rule.

[259] *See, e.g.,* letters from Fannie and Freddie; SFA II.

[260] *See* letter from Fannie and Freddie.

[261] *See* letter from ABA. As discussed below, the final rule does not include an exclusion from the definition of ''sponsor'' for the Enterprises while in conservatorship in light of concerns that the proposed exclusion was unclear and concerns regarding the impact of an automatic change to the Enterprises' status immediately upon existing conservatorship. For the same reasons, the final rule does not contain an exclusion for an ABS that is fully insured or fully guaranteed as to the timely payment of principal and interest by the Enterprises while in conservatorship. *See* Section II.A. for more information about the types of ABS that are subject to the final rule.

definition.[262] One commenter stated that the capital support from the United States while in conservatorship or receivership is not an explicit government guarantee of the Enterprises' ABS or MBS.[263] Another commenter suggested that the Enterprises should be sponsors for purposes of Rule 192, but that the final rule should permit credit risk transfer (''CRT'') transactions regardless of sponsor,[264] which would treat the Enterprises and other market participants alike.

Because, as proposed, the Enterprise exclusion from the ''sponsor'' definition would only apply with respect to ABS fully guaranteed by the Enterprises and not with respect to the CRT securities they issue,[265] some commenters expressed concerns that, together with the proposed restriction that the initial distribution of an asset-based security would not be risk-mitigating hedging,[266] the proposed rule would have the effect of prohibiting all Enterprise CRTs as *per se* conflicted transactions.[267] Some commenters stated that, for this reason, the cumulative effect of the proposed approach (*i.e.,* to exclude the Enterprises as sponsors with respect to fully-guaranteed ABS, but not with respect to CRTs, and to exclude CRT transactions from the risk-mitigation hedging exception) was unclear.[268] To address this concern, one commenter requested that either the Enterprises be excluded from the ''sponsor'' definition in perpetuity (or until the Commission revisited the exclusion), or that the Enterprises' synthetic ABS issuances (*i.e.,* CRT transactions) be permitted to qualify under the risk-mitigating hedging exception so long as they continue to be government-sponsored enterprises.[269] Alternatively, this commenter requested that the sponsor exclusion remain in place for at least 24 months following the Enterprises' exit from conservatorship to permit the Commission to make a determination after the nature of the post-conservatorship landscape becomes clear.[270] Relatedly, one commenter stated that permitting the Enterprises to continue their credit risk transfer securitization program under the risk-mitigating hedging exception would provide more clarity and certainty for all participants involved than excluding the Enterprises from the ''sponsor'' definition.[271]

After considering the comments received, we are not adopting the proposed Enterprise exclusion from the ''sponsor'' definition and, therefore, the Enterprises are sponsors under the final rule with respect to any ABS they issue, whether or not it is fully guaranteed. Although we still believe that, while the Enterprises are in conservatorship, investors in their guaranteed ABS are not exposed to the same types of risk that existed in certain ABS transactions leading up the financial crisis of 2007–2009,[272] that would not be the case once the Enterprises exit conservatorship. In light of the concerns that the cumulative effect of the proposed exclusion from the ''sponsor'' definition and the proposed exception for risk-mitigating hedging activities was unclear, we have concluded that including the Enterprises as sponsors and permitting Enterprise CRT transactions so long as they meet the conditions enumerated in the risk-mitigating hedging exception,[273] would provide more certainty for the Enterprises and the market. Further, we believe that the revisions to the definition of ''conflicted transactions,'' together with the revised exception for risk-mitigating hedging activities discussed below, sufficiently address commenter concerns with respect to the ability of the Enterprises to continue to engage in CRT transactions for purposes of managing their credit risk.[274] As sponsors—and, thus, securitization participants—subject to the prohibition in Rule 192(a) against engaging in conflicted transactions, the Enterprises are subject to the same limitations on such behavior as private market participants.

c. Affiliates and Subsidiaries

After consideration of commenters' concerns and recommendations, discussed in detail below, we are revising paragraph (ii) of the definition of ''securitization participant'' to limit which affiliates or subsidiaries [275] are securitization participants. An affiliate or subsidiary is a securitization participant for purposes of the final rule only if it acts in coordination with [276] an underwriter, placement agent, initial purchaser, or sponsor or if it has access to or receives information about the relevant ABS or the asset pool underlying or referenced by the relevant ABS prior to the date of the first closing of the sale of the relevant ABS.[277]

While some commenters supported the proposal to include affiliates and subsidiaries of underwriters, placement agents, initial purchasers, and sponsors as securitizations participants,[278] many commenters expressed concerns that the

[262] *See, e.g.,* letters from HPC; M. Calabria.

[263] *See* letter from M. Calabria. This commenter also stated that an exclusion from the prohibition in Rule 192 would disincentivize or prevent the Enterprises from leaving conservatorship.

[264] *See* letter from HPC.

[265] The Enterprises engage in security-based credit risk transfer transactions to allow for efficient mitigation of the Enterprises' retained credit risk associated with their holdings of residential and commercial mortgages and MBS. A security-based CRT transaction typically involves the issuance of unguaranteed ABS by a special purpose trust where the performance of such ABS is linked to the performance of a reference pool of mortgage loans that collateralize Enterprise guaranteed-MBS. As part of a security-based CRT transaction structure, the relevant Enterprise enters into an agreement with the special purpose trust pursuant to which the trust has a contractual obligation to pay the Enterprise upon the occurrence of certain adverse events with respect to the referenced mortgage loans. *See* letter from Fannie and Freddie; *see also, e.g.,* the relevant legal documentation and other related information about Freddie Mac's single-family transaction, *available at https://capitalmarkets.freddiemac.com/crt/securities/deal-documents.*

[266] *See* Section II.E.

[267] *See, e.g.,* letters from ABA; Fannie and Freddie; SFA I. Some of these commenters stated that they did not believe that this was the intent in light of the Commission's statement in the Proposing Release that the exclusion from the ''sponsor'' definition should address concerns that, absent such an exception, an Enterprise might be prohibited from engaging in a security-based CRT transaction. *See* letters from ABA; SIFMA II.

[268] *See, e.g.,* letters from ABA; Fannie and Freddie; SIFMA II.

[269] *See* letter from Fannie and Freddie. *See also* Section II.E. for a discussion of the risk-mitigation hedging exception under the final rule.

[270] *See* letter from Fannie and Freddie.

[271] *See* letter from SIFMA II.

[272] *See* Proposing Release Section II.B.2.c.

[273] *See* Section II.E.

[274] As discussed in detail below, the definition of ''conflicted transaction'' in final Rule 192(a)(3) captures the relevant conflict of interest in the context of the issuance of a new synthetic ABS (*e.g.,* the issuance of a CRT transaction), but such synthetic ABS will be permissible if it meets the conditions for the exception for risk-mitigating hedging activities. Furthermore, the synthetic ABS will be subject to the rule and the related securitization participants will be subject to the prohibition. *See* Sections II.D. and II.E. below.

[275] For purposes of the final rule, the terms ''affiliate'' and ''subsidiary'' will have the same meaning as in Securities Act Rule 405 (17 CFR 230.405). Under Securities Act Rule 405, an ''affiliate'' of a specified person is a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified, and a ''subsidiary'' of a specified person means an affiliate controlled by such person directly, or indirectly through one or more intermediaries. Securities Act Rule 405 also defines the term ''control'' to mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. 17 CFR 230.405.

[276] As suggested by one commenter, an affiliate or subsidiary would be acting in coordination with a named securitization participant if it (i) directly engages in the structuring of or asset selection for the securitization, (ii) directly engages in other activities in support of the issuance and distribution of the ABS, or (iii) otherwise acts in concert with its affiliated securitization participant through, *e.g.,* coordination of trading activities. *See* letter from ABA.

[277] 17 CFR 230.190(c).

[278] *See, e.g.,* letters from AARP dated Mar. 23, 2023 (''AARP''); Better Markets.

proposed approach would hinder market participants' ability to effectively comply with the rule's prohibition.[279] Commenters stated that compliance with Rule 192 as proposed could interfere with securitization participants' ability to comply with existing information barriers, including those that may be required by other applicable Federal- and State-level laws, in order to effectively implement a compliance program designed to monitor for, and prevent the occurrence of, potentially conflicted transactions.[280] Some of these commenters acknowledged that Section 27B specifies that the prohibition applies to affiliates and subsidiaries of other named securitization participants[281] and many supported such application in circumstances in which affiliates or subsidiaries have direct involvement in, or knowledge of, the covered ABS or are otherwise acting in coordination with the named securitization participant.[282] Commenters recommended various approaches to address their stated concerns, which can generally be grouped into three categories, which we discuss below.

First, several commenters requested that the rule exclude affiliates and subsidiaries from the definition of ''securitization participant'' and instead treat a securitization participant's use of an affiliate or subsidiary to indirectly engage in a conflicted transaction as an evasion of the prohibition in Rule 192(a).[283] To implement this recommendation, commenters suggested that the proposed anti-circumvention provision could be revised to make clear that a securitization participant could not engage in a transaction as part of a plan or scheme to evade the prohibition of the rule, whether directly or indirectly, including through the use of affiliates and subsidiaries.[284] Section 27B, however, states that affiliates and subsidiaries of an underwriter, placement agent, initial purchaser, or sponsor of a relevant ABS are subject to the prohibition in their own right, not merely that the other parties to the transaction are prohibited from engaging in conflicted transactions directly or indirectly through an affiliate or subsidiary. Accordingly, we believe that the suggested revision to treat a securitization participant's use of an affiliate or subsidiary to engage in a conflicted transaction as an evasion of the prohibition would not be appropriate or consistent with Section 27B.

Second, some commenters requested that the rule exclude affiliates and subsidiaries bound by, and operating consistent with, fiduciary duties from the definition of securitization participant.[285] These commenters stated that funds advised by the same asset manager should not be considered affiliates to the extent that the manager is bound by fiduciary duties to the issuing entity for the securitization and/or its investors and that the term ''securitization participant'' should exclude any entity acting in its capacity as an investment adviser, as well as that entity's advisory clients.[286] For the reasons stated in Section II.B.3.b.ii. above, we believe that permitting a fiduciary duty-based exclusion from the rule is inconsistent with the rule's objective.[287]

Finally, while some commenters agreed that the rule should not include an exemption for affiliates and subsidiaries dependent on the use of information barriers,[288] other commenters requested that the final rule permit the use of information barriers or other indicia of separateness to mitigate potential conflicts of interest.[289] In support of this request, these commenters referenced the Proposing Release statements[290] acknowledging that the Commission has recognized information barriers in other Federal securities laws and the rules thereunder.[291] Some of these commenters requested that we adopt a specific information barrier exception in the final rule and offered suggestions for modifications to the conditions for such an exception as discussed in the Proposing Release,[292] but several others articulated concerns that the conditions would be too burdensome or expensive.[293] Instead, many commenters suggested that the final rule should consider the presence or absence of information barriers (and the robustness and effectiveness thereof) as part of a multi-factor analysis as a preferred alternative to affirmatively requiring the use of prescriptive information barriers.[294] To highlight the challenges that would be presented by a prescriptive information barrier exception, some commenters stated that

[279] *See, e.g.,* letters from ABA; AIC; AFME; AIMA/ACC; ICI; LSTA III; LSTA IV; MFA II; SFA I; SIFMA I.

[280] *See, e.g.,* letters from ABA; AIC; AFME; ICI; MFA II. Some commenters also expressed concern that, without recognizing information barriers or including other limitations on the rule's applicability to affiliates and subsidiaries, the prohibition could apply to foreign affiliates and subsidiaries of U.S.-based securitization participants regardless of their participation in the transaction. *See, e.g.,* letters from AFME; AIC. We believe that, together with the discussion in Section II.A.3.c. above about the cross-border application of Rule 192, the definition of ''securitization participant'' with respect to affiliates and subsidiaries, as discussed in greater detail below, will appropriately limit such application only to those affiliates and subsidiaries who have direct involvement in, or access to information about, a covered ABS, which should mitigate these concerns.

[281] *See, e.g.,* letters from ABA; SFA I; SFA II.

[282] *See, e.g.,* letters from ABA; AFME; ICI; LSTA III; SFA II; SIFMA I; SIFMA II.

[283] *See, e.g.,* letters from ABA; AIC; ICI; SFA I.

[284] *See, e.g.,* letter from AIC.

[285] *See, e.g.,* letters from ABA; AIC; ICI; LSTA IV; SIFMA I. *See also* Section II.B.3.b.ii., above, for a discussion of comments requesting an exclusion from the definition of ''sponsor'' for any person operating pursuant to a fiduciary duty.

[286] *See, e.g.,* letters from ABA; SIFMA I.

[287] *See* Section II.D. for a discussion of why the rule does not include a similar exclusion from the definition of ''conflicted transactions'' for transactions that such securitization participants may enter into pursuant to a fiduciary duty.

[288] *See, e.g.,* letters from AARP; Better Markets.

[289] *See, e.g.,* letters from ABA; AIMA/ACC; AFME; AIC; ICI; LSTA II; LSTA III; LSTA IV; MFA II; Pentalpha; SFA I; SIFMA I; SFA II; SIFMA II. Some of these commenters also recommended that, in the alternative, the final rule could specify that any transaction described in paragraph (a)(3) of the final rule, entered into at the direction of a related person, would be presumed to be a conflicted transaction unless that person demonstrates that it had no substantive role in structuring, marketing, or selling the ABS or in the selection of the asset pool underlying or referenced by the relevant ABS. *See* letters from SFA II; SIFMA II.

[290] *See* Proposing Release Section II.B.c.3. The Proposing Release noted as an example that brokers and dealers have used information barriers to manage the potential misuse of material non-public information to comply with Exchange Act 15(g) (17 U.S.C. 78*o*(g)) and that Regulation M contains an exception for affiliated purchasers if, among other requirements, the affiliate maintains and enforces written policies and procedures reasonably designed to prevent the flow of information to or from the affiliate that might result in a violation of Regulation M (17 CFR 242.100–105; 17 CFR 242.100(b)). *Id.*

[291] *See, e.g.,* letters from ABA; AIMA/ACC; AFME; AIC; ICI; LSTA II; LSTA III; MFA II; Pentalpha; SFA I; SIFMA I.

[292] *See, e.g.,* letters from ICI; Institute of Internal Auditors dated Mar. 27, 2023 (''IIA''); Pentalpha. See Proposing Release Section II.B.3. and Requests for Comment 29–38 for a discussion of potential conditions for an information barrier exception. The modifications suggested by these commenters include: to specify that policies and procedures must be ''reasonably designed,'' that an internal audit group be allowed to conduct the required independent assessment, and that the independent assessment should be conducted with respect to individual securitizations rather than on a corporate platform basis. While one of these commenters supported the inclusion of an information barrier exception subject to certain conditions in the final rule, the commenter also requested that investment funds and advisers be exempt from the conditions to qualify for such exception. *See* letter from ICI.

[293] *See, e.g.,* letters from ABA; AFME; AIC; LSTA III; MFA II; SIFMA I.

[294] *See, e.g.,* letters from LSTA III; LSTA IV; SFA II; SIFMA I. Other commenters similarly indicated that a final rule that merely permits the use of existing information barriers would be sufficient to address their concerns. *See, e.g.,* letters from ABA (stating that it is critical for the final rule to acknowledge information barriers); MFA II (noting that any information barriers permitted must be workable).

several securitization participants already use information barriers and similar mechanisms to ensure compliance with various laws and that requiring these entities to establish new information barriers tailored to Rule 192 could lead to inconsistent, intersecting, and/or conflicting information barriers that compromise rather than facilitate compliance.[295] Other commenters stated that, while some securitization participants may have existing information barriers for compliance with other securities laws, such as the Volcker Rule,[296] not all securitization participants subject to the prohibition in Rule 192 are necessarily subject to such laws, and therefore a prescriptive information barrier exception (including one modeled on such an exception to another securities law) would disproportionately increase costs of compliance for those entities.[297]

While it is true that the Federal securities laws recognize the use of information barriers in certain situations, we do not believe that an information barrier exception would be appropriate in the context of Rule 192 for several reasons. First, we are concerned that an information barrier exception has the potential to become a ''check-the-box'' exercise that could result in an emphasis on form over function or effectiveness of such information barriers. Due to the wide range of securitization participants subject to the prohibition in Rule 192, any prescriptive information barrier exception would have to be drafted in such a way as to be generally applicable to the various types of securitization participants, which could result in standards that are either too permissive for one type of securitization participant (resulting in weakened protections for ABS investors) or too difficult for another to satisfy due to limitations such as numbers of employees, regulatory regimes applicable to certain types of securitization participants, etc.[298] Additionally, as demonstrated by the commenter concerns discussed above, an information barrier exception could have the unintended consequence of potentially compromising various existing compliance programs or disadvantaging certain securitization participants.[299] For these reasons, Rule 192 does not include an information barrier exception. However, we acknowledge commenters' concerns about their ability to concurrently comply with the prohibition in Rule 192 with respect to various affiliates and subsidiaries, as well as other applicable Federal- and State-level laws that may permit or require information barriers or other similar firewalls. The revisions we are adopting to the definition of ''securitization participant,'' as discussed in greater detail below, are aimed at alleviating commenters' concerns with respect to the scope of the rule's prohibition, while also obviating the need for a prescriptive information barrier exception, avoiding potential additional costs associated with establishing policies and procedures to satisfy conditions imposed by such an exception.

As adopted, an affiliate or subsidiary of an underwriter, placement agent, initial purchaser, or sponsor will only be a securitization participant if the affiliate or subsidiary acts in coordination with a securitization participant or has access to, or receives, information about a covered ABS or the asset pool underlying or referenced by the relevant ABS prior to the date of first closing of the sale of the covered ABS.[300] This approach is consistent with the commenter suggestions, as noted above, that affiliates or subsidiaries should only be subject to the prohibition if they have direct involvement in, or access to information about, the relevant ABS or are otherwise acting in coordination with the named securitization participant.[301] This approach is also consistent with commenter recommendations that the final rule permit securitization participants to demonstrate lack of involvement or control through the presence and effectiveness of information barriers or other indicia of separateness.[302]

Whether an affiliate or subsidiary acts in coordination with a securitization participant or had access to, or received, information about an ABS or its underlying asset pool or referenced asset pool prior to the closing date will depend on the facts and circumstances of a particular transaction.[303] Therefore, an affiliate or subsidiary may not be a ''securitization participant'' if the named securitization participant, for example:

- Has effective information barriers between it and the relevant affiliate or subsidiary (including written policies and procedures designed to prevent the flow of information between relevant entities, internal controls, physical separation of personnel, etc.),[304]
- Maintains separate trading accounts for the named securitization participant and the relevant affiliate or subsidiary,
- Does not have common officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) between the named securitization participant and the relevant affiliate or subsidiary,
- Is engaged in an unrelated business from the relevant affiliated entity and does not, in fact, communicate with such relevant affiliated entity,[305] or
- Has personnel with oversight or managerial responsibility over accounts of both the named securitization participant and the affiliate or subsidiary, but such persons do not have authority to (and do not) execute trading in individual securities in the accounts or authority to (and do not) pre-approve trading decisions for the accounts.[306]

[295] *See, e.g.,* letters from AFME; SIFMA I.

[296] 17 CFR 255.

[297] *See, e.g.,* letter from AIC (noting as an example that investment funds and portfolio companies are not subject to the Volcker Rule).

[298] For example, while it may be relatively easy for large multi-service firms to implement information barriers by establishing completely separate teams of employees to prevent the flow of information where necessary, smaller securitization participants may not have a sufficient number of employees to do so, and therefore such persons may need to employ different mechanisms to prevent such flow of information.

[299] For example, larger multi-service entities may have many different business units already subject to various regulatory provisions related to the unit's particular business and that may require compliance programs involving information barriers. A prescriptive information barrier exception in Rule 192, therefore, has the potential to overlap and/or interfere with those existing compliance programs, which could potentially increase compliance burdens.

[300] 17 CFR 230.192(c).

[301] *See, e.g.,* letters from ABA; AFME; ICI; LSTA III; LSTA IV; SFA II; SIFMA I; SIFMA II.

[302] *See, e.g.,* letters from AIC; LSTA III; SFA II; SIFMA I; SIFMA II.

[303] If an affiliate or subsidiary receives information—or has access to information—after the closing of the first sale of the ABS, then—absent coordination with the securitization participant—the affiliate or subsidiary will not be a securitization participant as defined by the final rule.

[304] It will not be inconsistent with this example if the relevant entity has a shared research desk that provides research to the named securitization participant and an affiliated fund but the named securitization participant and the affiliated fund themselves do not share information with each other.

[305] As an example, one commenter stated that, if affiliated entities operate as independent businesses, notwithstanding their common control by a shared manager, such entities may have no relationship or communication with one another. *See* letter from AIC. As stated above, whether the operation as independent businesses, despite common control, is sufficient to effectively prevent the flow of information between the named securitization participant and the affiliate or subsidiary will depend on the facts and circumstances of the particular transaction.

[306] This list is not exhaustive and simply includes examples of the types of barriers that could be used by securitization participants and their affiliates and subsidiaries. We are not endorsing any one of these methods over another mechanism that may be used to prevent the flow of information between the relevant entities. While it is possible that one of

Any such mechanisms must effectively prevent the affiliate or subsidiary from acting in coordination with the named securitization participant or from accessing or receiving information about the relevant ABS or the asset pool underlying or referenced by the relevant ABS.[307]

By revising the definition of ''securitization participant'' in this way, the final rule aims to capture the range of affiliates and subsidiaries with the opportunity and incentive to engage in conflicted transactions without frustrating market participants' ability to meet their obligations under other Federal- and State-level laws that require the use of information barriers or other such firewalls. Rather than an information barrier exception potentially becoming a ''check-the-box'' exercise, securitization participants will be incentivized to regularly assess their compliance programs to confirm the presence and effectiveness of their information barriers or other firewalls to prevent a potential violation of Rule 192. Moreover, this approach addresses commenters' concerns with respect to additional compliance burdens for securitization participants by not requiring that they either create new or recalibrate existing information barriers to satisfy a prescriptive set of conditions for Rule 192 compliance. The final rule is designed to provide securitization participants with the flexibility to use information barriers or other mechanisms to prevent coordination or sharing of information with an affiliate or subsidiary, while still achieving the objective of prohibiting securitization participants from engaging in conflicted transactions.

If, however, an information barrier or other tool used to maintain the separation of an affiliate or subsidiary from another named securitization participant failed or was otherwise breached, it would call into question whether the affiliate or subsidiary had access to, or received, information or otherwise acted in coordination with such named securitization participant and such affiliate or subsidiary could therefore be a securitization participant.[308] This approach is consistent with Section 27B and appropriately balances market participants' need for sufficiently clear boundaries to establish effective compliance programs. Further, the final rule acknowledges the role that information barriers play in the financial markets, without the need for a prescriptive exception, which, as noted above, has the potential to prioritize form over function in light of the wide range of securitization participants subject to Rule 192.[309]

C. Prohibition Timeframe

1. Proposed Prohibition Timeframe

Section 27B specifies that securitization participants be prohibited from entering into a conflicted transaction at ''any time for a period ending on the date that is one year after the date of the first closing of the sale of the asset-backed security,'' but does not specify the commencement point of that prohibition. The Commission proposed that the prohibition in Rule 192(a)(1) would commence on the date on which a person has reached, or has taken substantial steps to reach, an agreement that such person will become a securitization participant (''proposed commencement point'') and would end one year after the date of the first closing of the sale of the relevant ABS.[310] The Commission did not propose definitions of ''agreement''[311] or ''substantial steps,'' stating that whether a person has taken ''substantial steps to reach an agreement to become a securitization participant'' would be a facts and circumstances determination based on the actions of such person in furtherance of becoming a securitization participant.[312] The proposed approach to the commencement point was designed to reduce the circumstances in which a person could engage in prohibited conduct prior to the issuance of the relevant ABS and was aimed at capturing the point at which a person may be incentivized and/or could act on an incentive to engage in the misconduct that Section 27B is designed to prevent.[313]

2. Comments Received

The Commission received numerous comments on the proposed prohibition timeframe.[314] Several commenters opposed the proposed commencement point, stating that the determination of whether a person has taken ''substantial steps to reach an agreement'' involves too much ambiguity and subjectivity to successfully conform their activities to the rule and ensure compliance.[315] Some commenters further stated that, because the proposed commencement point is backward-looking (*i.e.,* a person can become a securitization participant with respect to a relevant ABS before the ABS is created and sold), the ambiguity introduced by the

these methods (or another method not listed here) may be sufficient for compliance with the final rule, securitization participants may find that they need to utilize a combination of methods to establish an effective compliance program.

[307] A securitization participant generally should consider the structure of its organization and the ways in which information is shared to assess what mechanisms should be employed to comply with Rule 192. If, for example, a securitization participant employs an information barrier, and the barrier fails, whether the affiliate or subsidiary is a securitization participant under Rule 192 will depend on the facts and circumstances. On one hand, if the failure was accidental, was quickly remedied upon discovery, and the affiliate did not use the information to influence the assets included in the ABS, then the affiliate would likely not be a securitization participant under Rule 192. On the other hand, even if the failure was accidental, but the access to information led to the affiliate using the information to influence the assets included in the ABS, then that affiliate would likely be a securitization participant for purposes of Rule 192. Additionally, if the affiliated entity did not meet the terms of the definition of affiliate and subsidiary, as adopted, at the time that it enters into the conflicted transaction (*i.e.,* it did not act in coordination with the named securitization participant and did not have information (or access to information) about the ABS or the asset pool prior to closing), such affiliated entity would not then retroactively become a securitization participant upon the subsequent receipt of such information. For example, if an affiliate or subsidiary receives information—or has access to information—after having previously engaged in a conflicted transaction, whether the affiliate or subsidiary would then be a securitization participant under the final definition depends on the facts and circumstances as they existed leading up to and at the time of the entry into the conflicted transaction.

[308] *See id.*

[309] This approach also significantly mitigates concerns expressed with respect to both the scope of the rule's applicability to affiliates and subsidiaries and compliance burdens that would be associated with a new prescriptive information barrier requirement. *See* Section IV.

[310] *See* Proposing Release Section II.C.

[311] The Proposing Release stated that an ''agreement'' need not constitute an executed written agreement, such as an engagement letter, but rather that oral agreements and facts and circumstances constituting an agreement could be an agreement for purposes of the rule. *See* Proposing Release at 9692, n. 101. Additionally, the Commission requested comment on whether the rule should identify specific indicia of having reached an ''agreement,'' but did not receive feedback in response to that request. *See* Proposing Release at 9693, Request for Comment 41.

[312] *See* Proposing Release Section II.C. As an example, the Commission indicated that engaging in substantial negotiations over the terms of an engagement letter or other agreement to become an underwriter, placement agent, initial purchaser, or sponsor of an ABS would constitute taking substantial steps to reach an agreement to become a securitization participant.

[313] *See* Proposing Release Section II.C.

[314] *See also* Section II.D.1.c.iii for a discussion of the comments received regarding certain pre-securitization activities by securitization participants and the rule's applicability to such activities.

[315] *See, e.g.,* letters from ABA; AIMA/ACC; ICI; SFA II; SIFMA I. One commenter, without expressing support or opposition to the proposed commencement point, stated its belief that the prohibition timeframe should start ''at the earliest moment that a covered person could reasonably foresee a conflict of interest with investors,'' but did not elaborate or provide additional context as to how to identify such a point in time. *See* letter from AFR.

''substantial steps'' standard would make it particularly difficult to determine when a person becomes subject to the rule's prohibition.[316] One of these commenters stated that it is unclear what would constitute taking substantial steps related to the use of warehouse facilities for the financing of assets or for securitizations using master trust structures where a pool of assets can be assembled in a trust months or years before any particular ABS offering is contemplated.[317] Another commenter further stated that, with respect to the statement in the Proposing Release that the prohibition on material conflicts of interest would not apply to a person that never reaches an agreement to become a securitization participant,[318] it is not clear at what point in time a person would be determined to never have reached an agreement (*e.g.,* date of first sale of the relevant ABS, or some earlier point in time).[319] The Commission also received comment expressing concern that the proposed commencement point is particularly challenging to implement without an information barrier exception because, for example, it is possible that an affiliate or subsidiary of a person who took substantial steps to become a securitization participant would be unaware of such steps due to existing information barriers within a multi-service financial firm.[320] Commenters requested, therefore, that the rule include a more definitive commencement point to enable market participants to effectively implement procedures to govern their compliance with the rule's prohibition.[321] The Commission received one comment on the proposed end date of the prohibition timeframe, which suggested that the prohibition should potentially apply for a longer period of time.[322]

3. Final Rule

In response to comments received, we are revising the prohibition timeframe to begin at a more definitive commencement point and are adopting the end point of the prohibition timeframe as proposed. Under Rule 192(a)(1), the prohibition against entering into conflicted transactions will commence on the date on which such person has reached an agreement to become a securitization participant with respect to an asset-backed security and will end one year after the date of the first closing of the sale of the relevant ABS.[323] By omitting the proposed language about taking ''substantial steps'' to reach an agreement, the final rule will avoid many of the concerns that commenters raised with respect to the scope of the proposed rule. The prohibition timeframe, as revised, together with the changes we are making to the final rule's applicability to affiliates and subsidiaries of named securitization participants, should help to mitigate commenters' concerns about their ability to determine when a person is subject to the rule's prohibition.[324]

The Commission received several commenter suggestions for specific dates as the prohibition's commencement point, including the commencement of marketing or pricing of the ABS,[325] 30 days prior to the first sale of the ABS,[326] 30 days prior to the date of the first closing of the sale of the ABS,[327] the date on which an engagement letter is signed,[328] and once an entity has ''actually'' become an underwriter, placement agent, initial purchaser, or sponsor.[329] While we understand that such specific dates may be desirable for market participants because they provide a level of certainty with respect to when a person is operating subject to the prohibition against engaging in conflicted transactions, we continue to believe that using specific dates could be underinclusive because a securitization participant could engage in the conduct that Rule 192 is designed to prevent just prior to such commencement points and the rule would, as a result, not cover conduct prior to those dates. Because there is significant variability between securitization structures, the procedures used to originate, acquire, and/or identify collateral for a securitization, and timelines on which market participants operate to structure or assemble ABS and conduct their offerings, selecting a specified date such as those suggested by commenters could, depending on the features of the securitization, fail to capture critical points in time during which a securitization participant may be incentivized and/or could act on an incentive to engage in conflicted transactions. Moreover, such structures, procedures, and timelines employed by market participants today could change as the market evolves and potentially render a prohibition commencement point tied to a specific date ineffective.

For purposes of Rule 192, ''agreement'' refers to an agreement in principle (including oral agreements and facts and circumstances constituting an agreement) as to the material terms of the arrangement by which such person will become a securitization participant. An executed written agreement, such as an engagement letter, is not required;[330] whether there has been an agreement to become a securitization participant will depend on the facts and circumstances of the securitization transaction and the parties involved.[331] As the Commission stated in the Proposing Release,[332] and as some commenters pointed out,[333] market participants are able to identify and understand when an agreement has

[316] *See, e.g.,* letters from ABA; AIMA/ACC; LSTA III; MFA II; SIFMA I. Relatedly, one commenter stated that, because the proposed timeframe could last for more than one year, it could have the effect of restricting a trader's ability to handle unrelated transactions because its firm is in a potentially conflicted position as it works on a securitization. *See* letter from ASA. We believe that the prohibition timeframe, as revised, together with the final rule's applicability to affiliates and subsidiaries of named securitization participants, should help to mitigate this concern. *See* Section II.B.3.c.

[317] *See* letter from ABA.

[318] *See* Proposing Release at 9693.

[319] *See* letter from SIFMA I. This commenter likewise observed that there could be a period of time after which a person has taken ''substantial steps,'' but before it is determined that an agreement to act as a securitization participant was never reached, during which a transaction could be challenged as a conflicted transaction, which further highlights the challenges presented by the ''substantial steps'' construction.

[320] *See, e.g.,* letter from ICI. See Section II.B.3.c. for a discussion of how Rule 192 will apply to affiliates and subsidiaries and the role of information barriers. We believe that the changes to the definition of ''securitization participant'' in Rule 192(c) with respect to affiliates and subsidiaries, together with the revised commencement point discussed in this section, address these concerns.

[321] *See, e.g.,* letters from ABA; MFA II; SFA II; SIFMA I.

[322] *See* letter from Pentalpha.

[323] 17 CFR 230.192(a)(1).

[324] *See, e.g.,* notes 319 and 320 and accompanying text. The revision to the commencement point also will address the commenter concern noted above that the proposed commencement point did not make clear when a person would no longer be subject to the rule if it never reaches an agreement to become a securitization participant because the prohibition as adopted does not apply until such person has reached an agreement.

[325] *See, e.g.,* letter from ABA.

[326] *See, e.g.,* letter from SFA II.

[327] *See, e.g.,* letters from LSTA III; MFA II; SIFMA I; SIFMA II.

[328] *See, e.g.,* letter from SFA II.

[329] *See, e.g.,* letters from LSTA III; MFA II.

[330] While a written agreement (such as engagement letter) is not necessary to establish an ''agreement'' for purposes of final Rule 192, it will be sufficient, regardless of whether such written agreement includes all material terms of the contractual arrangement. This is because, even in the absence of such material terms, the written agreement will be consistent with an agreement in principle to perform as a securitization participant for purposes of Rule 192.

[331] For example, once a person agrees with the issuer or selling security holder to be the underwriter for the relevant ABS transaction, that underwriter is a securitization participant subject to the prohibition in Rule 192, even if a written agreement has not yet been executed.

[332] *See* Proposing Release at 9692 n. 101 and accompanying text.

[333] *See, e.g.,* letters from LSTA III; SIFMA I.

been reached in their ordinary business operations and, therefore, they will be able to establish effective procedures for determining when they have triggered the prohibition against engaging in conflicted transactions.

While the prohibition against entering into conflicted transactions will commence on the date on which a person has reached an agreement to become a securitization participant with respect to an ABS, if such ABS is never sold to investors, Rule 192 will not apply. As noted above, the rule is designed to prevent the sale of ABS that are tainted by material conflicts of interest by specifically prohibiting securitization participants from engaging in conflicted transactions that could incentivize a securitization participant to structure an ABS in a way that puts the securitization participant's interests ahead of ABS investors. In the event that the sale of an ABS is not completed, there will be no investors with respect to which a transaction could involve or result in a material conflict of interest. Therefore, as adopted, the Rule 192 prohibition on material conflicts of interest will not apply if the ABS is never actually sold to an investor. If an ABS is created and sold, however, then the rule's prohibition will apply beginning on the date on which there was an agreement to become a securitization participant and will end one year after the date of the first closing of the sale of such ABS.[334]

D. Prohibition

Section 27B(a) provides that an underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity, of an ABS, including a synthetic ABS, shall not, at any time for a period ending on the date that is one year after the date of the first closing of the sale of the asset-backed security, engage in any transaction that would involve or result in any material conflict of interest with respect to any investor in a transaction arising out of such activity.[335]

1. Proposed Prohibition

Consistent with Section 27B(a), the Commission proposed in proposed Rule 192(a)(1) that a securitization participant shall not, for a period commencing on the date on which a person has reached, or has taken substantial steps to reach, an agreement that such person will become a securitization participant with respect to an ABS and ending on the date that is one year after the date of the first closing of the sale of such ABS, directly or indirectly engage in any transaction that would involve or result in any material conflict of interest between the securitization participant and an investor in such ABS.[336] As set forth in proposed 17 CFR 230.192(a)(2) (''Rule 192(a)(2)''), engaging in any transaction would involve or result in any material conflict of interest between a securitization participant and an investor if such transaction is a ''conflicted transaction'' as defined in proposed Rule 192(a)(3).

The Commission proposed to define this term under proposed Rule 192(a)(3) to include two main components. One component was whether the transaction is:

- As specified in proposed 17 CFR 230.192(a)(3)(i) (''Rule 192(a)(3)(i)''), a short sale of the relevant ABS;
- As specified in proposed 17 CFR 230.192(a)(3)(ii) (''Rule 192(a)(3)(ii)''), the purchase of a CDS or other credit derivative pursuant to which the securitization participant would be entitled to receive payments upon the occurrence of a specified adverse event with respect to the relevant ABS; or
- As specified in proposed 17 CFR 230.192(a)(3)(iii) (''Rule 192(a)(3)(iii)''), the purchase or sale of any financial instrument (other than the relevant asset-backed security) or entry into a transaction through which the securitization participant would benefit from the actual, anticipated, or potential:
  - Adverse performance of the asset pool supporting or referenced by the relevant ABS;
  - Loss of principal, monetary default, or early amortization event on the relevant ABS; or
  - Decline in the market value of the relevant ABS.

The other component related to materiality—*i.e.,* whether there is a substantial likelihood that a reasonable investor would consider the relevant transaction important to the investor's investment decision, including a decision whether to retain the ABS.

The proposed definition was designed to effectuate Section 27B(a) by prohibiting a securitization participant from entering into a conflicted transaction that is, in effect, a bet against the ABS that such securitization participant created and/or sold to investors. It was also designed to not unnecessarily prohibit or restrict activities routinely undertaken in connection with the securitization process, as well as routine transactions in the types of financial assets underlying covered securitizations.[337]

2. Comments Received

Several commenters stated that the phrase ''directly or indirectly'' should be removed from proposed Rule 192(a)(1).[338] One commenter specifically stated that the rule, as proposed, would already apply directly to the affiliates and subsidiaries of a securitization participant.[339] The Commission received no comments on proposed Rule 192(a)(2). With respect to proposed Rule 192(a)(3), commenters generally supported the Commission defining the term ''conflicted transaction.'' [340] Commenters also generally supported prohibiting securitization participants from entering into a short sale of the relevant ABS under proposed Rule 192(a)(3)(i) [341] and from purchasing a CDS or other credit derivative pursuant to which the securitization participant would be entitled to receive payments upon the occurrence of a specified adverse event with respect to the relevant ABS under proposed Rule 192(a)(3)(ii).[342] However, the Commission received a substantial number of comments that proposed Rule 192(a)(3)(iii) would be overly broad and unnecessarily capture a wide range of activities that are essential to the functioning and issuance of ABS and securitization participants' routine risk management activities.[343]

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[334] As we noted above, the Commission received one comment suggesting that we consider extending the prohibition beyond one year after first closing of a sale of ABS. *See* letter from Pentalpha Letter. We believe this would be inconsistent with Section 27B, which specifies that the prohibition apply for one year following the date of the first closing of the sale of the ABS. Therefore, we are adopting the prohibition end date as proposed.

[335] 15 U.S.C. 77z–2a(a).

[336] *See* Proposing Release Section II.D.

[337] *See* Proposing Release at 9694.

[338] *See* letters from SFA II; SIFMA II.

[339] *See* letter from SIFMA II.

[340] *See, e.g.,* letters from Better Markets; ICI.

[341] *See, e.g.,* letters from ABA (suggesting that the rule should prohibit a short sale of the relevant ABS); AIC (stating that, on its face, proposed Rule 192(a)(3)(i) was sufficiently clear); SIFMA I (agreeing that a short sale of ABS by a securitization participant may create a conflict of interest between that securitization participant and investors); SFA I (stating that such a transaction is a direct bet against the success of the relevant ABS); SFA II (agreeing that short sales of ABS by securitization participants should be prohibited).

[342] *See, e.g.,* letters from SFA I (stating that such a transaction is a direct bet against the success of the relevant ABS); SFA II (agreeing that purchase of a CDS or other derivatives on which the securitization participant would be paid as a result of the occurrence of adverse credit events with respect to the ABS should be prohibited); SIFMA I (agreeing that the entry into a CDS on the relevant ABS by a securitization participant may create a conflict of interest between that securitization participant and investors).

[343] *See, e.g.,* letters from CREFC I (stating that, when read broadly, the proposal could mean that any component of a securitization transaction could

Continued

Commenters provided numerous examples of transactions that, in their view, would not give rise to a material conflict of interest with ABS investors but that could nevertheless be potentially prohibited by proposed Rule 192(a)(3)(iii), including general interest rate and currency exchange rate hedging, the provision of warehouse financing, and the sale or transfer of assets to an ABS issuer.[344] Commenters suggested various formulations of Rule 192(a)(3)(iii) that would, in their view, better align its scope with the discussion of its intended scope in the Proposing Release and avoid unnecessarily restricting customary transactions entered into with respect to securitizations.[345] The Commission also received comment that the materiality standard, as proposed, would be inappropriate,[346] and that the final rule should include a disclosure-based cure mechanism to mitigate material conflicts of interest.[347]

3. Final Rule

We are adopting the prohibition in Rule 192(a) with certain modifications from the proposal in response to comments received. Consistent with the investor protection goals of Section 27B, we are adopting a prohibition that is designed to capture transactions that are bets against the relevant ABS or the asset pool supporting or referenced by such ABS. Consistent with the proposal, final Rule 192(a)(1) provides that a securitization participant shall not, for a specified period of time,[348] directly or indirectly engage in any transaction that would involve or result in any material conflict of interest between the securitization participant and an investor in such asset-backed security.[349]

As noted above, several commenters suggested that the phrase ''directly or indirectly'' should be removed from proposed Rule 192(a)(1)[350] with one commenter specifically stating that the rule, as proposed, would already apply directly to the affiliates and subsidiaries of a securitization participant.[351] The final rule will apply to certain affiliates and subsidiaries of a securitization participant, but, as explained in the Proposing Release, a securitization participant could design a transaction structure to route the various payment legs of a short transaction through a variety of different legal entities that are deliberately structured to not be affiliates or subsidiaries of the securitization participant in an effort to obscure the ultimate economics of the relevant transaction.[352] Therefore, we are retaining the phrase ''directly or indirectly'' in the adopted rule to address this issue, minimize the risk of evasion, and, by extension, achieve the investor protection goals of Section 27B. At the same time, we recognize the separate concern of the same commenter that using the phrase ''directly or indirectly'' in Rule 192(a)(1) could be potentially interpreted to create a misalignment between the scope of the entities subject to the prohibition and the scope of the exceptions to the rule that apply to the activities of a securitization participant.[353] However, as discussed in detail below in Sections II.E. through II.G., the final rule does not prohibit a securitization participant from using an affiliate or subsidiary as an intermediary, for example, to effect risk-mitigating hedging activity or fulfill a liquidity commitment obligation of the securitization participant consistent with the conditions enumerated in the exceptions to the rule.

The Commission received no comments on proposed Rule 192(a)(2), and we are adopting it as proposed. Thus, engaging in any transaction would involve or result in any material conflict of interest between a securitization participant and an investor if such transaction is a ''conflicted transaction'' as defined in final Rule 192(a)(3). A ''conflicted transaction'' is defined in final Rule 192(a)(3) as any of the following transactions with respect to which there is a substantial likelihood that a reasonable investor would consider the transaction important to the investor's investment decision, including a decision whether to retain the ABS:[354]

- As specified in Rule 192(a)(3)(i), a short sale of the relevant ABS;
- As specified in Rule 192(a)(3)(ii), the purchase of a CDS or other credit derivative pursuant to which the securitization participant would be entitled to receive payments upon the occurrence of a specified adverse event with respect to the relevant ABS; or
- As specified in Rule 192(a)(3)(iii), the purchase or sale of any financial instrument (other than the relevant asset-backed security) or entry into a transaction that is substantially the economic equivalent of a transaction described in paragraph (a)(3)(i) or (a)(3)(ii), other than, for the avoidance of doubt, any transaction that only hedges

be a conflicted transaction, including ordinary decision-making activities by securitization participants); MFA II (suggesting that the Commission not adopt proposed Rule 192(a)(3)(iii)); SIFMA I (stating that proposed Rule 192(a)(3)(iii) was vague and unworkable on its face).

[344] *See, e.g.,* letters from MFA II (requesting that the Commission expressly permit interest rate hedging, currency hedging, and other non-credit related hedging); SFA I (stating that the final rule should not prohibit warehouse financing or the sale of assets into a securitization); SFA II (stating that transactions that are not related to the credit risk of the relevant ABS should not be conflicted transactions, such as transactions ''related to overall market movements''); SIFMA I (requesting that certain pre-securitization transactions be expressly carved out of the definition of conflicted transaction); SIFMA II (requesting that certain pre-securitization transactions be expressly carved out of the definition of conflicted transaction); LSTA IV (supporting SIFMA's position); SFA II (requesting a specific exception for such activities).

[345] *See. e.g.,* letter from SFA II (suggesting a formulation to only capture transactions that ''substantially replicate'' the type of transactions specified in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii)); SIFMA I (suggesting a formulation to only capture transactions that are the ''functional trading equivalent'' of the type of transactions specified in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii)); SIFMA II (suggesting a formulation to only capture transactions that ''substantially replicate'' the type of transactions specified in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii)).

[346] *See, e.g.,* letters from SFA I (stating that the proposed reasonable investor standard was designed by the courts ''to identify when disclosures are inadequate, so it is very difficult to divorce from the context of the disclosures that have been made''); SIFMA I (stating that the proposed reasonable investor standard is for disclosure and is not an appropriate standard for a rule that is a prohibition).

[347] *See, e.g.,* letters from ABA (suggesting a disclosure-based standard); AIMA/ACC (stating that it is unclear how a securitization participant would be able to determine what a ''reasonable investor'' would consider to be material to an investment decision and, therefore, a disclosure approach would be more effective at addressing conflict of interest concerns).

[348] *See* Section II.C.3. above for a detailed discussion of the timeframe of the prohibition.

[349] *See* Proposing Release Section II.D.

[350] *See* letters from SFA II (stating that the inclusion of both ''directly or indirectly'' and the proposed anti-circumvention provision are overlapping and potentially inconsistent); SIFMA II. We are adopting Rule 192(a)(1) to include the phrase ''directly or indirectly.'' However, as described in further detail in Section II.H below, in a change from the proposal, we are adopting an anti-evasion provision that will apply only with respect to the use of an exception as part of a plan or scheme to evade the rule's prohibition. We believe that this approach should address the concerns of commenters that the inclusion of both the phrase ''directly or indirectly'' in Rule 192(a)(1) and the proposed anti-circumvention provision could be overlapping and potentially inconsistent.

[351] *See* letter from SIFMA II.

[352] *See* Proposing Release at 9696. For example, a securitization participant might attempt to arrange a series of transactions through intermediate special purpose entities that are structured with ''orphan'' ownership structures where such intermediate special purpose entities are not affiliates or subsidiaries of the securitization participant but are instead notionally owned by a corporate services provider or a charitable trust. The inclusion of the phrase ''directly or indirectly'' in Rule 192(a)(1) is designed to capture this type of indirect activity. As described in further detail in Section II.H below, in a change from the proposal, we are adopting an anti-evasion provision that will apply only with respect to the use of an exception as part of a plan or scheme to evade the rule's prohibition.

[353] *See* letter from SIFMA II.

[354] *See* Section II.D.3.d. below for a discussion of the materiality standard.

general interest rate or currency exchange risk.

a. Rule 192(a)(3)(i): Short Sales

We are adopting Rule 192(a)(3)(i) as proposed to prohibit a securitization participant from betting directly against an ABS by engaging in a short sale of the relevant ABS. A short sale occurs when a securitization participant sells an ABS when it does not own it (or that it borrows for purposes of delivery). In such a situation, if the price of the ABS declines, then the short selling securitization participant could buy the ABS at the lower price to cover its short and make a profit. As stated in the Proposing Release, it is not relevant for purposes of the rule whether the securitization participant makes a profit on the short sale. It is sufficient that the securitization participant sells the ABS short.

Commenters generally supported adopting Rule 192(a)(3)(i) as proposed and agreed with the Commission that a short sale of an ABS by a securitization participant could create a conflict of interest between the securitization participant and investors in the relevant ABS.[355] One commenter expressed a concern that ''considering all short sales to be conflicted transactions'' would have a disproportionate impact on securitization markets and indicated that a profit should be required for a short sale transaction to be a conflicted transaction.[356] Another commenter stated that the practical effect of proposed Rule 192(a)(3)(i) would be to stop all ABS short selling and that such an outcome would be suboptimal for the ABS market.[357]

We believe that it would be inconsistent with the investor protection goals of Section 27B to limit the prohibition in Rule 192(a)(3)(i) to short sales where the securitization participant earns a profit. A short sale of an ABS by a securitization participant is a bet against the relevant ABS regardless of whether the bet is successful, and this is the exact type of transaction that the rule is intended to prohibit in order to remove the incentive for securitization participants to place their own interests ahead of those of investors. We also do not believe that the practical effect of Rule 192(a)(3)(i) will be to prohibit all ABS short selling as the prohibition only applies to parties that are securitization participants with respect to the relevant ABS.[358] Third parties that are not securitization participants, as defined in the final rule, with respect to the relevant ABS are not prohibited from entering into short sales of such ABS.

b. Rule 192(a)(3)(ii): Credit Derivatives

We are adopting Rule 192(a)(3)(ii) as proposed to prohibit a securitization participant from betting directly against the relevant ABS by entering into a credit default swap or other credit derivative that references such ABS and entitles the securitization participant to receive a payment upon the occurrence of a specified credit event with respect to the ABS such as a failure to pay, restructuring or any other specified credit event that would trigger a payment on the derivative contract. It is irrelevant for the purpose of Rule 192(a)(3)(ii) whether the credit derivative is in the form of a CDS or other credit derivative product because the focus is on the economic substance of the credit derivative as a bet against the relevant ABS without regard to the specific contractual form or structure of the derivative. Rule 192(a)(3)(ii) also captures any credit derivative entered into by the securitization participant with the special purpose entity issuer of a synthetic ABS where that credit derivative would entitle the securitization participant to receive payments upon the occurrence of a specified credit event with respect to an ABS that is referenced by such credit derivative and with respect to which the relevant person is a securitization participant under the rule.

Commenters generally supported adopting Rule 192(a)(3)(ii) as proposed and agreed with the Commission that a credit default swap or other credit derivative transaction of the type described in the proposal could create a conflict of interest between a securitization participant and the investors in the relevant ABS.[359] One commenter suggested that Rule 192(a)(3)(ii) should be revised to allow for transactions that are designed to offset a loss with respect to a securitization participant's long position in the relevant ABS.[360] We believe that such change is unnecessary as hedging transactions, consistent with Section 27B, are permitted and more appropriately addressed by the risk-mitigating hedging activities exception discussed in detail in Section II.E. below.

c. Rule 192(a)(3)(iii): Substantially the Economic Equivalent of a Short Sale or Credit Derivative

We are adopting proposed Rule 192(a)(3)(iii) with certain modifications in response to comments received on the proposal. Specifically, final Rule 192(a)(3)(iii) will cover the purchase or sale of any financial instrument (other than the relevant asset-backed security) or entry into a transaction that is substantially the economic equivalent of transaction described in paragraph (a)(3)(i) or (a)(3)(ii), other than, for the avoidance of doubt, any transaction that only hedges general interest rate or currency exchange risk. The inclusion of this ''for the avoidance of doubt'' language in the definition of conflicted transaction is not designed to limit the types of transactions that are not conflicted transactions. For example, other transactions unrelated to the idiosyncratic credit performance of the ABS, such as reinsurance agreements, hedging of general market risk, or routine securitization activities (such as the provision of warehouse financing or the transfer of assets into a securitization vehicle) are not conflicted transactions, and thus are not subject to the prohibition in Rule 192(a)(1). By anchoring the catch-all provision in the specific transactions set forth in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii), as opposed to the more general language used in the proposal, the final rule should alleviate concerns that the proposed rule would be unworkable and vague. As explained in the Proposing Release, Rule 192(a)(3)(iii) is intended to capture the purchase or sale of any other financial instrument or entry into a transaction the terms of which are substantially the economic equivalent of a direct bet against the relevant ABS.[361] Given the potential ability of market participants to craft novel financial structures that can replicate the economic mechanics of the types of transactions described in Rule 192(a)(3)(i) and (ii) without triggering those prongs, final Rule 192(a)(3)(iii) is

[355] *See, e.g.,* letters from ABA (suggesting that the rule should prohibit a short sale of the relevant ABS); AIC (stating that, on its face, proposed Rule 192(a)(3)(i) was sufficiently clear); SIFMA I (agreeing that a short sale of ABS by a securitization participant may create a conflict of interest between that securitization participant and investors); SFA I (stating that such a transaction is a direct bet against the success of the relevant ABS); SFA II (agreeing that short sales of ABS by securitization participants should be prohibited).

[356] *See* letter from AIMA/ACC.

[357] *See* letter from CreditSpectrum Corp. dated Feb. 22, 2023 (''CreditSpectrum'').

[358] *See* Section II.B.3.

[359] *See, e.g.,* letters from SIFMA I (agreeing that the entry into a CDS on the relevant ABS by a securitization participant may create a conflict of interest between that securitization participant and investors); SFA I (stating that such a transaction is a direct bet against the success of the relevant ABS); SFA II (agreeing that purchase of a CDS or other derivatives on which the securitization participant would be paid as a result of the occurrence of adverse credit events with respect to the ABS should be prohibited).

[360] *See* letter from ABA.

[361] *See* Proposing Release at 9694.

designed to alleviate the risk that securitization participants could avoid Section 27B's prohibition premised on the form of the transaction rather than its substance while also addressing the concerns of commenters regarding the potentially overbroad formulation of Rule 192(a)(3)(iii) as proposed.

Certain commenters stated that proposed Rule 192(a)(3)(iii) would be inappropriate because it would extend beyond the ''ordinary and natural meaning'' of what is a ''conflict of interest''.[362] These commenters stated that the ordinary and natural meaning of a conflict of interest is limited to a conflict between an existing securities law duty of a securitization participant and its own self-interest.[363] For the reasons discussed below, we believe this formulation suggested by commenters misconstrues the nature of the statutory prohibition.

Final Rule 192(a)(3)(iii) defines conflicted transaction in a way that is consistent with the ordinary and natural meaning of what is a conflict of interest between a securitization participant and an ABS investor. Section 27B(b) requires that the Commission adopt rules to implement the prohibition in Section 27B(a) against a securitization participant engaging in any transaction that would involve or result in any material conflict of interest ''with respect to any investor'' in a transaction arising out of the ABS activity of a securitization participant.[364] Section 27B therefore specially addresses prohibited material conflicts of interest that arise between the self-interest of a securitization participant and the interests of ''any investor'' in a transaction arising out of the ABS activity of that securitization participant. The statutory prohibition does not reference a material conflict of interest with respect to existing Federal securities law duties to which securitization participants are currently subject, such as the prohibitions in Section 17(a) of the Securities Act or Section 206 of the Advisers Act. Furthermore, Section 27B is designated as its own section, apart from these other provisions. In our view, it would be inconsistent with the text and statutory placement of Section 27B to limit the scope of the rule to ABS activities that currently constitute a violation of existing Federal securities laws. To do so would render Section 27B superfluous as the statute would have little effect beyond what is already prohibited under existing federal securities laws. This interpretation would not only fundamentally frustrate the purpose of the statute to prevent a securitization participant from placing its own self-interest ahead of ABS investors but would also be inconsistent with other statutes that address conflicts of interest. For example, it would be inconsistent with the meaning of a ''conflict of interest'' set forth in Section 15E of the Exchange Act, which does not limit the scope of a ''conflict of interest'' arising in the business of issuing credit ratings by nationally recognized statistical rating organizations (''NRSRO'') to conflicts that arise with respect to an existing securities law duty of an NRSRO.[365]

As explained above, commenters generally agreed that the types of transactions specified in proposed Rule 192(a)(3)(i) and Rule 192(a)(3)(ii) are the types of transactions that create the potential for a material conflict of interest,[366] and we are adopting Rule 192(a)(3)(i) and Rule 192(a)(3)(ii) as proposed. By narrowing the scope of Rule 192(a)(3)(iii) from the proposal to capture only, as adopted, transactions that are substantially the economic equivalent of a transaction described in final Rule 192(a)(3)(i) or final Rule 192(a)(3)(ii), the final Rule 192(a)(3)(iii) is designed to capture the types of transactions that create a potential for a material conflict of interest between the interest of a securitization participant and the interest of an investor in the relevant ABS. As discussed in further detail below, commenters generally agreed that it would be appropriate for final Rule 192(a)(3)(iii) to function as a catch-all to capture transactions that are, in economic substance, a direct bet against the relevant ABS or the asset pool supporting or referenced by the relevant ABS even if they are not documented in the same form as a transaction specified in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii).[367] Final Rule 192(a)(3)(iii), as adopted, will specify that such direct bets against an ABS are subject to Section 27B's prohibition regardless of their form in order to remove the incentive for securitization participants to place their own interests ahead of those of ABS investors, as contemplated by the statute.

Commenters expressed concerns that proposed Rule 192(a)(3)(iii) would be overbroad as drafted and unnecessarily capture a wide range of activities that are essential to the functioning and issuance of ABS and the routine risk management of securitization participants.[368] Commenters provided numerous examples of transactions that, in their view, would not give rise to a material conflict of interest with ABS investors but that could nevertheless be potentially prohibited by proposed Rule 192(a)(3)(iii), including general interest rate and currency exchange rate hedging, the provision of warehouse financing, and the sale or transfer of assets to an ABS issuer.[369] As explained below, these types of transactions will not be captured by final Rule

[362] *See* letters from ABA (stating that the ordinary meaning of ''conflict of interest'' is a conflict between a legal duty and a personal interest and that in defining ''conflicted transactions'' and determining the extent to which the rule should apply to transactions engaged in by affiliates and subsidiaries, it is useful to consider whether and to what extent the personal interest that a sponsor, underwriter, placement agent, or initial purchaser has with respect to a transaction may lead that entity to disregard its duties under the securities laws); LSTA III (stating that the proposed definition is far broader and more encompassing than ''conflict of interest'' as set forth in Section 27B and, consequently, the proposed rule captured transactions that do not conflict with the duties that securitization participants have under the securities laws); SIFMA I (stating that the proposed definition seemed to conflate the term ''conflict of interest'' with the general expression ''conflicting interests'' and that Section 27B did not create any new underlying securities law duties so the Commission's authority is limited by the ordinary and natural meaning of the term material conflict of interest). As described in this section, commenters generally agreed that the types of transactions specified in proposed Rule 192(a)(3)(i) and Rule 192(a)(3)(ii) are the types of transactions that create the potential for a material conflict of interest.

[363] *See id.*

[364] 15 U.S.C. 77z–2a. *See* Section II.D.3.d. below for a discussion of the materiality standard that we are adopting for purposes of Rule 192(a)(3).

[365] *See* 15 U.S.C. 78o–7(h).

[366] *See e.g.,* letters from SIFMA I (agreeing that a short sale of ABS and entry into a CDS on the relevant ABS by a securitization participant may create a conflict of interest between that securitization participant and investors); SFA II (agreeing that short sales of ABS by securitization participants should be prohibited and agreeing that purchase of a CDS or other derivatives on which the securitization participant would be paid as a result of the occurrence of adverse credit events with respect to the ABS should be prohibited).

[367] *See. e.g.,* letters from AFR; AIC; Andrew Davidson.

[368] *See, e.g.,* letters from CREFC I (stating that, when read broadly, the proposal could mean that any component of a securitization transaction could be a conflicted transaction, including ordinary decision-making activities by securitization participants); MFA II (suggesting that the Commission not adopt proposed Rule 192(a)(3)(iii)); SIFMA I (stating that proposed Rule 192(a)(3)(iii) is vague and unworkable on its face).

[369] *See, e.g.,* letters from MFA II (requesting that the Commission expressly permit interest rate hedging, currency hedging, and other non-credit related hedging); SFA I (stating that the final rule should not prohibit warehouse financing or the sale of assets into a securitization); SFA II (stating that transactions that are not related to the credit risk of the relevant ABS should not be conflicted transactions, such as transactions ''related to overall market movements''); SIFMA I (requesting that certain pre-securitization transactions be expressly carved out of the definition of conflicted transaction); SIFMA II (requesting that certain pre-securitization transactions be expressly carved out of the definition of conflicted transaction); LSTA IV (supporting SIFMA's position); SFA II (requesting a specific exception for such activities).

192(a)(3)(iii) and, as a result, Rule 192(a)(3)(iii) is appropriately focused on transactions that give rise to material conflicts of interest between a securitization participant and ABS investors.

Commenters suggested various formulations of Rule 192(a)(3)(iii) that would, in their view, better align its scope with the discussion of its intended scope in the Proposing Release and avoid unnecessarily restricting customary transactions entered into with respect to securitizations. Certain commenters suggested that Rule 192(a)(3)(iii) should only capture transactions that are the ''functional trading equivalent'' of the transactions specified in Rule 192(a)(3)(i) and Rule 192(a)(3)(ii).[370] In a follow-up letter, two of these commenters suggested that Rule 192(a)(3)(iii) be revised to capture ''the purchase or sale of any financial instrument (other than the relevant asset-backed security) or entry into a transaction that substantially replicates one or both of the types of transactions set forth in [Rule 192(a)(3)(i)] or [Rule 192(a)(3)(ii)] by means of the securitization participant's shorting or buying protection on the asset pool underlying or referenced by the relevant asset-backed security.'' [371] Another commenter initially suggested that Rule 192(a)(3)(iii) be revised to only capture transactions that are the ''substantive equivalent'' of the types of transactions in Rule 192(a)(3)(i) and Rule 192(a)(3)(ii) and should exclude transactions that are unrelated to the credit risk of the ABS.[372] In a follow-up letter, this commenter suggested that Rule 192(a)(3)(iii) be revised to capture the ''purchase or sale of any financial instrument (other than the relevant asset-backed security) or entry into a transaction that substantially replicates one or both of the types of transactions set forth in [Rule 192(a)(3)(i)] or [Rule 192(a)(3)(ii)] by means of referencing the relevant asset-backed security or the asset pool underlying or referenced by the relevant asset-backed security.'' [373]

We are revising Rule 192(a)(3)(iii) from the proposal to better capture transactions that are within the intended scope of the rule, that is, transactions that are substantially the economic equivalent of a transaction described in final Rule 192(a)(3)(i) or final Rule 192(a)(3)(ii). This is consistent with the Commission's statements in the Proposing Release [374] and generally consistent with the suggestions from commenters described above that Rule 192(a)(3)(iii) should be focused on transactions that are similar in substance to the types of transactions described in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii).[375] However, the rule that we are adopting is more appropriate than the alternative approaches suggested by commenters because these approaches could potentially prioritize the form of a transaction over its economic substance and therefore be under-inclusive. This is because only capturing transactions that are the ''functional trading equivalent'' of a short sale or CDS or a transaction that ''substantially replicates'' a short sale or CDS could unnecessarily limit the scope of Rule 192(a)(3)(iii) to transactions with payment profiles or terms that are the same as or closely similar in form to a short sale or CDS. Under either such standard, securitization participants could design bets against the relevant ABS or the asset pool supporting or referenced by the relevant ABS that are documented to have payment profiles or terms that are sufficiently different from those of market-standard short sales or CDS in order to not trigger such suggested standards but that are nevertheless bets against the relevant ABS in economic substance. We are therefore adopting a rule that specially focuses on the economic substance of the relevant transaction rather than its form to address this concern.

We disagree with commenters who said that the scope of Rule 192(a)(3)(iii) should be limited to transactions that are entered into with respect to the relevant ABS or the asset pool supporting or referenced by such ABS.[376] Such an approach would be underinclusive. For example, it would allow a securitization participant to enter into a short with respect to a pool of assets with characteristics that replicate the idiosyncratic credit performance of the asset pool supporting the relevant ABS. We do not believe that it would be appropriate to exclude such transactions as securitizations participants would still have an opportunity to bet against the performance of their ABS by being allowed to enter into such transactions. Whether a short transaction entered into with respect to a similar pool of assets is a conflicted transaction under the final rule will be a facts and circumstances determination. If such a short position with respect to a similar pool of assets would be substantially the economic equivalent of a short sale of the relevant ABS itself or a CDS or credit derivative pursuant to which the securitization participant would be entitled to receive payments upon the occurrence of specified credit events in respect of the relevant ABS, then it would be a conflicted transaction. However, this standard is designed to not capture transactions entered into by a securitization participant with respect to an asset pool that has characteristics that are sufficiently distinct from the idiosyncratic credit risk of the asset pool that supports or is referenced by the relevant ABS. Such transactions do not give rise to the investor protection concerns that Section 27B is designed to address.

As noted above, various commenters agreed with the discussion in the Proposing Release that Rule 192(a)(3)(iii) should capture transactions that are, in economic substance, a bet against the relevant ABS or the asset pool supporting or referenced by the relevant ABS.[377] One of these commenters specifically stated that a conflicted transaction ''should be defined in terms of the economic substance, rather than the form or label of the transaction.'' [378] Another one of these commenters stated that ''it would be appropriate for the final rule to include some kind of category that encompasses transactions that substantially replicate the economic effects of a short sale of, or credit default swap on, the relevant ABS.'' [379] Additionally, another commenter agreed that it would be appropriate for the final rule to prohibit transactions that are ''substantially the economic equivalent

[370] *See* letters from SIFMA I (suggesting the ''functional trading equivalent'' formulation); AFME (supporting SIFMA's suggestion); LSTA III (supporting SIFMA's suggestion).

[371] *See* letter from SIFMA II (stating its belief that securitization professionals are able to monitor for the types of transactions that would be captured in its suggested revised paragraph (iii) and that the Commission would have the ability to stop the functional equivalent of short sales and credit default swaps, even if done via a financial instrument that has not yet been conceived). This commenter also stated that its suggested revision would clarify that non-credit related ancillary or embedded derivatives, such as interest rate or currency swaps, are not implicated by Rule 192; LSTA IV (supporting SIFMA's suggestion).

[372] *See* letter from SFA I.

[373] *See* letter from SFA II (in its second letter, SFA also suggested specific exceptions for the following types of transactions: (i) those entered into pursuant to a fiduciary duty, (ii) those entered into by a third-party manager with investment discretion, and (iii) those not related to the credit risk of the ABS.)

[374] *See* Proposing Release at 9694.

[375] *See* discussion above of letters from AFR; AIC; Andrew Davidson; SFA II; SIFMA II.

[376] *See* letters from SFA II; SIFMA II.

[377] *See* letters from AFR; AIC; Andrew Davidson.

[378] *See* letter from AFR.

[379] *See* letter from AIC.

of a direct bet against the relevant ABS.'' [380]

Focusing Rule 192(a)(3)(iii) on transactions that are substantially the economic equivalent of a transaction specified in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii), which, as explained above, commenters broadly agreed give rise to a material conflict of interest, is designed to address many of the concerns that commenters expressed regarding the potentially overbroad application of the rule as proposed while still prohibiting securitization participants from engaging in transactions that result in material conflicts of interest with investors. As adopted, final Rule 192(a)(3)(iii) will capture the types of transactions through which the securitization participant could, in economic substance, bet against the ABS or the asset pool supporting or referenced by the relevant ABS in the same way as a short sale of the ABS or a CDS referencing the ABS but without regard to the particular form of the relevant transaction. This will help ensure that the rule protects investors from purchasing ABS tainted by material conflicts of interests as markets evolve and new forms of betting against an ABS or its relevant asset pool that are distinct from a short sale or CDS, but which are substantially the economic equivalent of such transactions, may emerge.

The types of transactions that are ''conflicted transactions'' for purposes of Rule 192(a)(3)(iii) and that will be substantially the economic equivalent of a transaction described in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii) will include a securitization participant entering into the short-side of a derivative that references the credit performance of the pool of assets underlying the relevant ABS and pursuant to which the securitization participant would benefit if the referenced asset pool performs adversely.[381] One commenter stated that taking a short position in the asset pool underlying or referenced by the relevant ABS should not be a conflicted transaction because such short activity does not raise the same material conflict of interest concerns as are raised by shorting the relevant ABS itself.[382] Other commenters stated that taking a short position in some portion of the asset pool underlying or referenced by the relevant ABS should not be a conflicted transaction because such short activity does not raise the same material conflict of interest concerns as are raised by shorting the relevant ABS itself.[383] In our view, however, a bet against the asset pool supporting or referenced by an ABS should be captured as a conflicted transaction. ABS are cash-flow vehicles that distribute cash to investors based on the performance of the relevant asset pool for such ABS. Therefore, a bet against the relevant asset pool is a bet against the ABS itself, which presents the same type of material conflict of interest raised by a short sale of the relevant ABS or a CDS entered into with respect to the relevant ABS as addressed in Rule 192(a)(3)(i) and Rule 192(a)(3)(ii), respectively. Accordingly, it would not be appropriate to allow a securitization participant to bet against the performance of the relevant asset pool. In the context of an ABS with an asset pool consisting of a large number of different and distinct obligations, we recognize that a short transaction with respect to a single asset or some non-sizeable portion of the assets in that pool would generally not result in a short position with respect to such asset or assets being substantially the economic equivalent of a short sale of the relevant ABS itself or a CDS or credit derivative pursuant to which the securitization participant would be entitled to receive payments upon the occurrence of specified credit events in respect of the relevant ABS. However, if the relevant assets do represent a sizeable portion of the asset pool supporting or referenced by the relevant ABS, then entering into a transaction with respect to such assets can present the same investor protection concerns that Section 27B was intended to address. Under the final rule, such a transaction can be a conflicted transaction based on the facts and circumstances.[384]

Commenters stated that the definition of conflicted transaction should not capture the use of CDS index-based hedging strategies where the relevant ABS only represents a minimal component of the index.[385] Whether or not a transaction with respect to such index is a conflicted transaction under Rule 192(a)(3)(iii) will be a facts and circumstances determination based on the composition and characteristics of the relevant index. In particular, securitization participants will need to determine if a short position with respect to such index is substantially the economic equivalent of a short sale of the relevant ABS itself or a CDS or credit derivative pursuant to which the securitization participant would be entitled to receive payments upon the occurrence of specified credit events in respect of the relevant ABS. If the relevant ABS or the asset pool supporting or referenced by such ABS does not represent a sizeable portion of the index, then entering into a transaction with respect to such index will not present the same investor protection concerns that Section 27B addresses. In such a scenario, the adverse performance of the asset pool supporting or referenced by such ABS would not have enough of an economic impact on the performance of the relevant index for a short position with respect to that index to be substantially the economic equivalent of a transaction described in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii).[386] However, if the relevant ABS or the asset pool does represent a

[380] *See* letter from Andrew Davidson.

[381] One commenter specifically requested an exception to the final rule for a riskless principal transaction where a securitization participant that is a broker-dealer intermediates a trade for a customer by entering into a conflicted transaction and offsetting that conflicted transaction by entering into a contemporaneous transaction with a third-party. *See* letter from SFA II. This type of activity is eligible for the bona fide market-making activities exception discussed in detail in Section II.G subject to satisfaction of the conditions applicable to the exception. Therefore, we do not believe that a separate exception is necessary for this type of activity.

[382] *See* letter from SIFMA I.

[383] *See, e.g.,* letters from AIC (stating its belief that the rule, as proposed, was intended to prohibit taking a short position with respect to a material concentration of the assets underlying the ABS and that an investor would not consider such a position with respect to a single asset or obligor to be material); LSTA II (requesting clarification that the rule does not apply to transactions related to individual assets or a group of assets held by a securitization vehicle).

[384] Even if such transaction is a conflicted transaction, it could be eligible for the risk-mitigating hedging activities exception if the conditions applicable to the exception are satisfied. *See* the discussion in Section II.E. below.

[385] *See, e.g.,* letters from AFME (requesting an exception for transactions involving the purchase or sale of an index including ABS where those ABS constitute a de minimis portion of the overall index); ICI (specifically requesting clarification that a fund or adviser, as a fiduciary on behalf of another fund or other client, taking a position on an ABS index that includes ABS of an affiliated securitization participant, would not be a conflicted transaction); SIFMA I (recommending that, if an ABS is referenced in an index, a short position in that index should be carved out of the prohibition as long as the ABS represents less than a threshold percentage of that index and citing the language adopted in Regulation RR, which limits the exclusion to indices where the subject ABS represents no more than 10% of the dollar-weighted average of all instruments in the index).

[386] For example, a transaction with respect to an index that includes a class of the relevant ABS and that is permissible under 12 CFR 373.12(d) will not be a conflicted transaction for purposes of the final rule given that the restrictions on the composition of the relevant index will not result in a short position with respect to such index being substantially the economic equivalent of a transaction described in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii). We also believe that it would be inconsistent for an index hedge that is permissible under 12 CFR 373.12(d) to be impermissible under this rule.

sizeable portion of the index, then entering into a transaction with respect to such index presents the same investor protection concerns that Section 27B addresses. Under the final rule, such a transaction could be a conflicted transaction based on the facts and circumstances.[387]

Although we do not believe that a general interest rate or currency exchange rate hedge will be captured as a transaction that is substantially the economic equivalent of a transaction described in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii), we are specifying in final Rule 192(a)(3)(iii) that, for the avoidance of doubt, any transaction that only hedges general interest rate or currency exchange risk is not a conflicted transaction in order to avoid uncertainty and to not unnecessarily limit or discourage the prudent management of general interest rate and currency exchange risks by securitization participants. The inclusion of this language will also directly address the concerns raised by commenters that the rule as proposed could inadvertently prohibit the hedging of general interest rate and foreign exchange risks by a securitization participant.[388] We do not believe that Section 27B was intended to restrict the ability of a securitization participant to manage its general interest rate and/or foreign exchange risk exposures. The language that we are adding to final Rule 192(a)(3)(iii) expressly allows for a securitization participant's continued ability to hedge general interest rate or foreign exchange exposure, and by extension, a securitization participant will not need to rely on the risk-mitigating hedging activities exception under the final rule to enter into such transactions.[389] The qualifier ''general'' has been included to specify that the relevant transaction must relate to overall market movements and not the idiosyncratic credit risk of the relevant ABS. This is consistent with the suggestion of commenters that the definition of ''conflicted transaction'' should not capture interest rate or currency exchange hedges that are not related to the credit risk of the relevant ABS.[390] As adopted, Rule 192(a)(3)(iii) will permit any transaction that only hedges general interest rate or currency exchange risk. Other transactions unrelated to the idiosyncratic credit performance of the ABS, such as hedging of general market risk, are not conflicted transactions, and thus are not subject to the prohibition in Rule 192(a)(1). The inclusion of this ''for the avoidance of doubt'' language in the definition of conflicted transaction also does not limit the scope of the risk-mitigating hedging activities exception or any other exception to the final rule. Each of the exceptions to the final rule is discussed in detail below.

Commenters expressed concerns that the rule as proposed would prohibit the ordinary course pre-securitization and issuance activities of market participants, such as the provision of warehouse financing or the transfer of assets into a securitization vehicle.[391] As stated in the Proposing Release, the rule is not designed to hinder routine securitization activities that do not give rise to the risks that Section 27B addresses.[392] This includes the provision of warehouse financing and the transfer or sale of assets into the relevant securitization vehicle, which are standard activities in connection with the issuance of ABS. Such normal-course activities are not prohibited by final Rule 192(a)(3)(iii) as they are not transactions that are substantially the economic equivalent of a transaction described in final Rule 192(a)(3)(i) or final Rule 192(a)(3)(ii).[393] As described in further detail below, the customary mechanics of secured loans, such as warehouse financing facilities, do not render that financing facility a conflicted transaction under Rule 192(a)(3)(iii) because they do not provide a mechanism for the financing provider to benefit from the adverse performance of the asset pool supporting or referenced by the relevant ABS. Similarly, the transfer or sale of assets to a securitization vehicle does not provide the transferor or seller a mechanism for such entity to benefit from the adverse performance of the asset pool supporting or referenced by the relevant ABS as, absent some other transaction that may need to be separately analyzed, such entity no longer has exposure to the performance of such assets.

Similarly, the final rule is not designed to disincentivize an underwriter, placement agent, or initial purchaser from intermediating an ABS transaction for a customer, client, or counterparty where the securitization participant does not take a short position with respect to the relevant ABS. Rule 192(a)(3)(iii) captures, in relevant part, the purchase or sale of any financial instrument ''(other than the relevant asset-backed security)'' or entry into a transaction that is substantially the economic equivalent of a transaction described in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii). The inclusion of the language ''(other than the relevant asset-backed security)'' is designed to specify that merely entering into an agreement to serve as a securitization participant with respect to an ABS and engaging in a purchase or sale of the ABS as an underwriter, placement agent, or initial purchaser for such ABS is not itself a conflicted transaction.[394]

The Commission received a comment that the prohibition should not apply to transactions that terminate prior to the issuance of the relevant ABS.[395] As explained above in Section II.C.3., the prohibition on material conflicts of interest will not apply if the relevant ABS is never actually sold to an investor. However, if an ABS is created and sold, then the rule's prohibition will apply beginning on the date on which there was an agreement by the relevant person to become a securitization participant with respect to the relevant ABS and will end one

[387] Even if such transaction is a conflicted transaction, it could be eligible for the risk-mitigating hedging activities exception if the conditions applicable to the exception are satisfied. *See* the discussion in Section II.E. below.

[388] *See, e.g.,* letters from MFA II (requesting that the Commission expressly permit interest rate hedging, currency hedging, and other non-credit related hedging); SFA II (stating that hedging transactions that are not related to the credit risk of the relevant ABS should not be subject to the conditions in the proposed risk-mitigating hedging activities exception); SIFMA I (focusing on ''interest rate, currency or other non-credit related trading and hedging activities'').

[389] This approach would be generally consistent with the suggestion of a commenter that proposed 17 CFR 230.192(a)(3)(iii)(C) should be revised to capture only a decline in the market value of the relevant ABS relative to similar ABS. We agree that the market value of an ABS can decline due to macro-economic shifts that affect the entire ABS market, such as interest rate changes, that are beyond the control of a securitization participant.

[390] *See, e.g.,* letters from MFA II (requesting that the Commission expressly permit interest rate hedging, currency hedging, and other non-credit related hedging); SFA II (stating that transactions that are not related to the credit risk of the relevant ABS should not be conflicted transactions, such as transactions ''related to overall market movements'').

[391] *See, e.g.,* letters from AFME (requesting that certain pre-securitization transactions be expressly carved out of the definition of conflicted transaction); SFA I (stating that the final rule should not prohibit warehouse financing or the sale of assets into a securitization); SFA II (requesting a specific exception for such activities); SIFMA I (requesting that certain pre-securitization transactions be expressly carved out of the definition of conflicted transaction); SIFMA II (requesting that certain pre-securitization transactions be expressly carved out of the definition of conflicted transaction).

[392] *See* Proposing Release at 9679.

[393] As discussed above in Section II.B.3., warehouse lenders that are not affiliated with a named securitization participant and that engage only in warehouse lending activity with respect to an ABS are not sponsors under the final rule. However, if the warehouse lender is an affiliate or subsidiary of another securitization participant, it will be subject to the prohibition in Rule 192(a).

[394] The short sale of the relevant ABS is separately covered under Rule 192(a)(3)(i).

[395] *See* letter from SFA II.

year after the date of the first closing of the sale of such ABS. We do not believe that it would be appropriate to allow a securitization participant to bet against the performance of an asset pool while, for example, after reaching an agreement to become a securitization participant, simultaneously marketing an ABS to investors that references or is collateralized by that same asset pool even if the relevant bet is closed out prior to the issuance of the relevant ABS. As discussed in detail in Section II.E.3. below, a securitization participant may rely on the risk-mitigating hedging activities exception for transactions entered into prior to the issuance of the relevant ABS when the conditions to the exception are satisfied.

The Commission also received a comment that the prohibition should not apply to any transaction relating to all or a portion of the pool of assets underlying the ABS that terminates on or prior to the date on which such assets are included in the securitization.[396] Rule 192(a)(3)(iii) as adopted captures a transaction that is substantially the economic equivalent of a short sale of the relevant ABS itself or a CDS or credit derivative pursuant to which the securitization participant would be entitled to receive payments upon the occurrence of specified credit events in respect of the relevant ABS. As discussed above, ABS are cash-flow vehicles that distribute cash to investors based on the performance of the relevant asset pool for such ABS, and, therefore, a bet against the relevant asset pool is a bet against the ABS itself.

In response to the comment, if a securitization participant engages in a transaction with respect to a pool of assets that, during the duration of the transaction, neither underlies the relevant ABS nor is referenced by the relevant ABS, then that transaction will not be substantially the economic equivalent of a transactions described in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii). Therefore, including a specific exception for such transactions is unnecessary. However, as discussed in detail above, if the transaction is with respect to a pool of assets with characteristics that replicate the idiosyncratic credit performance of pool of assets that is already underlying or referenced by the relevant ABS, then whether such transaction is a conflicted transaction under the final rule will be a facts and circumstances determination.

Several commenters questioned whether the intrinsic feature of certain risk-management transactions documented as synthetic ABS transactions would be captured under Rule 192(a)(3)(iii) and suggested that the final rule should not prohibit balance sheet synthetic securitizations used for risk-mitigation purposes.[397] Another commenter generally stated that the rule should not include any exception from the prohibition for conflicts that are ''inherent'' to the securitization.[398] Section 27B specifically applies to synthetic ABS transactions, and, for the reasons discussed below, we are adopting a definition of conflicted transaction that captures the relevant conflict of interest in the context of the issuance of a new synthetic ABS. However, Section 27B also provides an exception for risk-mitigating hedging activity;[399] therefore, we believe that it is consistent with Section 27B to allow for the conflicted transaction that arises in the context of a synthetic ABS as described below to be eligible for the risk-mitigating hedging activities exception if it satisfies the conditions to the exception.

As discussed in the Proposing Release, the relevant material conflict of interest in the context of the issuance of a new synthetic ABS arises when the securitization participant engages in a transaction (such as CDS contract(s) with the synthetic ABS issuer) where cash paid by investors to acquire the newly created synthetic ABS will fund the relevant contract(s) and be available to make a payment to the securitization participant upon the occurrence of an adverse event with respect to the assets included in the reference pool.[400] In economic substance, if the reference pool for the synthetic ABS performs adversely, then the securitization participant benefits at the expense of the investors in the synthetic ABS. Pursuant to the final rule, this arrangement will result in a conflicted transaction with respect to the investors in the synthetic ABS because it is substantially the economic equivalent of a bet against such ABS itself. Additionally, if the reference pool for the synthetic ABS collateralizes a separate ABS with respect to which the relevant securitization participant is a securitization participant under the final rule, this arrangement will result in a conflicted transaction with respect to the investors in the ABS collateralized by such reference pool as being substantially the economic equivalent of a bet against such ABS itself. Such transaction, in economic substance, is the same as the securitization participant entering into a bilateral CDS on the ABS that is collateralized by such reference pool. As discussed in the Proposing Release, in certain synthetic ABS structures, the relevant agreement that the securitization participant enters into with the special purpose entity that issues the synthetic ABS may in some circumstances not be documented in the form of a swap; however, the terms of such agreement are structured to replicate the terms of a swap pursuant to which the special purpose entity that issues the synthetic ABS is obligated to make a payment to the securitization participant upon the occurrence of certain adverse events with respect to the reference pool.[401] Such an agreement will be a conflicted transaction under Rule 192(a)(3)(iii) due to the economic substance of the transaction.

Like a short sale or credit default swap, the securitization participant stands to benefit at the expense of the investors in the synthetic ABS, and this results in a material conflict of interest with investors and is a conflicted transaction for purposes of the final rule. However, we also understand, as commenters stated, that securitization participants may utilize synthetic ABS structures for hedging purposes. Therefore, as discussed in detail in Section II.E. below, we are adopting a change to the proposed risk-mitigating hedging exception so that the issuance of synthetic ABS that are entered into

[396] *See* letter from SIFMA II.

[397] *See, e.g.,* letters from ABA (urging the Commission to clarify that CRT transactions are not per se ''conflicted transactions'' and that they are generally permissible unless they evidence an intentional bet against a separate ABS by a securitization participant for that separate ABS); AFME (noting that synthetic securitizations are important credit risk and balance sheet management tools for banks); Fannie and Freddie (requesting that the Commission modify the proposed definition of conflicted transaction to make clear that it does not encompass the Enterprises' entry into the associated transaction agreements necessary to effect CRT securities issuances); HPC (requesting that CRTs, regardless of sponsor, be excluded from the definition of conflicted transaction or, alternatively, that they be allowed under the risk-mitigating hedging exception); IACPM (stating the breadth of proposed Rule 192(a)(3)(iii) would make credit portfolio management via synthetic ABS functionally untenable); SIFMA I (stating its belief that neither the text of the statute or the legislative history empowered the Commission to ban entire classes or categories of securitization transactions).

[398] *See* letter from AFR.

[399] 15 U.S.C. 77z–2a(a)(1) and 15 U.S.C. 77z–2a(c)(1).

[400] *See* Proposing Release at 9695. As discussed above, the inclusion of the language ''(other than the relevant asset-backed security)'' in Rule 192(a)(3)(iii) is designed to specify that merely entering into an agreement to serve as a securitization participant with respect to an ABS and engaging in a purchase or sale of the ABS as an underwriter, placement agent, or initial purchaser for such ABS is not itself a conflicted transaction.

[401] *See* Proposing Release at 9695.

and maintained for hedging purposes are eligible for the risk-mitigating hedging activities exception. To help ensure that these types of transactions cannot be utilized as a bet by a securitization participant against the credit performance of the reference assets, any such transaction will need to satisfy each of the conditions to the risk-mitigating hedging activities exception described in Section II.E. If such transaction is not entered into for purposes of hedging an existing long exposure of the securitization participant to the assets included in the reference pool in accordance with the requirements of the risk-mitigating hedging activities exception, then such activity will not qualify for the exception and will be prohibited by the final rule.

Certain commenters also expressed concern that the proposed rule could prohibit the normal-course servicing activity of a securitization participant pursuant to its contractual rights and obligations under the transaction documents for the relevant ABS, particularly with respect to the servicing of distressed assets supporting the relevant ABS.[402] We recognize the role played by servicers over the life cycle of an ABS to help minimize losses for ABS investors with respect to distressed assets and understand that servicers may be entitled to additional income or expense reimbursement when servicing distressed assets that require the servicer to expend more of its time and resources or require specialized skills.[403] Accordingly, the final rule is designed not to impede the ability of servicers to service the assets supporting an ABS in accordance with the contractual covenants applicable to the servicer in the transaction agreements for such ABS. We understand that these covenants are subject to the negotiation of investors prior to the closing of the relevant ABS and that such covenants typically set forth a servicing standard that is designed to direct the servicer to maximize the recovery value of the assets and, by extension, support the overall performance of the ABS for the benefit of the investors in such ABS.[404] Restricting servicing activity that is conducted in accordance with such servicing standards could, in some cases, not only harm the ABS investors that the rule is intended to protect but also impede the ability of the relevant underlying obligors to avoid foreclosure or insolvency. As adopted, the final rule will not prohibit such servicing activity as it is not substantially the economic equivalent of a transaction described in final Rule 192(a)(3)(i) or final Rule 192(a)(3)(ii). We also note that, as discussed above in Section II.B.3.b.iii., persons that only perform activities that are administrative, legal, due diligence, custodial, or ministerial in nature with respect to an ABS are excluded from the definition of ''sponsor.''

A number of commenters expressed concern that a securitization participant financing an investor's long purchase of an ABS could be a conflicted transaction under the proposed rule.[405] We understand that it is customary for financing arrangements of ABS to include borrowing base mechanics, which are collateral arrangements that require the long purchaser (borrower) to post cash or other collateral in order to maintain a required collateralization level if the value of the financed ABS declines. Customary transactions that are designed to protect the financing provider from a decline in the value of the collateral for its loan would not give rise to the investor protection concerns addressed by Section 27B. In the event of a default by the borrower, any additional collateral posted by the borrower would customarily be available to the lender exercising its rights as a secured creditor but would not provide an additional net benefit to the lender.[406] These types of customary mechanics of secured loans do not render a financing facility a conflicted transaction under Rule 192(a)(3)(iii) because they do not provide a mechanism for the financing provider to benefit from the adverse performance of the asset pool supporting or referenced by the relevant ABS and are therefore not substantially the economic equivalent of a transaction described in final Rule 192(a)(3)(i) or final Rule 192(a)(3)(ii).

Some commenters stated that MILNs and similar reinsurance arrangements should not be captured as conflicted transactions.[407] As explained above in Section II.A.3., MILNs and similar reinsurance arrangements do not meet the definition of ''asset-backed security'' for purposes of the final rule and transactions with respect to such structures are not subject to the prohibition of the final rule. Therefore, no changes to the conflicted transaction definition are required to address the concerns of these commenters.

Some commenters expressed concerns that entities, such as investment advisers, may be in violation of the prohibition if they engage in conflicted transactions on behalf of a client, customer, or counterparty pursuant to a fiduciary duty.[408] We do not believe that a carve-out for conflicted transactions entered into pursuant to a fiduciary duty would be appropriate or necessary. As discussed above in Section II.B.3., Rule 192 will complement the existing Federal fiduciary duties. Final Rule 192(a)(3)(iii) is focused on prohibiting a securitization participant from entering into a bet against the ABS or the asset pool supporting or referenced by an ABS. This approach is designed to remove the incentive for a securitization participant to select poor credit quality assets for the asset pool supporting or referenced by an ABS. The final rule, therefore, prohibits an investment adviser from entering into a conflicted transaction to allow a fiduciary client to

[402] *See, e.g.,* letters from AIC (requesting that the Commission clarify that the exercise of a securitization participant's rights under the ABS transaction documents does not constitute a conflicted transaction with respect to that ABS); AFME (providing as an example that actions of loan officers related to refinancing, restructuring, or working out a defaulted loan could constitute a conflicted transaction, as proposed); CREFC I (suggesting an additional exception for the exercise of contractual rights granted to, or performance of contractual obligations by, a securitization participant with respect to the underlying assets or the related asset-backed securities pursuant to the agreements governing such transaction); LSTA II (focusing on, among other things in the context of collateralized loan obligations, LIBOR transaction amendments, loan restructurings, and refinancings).

[403] *See* letter from CREFC I.

[404] *See* letter from CREFC I (explaining that, for example, the servicing standard for CMBS places requirements on the servicer with a view to maximizing the recovery of principal and interest on the mortgage loans).

[405] *See* letters from IACPM (describing the margin posting mechanics of certain financing transactions); SFA I (providing as an example that, in a repurchase transaction, the repurchase buyer (lender) has the right to protect its level of collateralization through the borrowing base mechanics by marking the ABS to market and that, when it does so in a declining market, it often will make a margin call on the repurchase seller (borrower) for additional cash or collateral); SFA II (requesting a specific exception for financing activities); SIFMA II (requesting a specific exception for financing arrangements).

[406] In such scenario, the lender would customarily apply any such collateral to the satisfaction of the outstanding relevant loan obligations of the borrower.

[407] *See, e.g.,* letters from MBA (stating that MILNs, which are reinsurance-based note structures, should not viewed as a conflicted transaction); PMI Industry I (stating that MILNs should not be considered conflicted transactions).

[408] *See, e.g.,* letters from ICI (stated that advisers are fiduciaries and must act in the best interest of their clients, including the funds they manage); SFA I (noting that not allowing a securitization participant to execute such a transaction could cause it to violate its fiduciary duties imposed by law); SFA II (suggesting that the rule should not apply to any securitization participant with a fiduciary duty to the issuer of the ABS pursuant to the Advisers Act when the transaction is entered into by that securitization participant on behalf of another client, fund or account managed by the securitization participant and conducted in accordance with that securitization participant's fiduciary duty to that client, fund or account under the Advisers Act).

profit from the adverse performance of an ABS with respect to which the investment adviser structured and selected the asset pool in order to sell such ABS to long investors. In response to the concerns of commenters, the revised approach to affiliates and subsidiaries described above in Section II.B.3.c. should help address situations that do not involve these same investor protection concerns, such as where there is no coordination or information sharing between the relevant personnel of the investment adviser entering into the relevant client transaction and the relevant investment personnel responsible for the design and composition of the ABS.[409] We recognize that securitization participants, when entering into an agreement to participate in the securitization, will need to consider potential impacts related to their affiliates or subsidiaries (that meet the definition of securitization participant in Rule 192(c)), as the prohibition will restrict those affiliates and subsidiaries from entering into conflicted transactions. A conflicted transaction entered into by such an affiliate or subsidiary may fall within an available exception, but, in any case, will still be covered by this rule. Additionally, as discussed in detail in Section II.E.3. below, the revised scope of the risk-mitigating hedging activities exception is designed to not unnecessarily restrict the ability of an affiliate or subsidiary of a securitization participant to hedge exposures that it originates, retains, acquires, or finances in connection with the ordinary course of its business but that is unrelated to the securitization activities of the securitization participant (such as its CLO business).

We do not believe that the suggestion of certain commenters that Rule 192(a)(3)(iii) should be limited in scope to only prohibit transactions through which the securitization participant actually profits from its bet against the ABS would be appropriate.[410] As discussed above, final Rule 192(a)(3)(iii) is focused on prohibiting a securitization participant from entering into a bet against the ABS or the asset pool supporting or referenced by the relevant ABS. This approach is intended to remove the incentive for a securitization participant to select poor credit quality assets for the asset pool supporting or referenced by the ABS. If the prohibition were limited to transactions through which the securitization participant actually profits from its bet, it would fall short of implementing the statutory prohibition and addressing the incentive to design transactions that are intended to fail. Therefore, under Rule 192(a)(3)(iii), the securitization participant need not ultimately profit from the conflicted transaction in order for it to be prohibited.

Certain commenters stated that the definition of ''conflicted transaction'' should include an intent or knowledge element in order to narrow the application of the final rule.[411] However, another commenter stated that intent should not be a required element.[412] Section 27B does not include an intent or knowledge element and provides, in relevant part, that a securitization participant ''shall not . . . engage in any transaction that would involve or result in any material conflict of interest.'' [413] We believe that narrowing the scope of the final rule to add an element of intent or knowledge is not appropriate because the statute is clear in mandating the prohibition of material conflicts of interest in ABS transactions. Narrowing the scope of the rule to require knowledge or intent would frustrate the statutory mandate of Section 27B. The final rule is intended to prophylactically protect against the sale of ABS tainted by material conflicts of interest; therefore an investor is able to rely on the fact that it is unlawful for a securitization participant to bet against the relevant ABS or the asset pool supporting or referenced by an ABS. Introducing an element of knowledge or intent would not provide the same level of prophylactic protection and would introduce an element of uncertainty that an investor would need to consider with each ABS transaction.

The Commission also received comment that the final rule should include a provision authorizing it to exempt certain transactions from the final rule.[414] As discussed in detail below, we are adopting specific exceptions to the rule's prohibition to implement the exceptions provided for in Section 27B. We are not persuaded that any additional exceptions are necessary in order to implement Section 27B, nor do we believe that it is necessary to include a mechanism to provide such additional exceptions in the future. The changes made from the proposed rule to narrow the scope of the definition of conflicted transaction as described in this section and the changes made from the proposed rule to narrow the scope of the affiliates and subsidiaries of a securitization participant that are subject to the rule as described in Section II.B.3.c. above [415] should generally ease compliance burdens and mitigate the need for any additional exceptions to the final rule. If the Commission determines that additional exceptions are needed in the future, it can utilize available authorities under its governing statutes, including Section 28 of the Securities Act, to provide such exceptions.

d. Materiality

Consistent with Section 27B's prohibition of conflicts of interest that are ''material,'' we are adopting, as proposed, a definition of ''conflicted transaction'' in Rule 192(a)(3) requires that there is a substantial likelihood that a reasonable investor would consider the relevant transaction important to the investor's investment decision, including a decision whether to retain the asset-backed security. As stated in the Proposing Release, this is derived from the ''reasonable investor'' standard of materiality articulated in *Basic* v. *Levinson*.[416] The Commission received comments stating that this longstanding standard would be inappropriate in this context,[417] and some commenters

[409] *See* letter from LSTA IV (stating that many asset management companies that manage CLOs often employ other strategies managed by different personnel who have fiduciary duties to other clients than the CLO and that ''[i]ncorporating information barriers into any final rule would solve this problem and comport with other provisions in the U.S. securities laws'').

[410] *See* letters from ABA (suggesting a definition of profit that focuses on income or gain generated as a result of a short position or the settlement of loss protection); MFA II (suggesting that the Commission replace ''benefit'' with ''profit'').

[411] *See, e.g.,* letters from AIC (stating that a requirement that the securitization participant has actual knowledge of the subject ABS and structures the transaction to fail would align the rule with Section 27B); SFA II (requesting an exception for transactions entered into by a third-party manager on behalf of a securitization participant without the direction of the securitization participant).

[412] *See* letter from AFR.

[413] 15 U.S.C. 77z–2a(a).

[414] *See* letters from AIC; SFA II; SIFMA II.

[415] *See* Section II.B.3.c. (discussing how paragraph (ii) of the definition of a ''securitization participant'' as adopted will only capture any affiliate (as defined in 17 CFR 230.405) or subsidiary (as defined in 17 CFR 230.405) of a person described in paragraph (i) of the definition if the affiliate or subsidiary: (A) acts in coordination with a person described in paragraph (i) of the definition; or (B) has access to or receives information about the relevant asset-backed security or the asset pool supporting or referenced by the relevant asset-backed security prior to the first closing of the sale of the relevant asset-backed security).

[416] *See Basic* v. *Levinson,* 485 U.S. 224, 231–32 (1988) (citing *TSC Industries, Inc.* v. *Northway, Inc.,* 426 U.S. 438, 449 (1976)).

[417] *See, e.g.,* letters from AIC (explaining that it would be difficult for a sponsor-affiliated portfolio company to perform a *Basic* analysis); SFA II (stating that the proposed materiality standard would be difficult to apply if the rule does not provide for disclosure as a mitigant of a material

recommended that the ''materially adverse'' standard utilized in the Volcker Rule would be more appropriate.[418] However, we continue to believe that the ''reasonable investor'' materiality standard that is applied throughout the securities laws should be used for purposes of implementing Section 27B. This materiality standard is more appropriate for purposes of implementing Section 27B than the other suggested alternatives as it is focused on the perspective of the reasonable investor in the ABS (not the securitization participant) and, specifically, whether there is a substantial likelihood that such reasonable investor would consider the relevant transaction important to the investor's investment decision whether to acquire or retain the ABS.[419] Also, given that Section 27B was designated as a part of the Securities Act, the existing materiality standard will be more familiar to the broad base of securitization participants that are subject to the rule that engage in the issuance of ABS as opposed to a new standard that is not based on any jurisprudence related to the Securities Act. In this regard, we note that the Volcker Rule and its application relates to the Bank Holding Company Act, which is primarily designed to address safety and soundness concerns applicable to bank holding companies, as opposed to the investor protection focus of the securities laws, including Section 27B.

As stated in the Proposing Release, the use of the reasonable investor standard in this context does not imply that a transaction otherwise prohibited under the final rule would be permitted if disclosure of the conflicted transaction is made by the securitization participant to the relevant investor.[420] The prohibition will apply to transactions that are bets against the relevant ABS whether or not such transactions are disclosed to investors in the ABS. While certain commenters suggested that disclosure could adequately mitigate material conflicts of interest,[421] other commenters opposed any disclosure-based exception to the rule.[422] Consistent with the proposal and the prohibition in Section 27B, we have not included an exception to the final rule based on disclosure of potential material conflicts of interest because the final rule is designed to prevent the sale of ABS that are tainted by material conflicts of interest by prohibiting a securitization participant from entering into a conflicted transaction with respect to ABS that it creates or sells to investors. If the final rule were to include a disclosure-based exception, compliance with the rule could become a check-the-box exercise that would permit securitization participants to enter into a transaction prohibited by Section 27B, thereby allowing securitization participants to bet against the same ABS that they are creating or selling to investors when such conflicted transaction is disclosed. Even if disclosure of a conflicted transaction reduced the likelihood that an investor would invest in a tainted ABS, the incentive for a securitization participant to enter into the conflicted transaction might remain and investors might not benefit from the mandated investor protection of Section 27B. Furthermore, even if the relevant conflict is disclosed to investors, that does not mean that the relevant conflict is not material to the decision of the investor to purchase, retain, or sell the relevant ABS.

Similarly, as stated in the Proposing Release, the use of the reasonable investor standard does not imply that a transaction otherwise prohibited by the final rule will be permitted if an investor selected or approved the assets underlying the ABS.[423] We are not persuaded, as suggested by some commenters, that the prohibition should not apply with respect to an ABS where the investor selects or approves the asset underlying the relevant ABS.[424] Even if an investor in an ABS is given accurate information about the pool of assets underlying the ABS, and consents to the asset pool on the basis of such information, a securitization participant could nonetheless structure the ABS or construct the underlying asset pool in a way that would position the securitization participant to benefit from the adverse performance of the assets underlying the ABS, including in ways that investors may not understand. Additionally, as explained in the Proposing Release, we are concerned that an exclusion dependent on investor consent could cause some securitization participants to pressure investors to provide consent to the portfolio of underlying assets as a condition to participating in an ABS offering, which would undermine the effectiveness and purpose of such disclosure and the meaningfulness of the investor's consent.

E. Exception for Risk-Mitigating Hedging Activities

1. Proposed Exception

The Commission proposed to implement the exception for risk-mitigating hedging activity in Section 27B(c) by proposing that the prohibition in proposed Rule 192(a), subject to certain specified conditions, would not apply to the risk-mitigating hedging activities of a securitization participant in connection with and related to individual or aggregated positions, contracts, or other holdings of the securitization participant arising out of its securitization activities, including the origination or acquisition of assets that it securitizes, except that the initial distribution of an asset-backed security would not be eligible for the exception. The proposed rule was consistent with Section 27B(c), which provides that the prohibition in Section 27B(a) does not apply to risk-mitigating hedging activities in connection with positions or holdings arising out of the underwriting, placement, initial purchase, or sponsorship of an ABS, provided that such activities are designed to reduce the specific risks to the underwriter, placement agent, initial purchaser, or sponsor associated with positions or holdings arising out of such underwriting, placement, initial purchase, or sponsorship.[425] In order to distinguish permitted risk-mitigating hedging activities from prohibited conflicted transactions, the Commission proposed the following three conditions that would need to be satisfied in order for a securitization participant to rely on the risk-mitigating hedging activities exception:

- That, at the inception of the hedging activity and at the time of any

conflict of interest); SIFMA II (explaining that there are many non-adverse transactions that a securitization participant enters into which a reasonable investor would want to figure into their investment decision).

[418] *See* letters from ABA; AFME; SFA II; SIFMA I; SIFMA II.

[419] The transactions specified in Rule 192(a)(3)(i), Rule 192(a)(3)(ii), or Rule 192(a)(3)(iii) are prohibited under the final rule to the extent that there is a substantial likelihood that a reasonable investor would consider the transaction important to the investor's investment decision, including whether to retain the ABS. The application of the materiality standard does not, for example, mean that a transaction that only hedges general interest rate or current exchange risk (that is not a conflicted transaction under Rule 192(a)(3)(iii)) is a conflicted transaction.

[420] Proposing Release at 9696.

[421] *See, e.g.,* letters from ABA (stating that, except with respect to certain categories of conflicted transactions such as short sales of the relevant ABS, disclosure would be appropriate to protect investors where there are inherent conflicts of interest); AIC (stating that disclosure is a valuable tool and should be used where possible to mitigate the materiality of the relevant conflict); MFA II (stating that the rules should permit disclosure as a means of addressing conflicts of interest).

[422] *See* letters from AFR; Better Markets.

[423] Proposing Release at 9697.

[424] *See* letters from SFA II; SIFMA II.

[425] 15 U.S.C. 77z–2a(c)(1).

adjustments to the hedging activity, the risk-mitigating hedging activity is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks arising in connection with and related to identified positions, contracts, or other holdings of the securitization participant, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof;

- That the risk-mitigating hedging activity is subject, as appropriate, to ongoing recalibration by the securitization participant to ensure that the hedging activity satisfies the requirements of the exception and does not facilitate or create an opportunity to benefit from a conflicted transaction other than through risk-reduction; and
- That the securitization participant has established, and implements, maintains, and enforces, an internal compliance program that is reasonably designed to ensure the securitization participant's compliance with the requirements set out in paragraph (b)(1) of the exception, including reasonably designed written policies and procedures regarding the risk-mitigating hedging activities that provide for the specific risk and risk-mitigating hedging activity to be identified, documented, and monitored.

2. Comments Received

A number of commenters stated that the risk-mitigating hedging exception, as proposed, would be too narrow to facilitate the effective credit portfolio management of securitization participants.[426] In particular, commenters expressed concerns that the exception, as proposed, would restrict the ability of securitization participants to hedge interest rate, foreign exchange, and other risks that are not materially related to the credit risk of the relevant ABS or the asset pool supporting or referenced by the relevant ABS.[427] While certain commenters supported the proposed conditions applicable to the exception,[428] other commenters stated that the proposed conditions would be unnecessarily prohibitive or difficult to implement.[429] The Commission also received comments specifically requesting that synthetic securitizations used for risk-mitigation purposes should be permitted under the risk-mitigating hedging exemption.[430] These comments are addressed in detail below.

3. Final Rule

We are adopting the risk-mitigating hedging activities exception with certain modifications from the proposal in response to comments received. Consistent with Section 27B, we are adopting a risk-mitigating hedging activities exception that permits securitization participants to continue to hedge their risk exposures. Subject to the conditions discussed in detail below, the final rule provides an exception for risk-mitigating hedging activities of a securitization participant in connection with and related to individual or aggregated positions, contracts, or other holdings of the securitization participant, including those arising out of its securitization activities, such as the origination or acquisition of assets that it securitizes.

Given that the accumulation of assets prior to the issuance of an ABS is a fundamental component of assembling an ABS prior to its sale, consistent with the proposal, the final risk-mitigating hedging activities exception allows for a securitization participant to not only hedge retained ABS positions (in compliance, as applicable, with Regulation RR)[431] but also hedge exposures arising out of the assets that are originated or acquired by the securitization participant in connection with warehousing assets in advance of an ABS issuance. Also consistent with the proposal, the final risk-mitigating hedging activities exception allows for the relevant hedging activity related to a securitization participant's securitization activity to be done on an aggregated basis and would not require that the exempt hedging be conducted on a trade-by-trade basis. Given the nature of the ABS market and the types of assets that collateralize ABS (such as receivables or mortgages), it may not be possible for a securitization participant to enter into a hedge with respect to an ABS or any of its underlying assets on an individualized basis. Such hedge may also need to be aggregated with hedges of risks that are unrelated to the relevant ABS and the asset pool supporting or referenced by such ABS. Therefore, this approach to the risk-mitigating hedge exception should allow securitization participants sufficient flexibility to design their securitization-related hedging activities in a way that is not unduly complicated or cost prohibitive.

In a change from the proposal, the initial issuance of a synthetic ABS will be eligible for the risk-mitigating hedging activities exception set forth in the final rule. This change is intended to allow for the initial issuance of a synthetic ABS that the relevant securitization participant enters into and maintains as a hedge. This change is also consistent with the requests of certain commenters.[432] As discussed

[426] *See, e.g.,* letters from AIMA/ACC (stating that is uncertain whether the scope of the exception is sufficiently clear so as to be relied upon); AFME (focusing on CRT transactions); Andrew Davidson (stating its belief that the proposed exception is too narrow); IACPM (stating its belief that, as proposed, the exception is too narrow to facilitate effective credit portfolio management activities); SFA II (expressing concern about the ability of securitization participants to limit credit, interest rate, and other risks); SIFMA II (stating that the proposed formulation of the exception would unintentionally limit important business activity).

[427] *See, e.g.,* letters from HPC (focusing specifically to interest rate risk hedging); MFA II (expressing a preference that the Commission not construe such transactions as conflicted transactions); SIFMA I (stating that these hedging activities are unrelated to the concerns that motivated Section 27B).

[428] *See* letters from AARP (describing the proposed conditions and agreeing that exceptions for hedging transactions, to the extent narrowly drawn and clearly defined, are appropriate); AFR (stating that hedge positions must never be greater than the actual exposure of the securitization participant); Better Markets (stating that the compliance program requirement will strengthen the ability of the Commission to police the use of the exception).

[429] *See* letters from ABA (expressing concerns that the compliance program requirement would create limitations and confusion given the scope of securitization participants that would be subject to the rule); AIMA/ACC (expressing concern that the conditions would require facts and circumstances determinations); IACPM (expressing concerns regarding the conditions on the basis that credit portfolio management activities are rarely directed calibrated to the risks of specific securitization activities); SFA I (requesting that the ongoing recalibration requirement be eliminated), SIFMA II (requesting that the ongoing recalibration requirement should be eliminated).

[430] *See* letters from AFME (specifically supporting SIFMA's recommendations); Andrew Davidson (suggesting that CRTs be specifically exempted or evaluated against a separate set of rules); Fannie and Freddie (requesting as one alternative that the Commission amend the exception to permit the Enterprises to continue to engage in CRT issuances following conservatorship); HPC (expressing a preference that credit risk transfer transactions be carved out of the definition of conflicted transactions, but suggesting inclusion as risk-mitigating hedging as an alternative); LSTA III (stating that the risk-mitigating hedging activities exception should include permitted risk transfer transactions); PGGM Credit Risk Sharing dated Mar. 27, 2023 (''PGGM'') (advocating for an exception for on-balance-sheet synthetic securitizations); SFA II (requesting that the exclusion of initial distribution of ABS be removed to permit prudent risk transfer transactions); SIFMA II (stating its belief that synthetic securitization should fall under the risk mitigating hedging activities exception under most circumstances).

[431] This standard would not broaden, limit, or otherwise modify the requirements applicable to a securitization participant pursuant to Regulation RR.

[432] *See* letters from AFME (specifically supporting SIFMA's recommendations); Andrew Davidson (suggesting that CRTs be specifically exempted or evaluated against a separate set of rules); Fannie and Freddie Letter (requesting as one alternative that the Commission amend the exception to permit the Enterprises to continue to engage in CRT issuances following conservatorship); HPC (expressing a preference that credit risk transfer

above in Section II.D.3., the relevant material conflict of interest in the context of the issuance of a new synthetic ABS arises when the securitization participant engages in a transaction (such as CDS contract(s) with the synthetic ABS issuer) where cash paid by investors to acquire the newly created synthetic ABS would fund the relevant contract(s) and be available to make a payment to the securitization participant upon the occurrence of an adverse event with respect to the assets included in the reference pool.[433] If such activity is not entered into for purposes of hedging an exposure of the securitization participant to the assets included in the reference pool, then such activity will not qualify for the risk-mitigating hedging exception.

However, we understand that the Enterprises and other market participants utilize synthetic ABS structures for hedging purposes. To the extent that such transactions mitigate a specific and identifiable risk exposure of the securitization participant, we agree that such transactions should be permitted under the risk-mitigating hedging exception. Section 27B specifically applies to synthetic ABS transactions and provides an exception for risk-mitigating hedging activity;[434] therefore, we believe that it is consistent with Section 27B to allow a synthetic ABS as described above to be eligible for the risk-mitigating hedging activities exception if it is entered into and maintained for risk-mitigating hedging purposes. We understand that commentators have expressed concerns about the systemic risk implications of CRTs.[435] However, we are adopting this rule pursuant to our congressional mandate under Section 27B, which focuses on investor protection rather than mitigating systemic risk. To ensure that these types of transactions cannot be utilized as a bet by a securitization participant against the performance of the reference assets, the rule as adopted requires any such transaction to satisfy each of the conditions to the risk-mitigating hedging activities exception described below.

A number of commenters stated that the risk-mitigating hedging activities exception should encompass interest rate, currency, and other hedging activities that are not materially related to the credit risk of the relevant ABS or the asset pool supporting or referenced by the relevant ABS.[436] As described in Section II.D.3., general interest rate hedges and currency exchange hedges entered into by a securitization participant are not conflicted transactions. Furthermore, hedges that are unrelated to the credit performance of the relevant ABS or the asset pool supporting or referenced by the relevant ABS will not be conflicted transactions as they are not substantially the economic equivalent of a transaction described in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii). Therefore, we are not including such activities in the risk-mitigating hedging exception because securitization participants engaging in such transactions will not need to rely on any exception to the rule.

In a change from the proposal, the risk-mitigating hedging activities exception will apply to the risk-mitigating hedging activities of a securitization participant in connection with and related to individual or aggregated positions, contracts or other holdings of the securitization, ''including those'' arising out of its securitization activities, such as the origination or acquisition of assets that is securities, rather than only those positions, contracts or other holding of a securitization participant arising out of its securitization activities. The addition of the phrase ''including those'' is designed to not unnecessarily restrict the ability of an affiliate or subsidiary of a securitization participant to hedge exposures that it may originate, retain, acquire, or finance in connection with the ordinary course of its business but that may be unrelated to the securitization activities of the securitization participant.[437] For example, if an underwriter of an ABS has an affiliate or subsidiary (that is subject to the rule) that acquires, in its ordinary course of business, a long position in such ABS, the affiliate or subsidiary will be able to rely on the risk-mitigating hedging activities exception to hedge that long position, subject to the conditions of the exception. This change is also responsive to the concerns of certain commenters that stated that the risk-mitigating hedging activities exception should not be limited to the hedging of exposures arising out of a securitization participant's securitization activities.[438]

Other commenters requested an exception for hedging related to intermediation and financing services provided by a securitization participant.[439] As discussed above in Section II.D.3., providing financing to a long purchaser of an ABS is not a conflicted transaction under Rule 192(a)(3). If the person providing such financing is a securitization participant with respect to the relevant ABS and

transactions be carved out of the definition of conflicted transactions, but suggesting inclusion as risk-mitigating hedging as an alternative); LSTA III (stating that the risk-mitigating hedging activities exception should include permitted risk transfer transactions); PGGM (advocating for an exception for on-balance-sheet synthetic securitizations); SFA II (requesting that the exclusion of initial distribution of ABS be removed to permit prudent risk transfer transactions); SIFMA II (stating its belief that synthetic securitization should fall under the risk mitigating hedging activities exception under most circumstances).

[433] *See* Section II.D.3. (discussing how the inclusion of the language ''(other than the relevant asset-backed security)'' in Rule 192(a)(3)(iii) is designed to specify that merely entering into an agreement to serve as a securitization participant with respect to an ABS and engaging in a purchase or sale of the ABS as an underwriter, placement agent, or initial purchaser for such ABS is not itself a conflicted transaction).

[434] 15 U.S.C. 77z–2a(a)(1) and 15 U.S.C. 77z–2a(c)(1).

[435] *See, e.g.,* Matt Wirz and Peter Rudegeair, *Big Banks Cook Up New Way to Unload Risk,* Wall Street J. (Nov. 7, 2023), *available at https://www.wsj.com/finance/banking/bank-synthetic-risk-transfers-basel-endgame-62410f6c.*

[436] *See, e.g.,* letters from HPC (referring specifically to interest rate risk hedging); LSTA III (stating the risk-mitigating hedging activities exception should include interest rate, currency, and other non-credit related trading and hedging activities); MFA II (stating that the exception for risk-mitigating hedging activity should specifically include interest rate and currency hedging, but expressing a preference that the Commission not construe such transactions as conflicted transactions at all).

[437] If the relevant affiliate or subsidiary is not a securitization participant under the final rule because it does not act in coordination with the named securitization participant and does not have access to or receive information about the relevant ABS or the asset pool underlying or referenced by the relevant ABS prior to the first closing of the sale of the relevant ABS, then such affiliate or subsidiary will not need to rely on the risk-mitigating hedging activities exception. *See* Section II.B.3.c. above (discussing the application of the final rule to affiliates and subsidiaries). By including both a narrower definition of the affiliates and subsidiaries of a securitization participant that are subject to the final rule's prohibition and an expanded risk-mitigating hedging activities exception, the final rule is designed to provide securitization participants with more than one way to approach the compliance of the activities of their affiliates and subsidiaries with the requirements of the final rule.

[438] *See, e.g.,* letters from IACPM (stating that credit portfolio managers use credit portfolio management transactions to hedge risks wholly unrelated to the institution's securitization exposures); LSTA IV (stating that deleting this requirement is necessary to capture hedging activities that are related to positions that did not arise out of securitization activities); SIFMA II (stating that this requirement could have adverse and unintended effects on everyday operations and risk management practices of financial institutions and their affiliates); SFA II (suggesting that the Commission broaden the exception by deleting this requirement).

[439] *See* letters from IACPM (stating that, if banks are unable to engage in effectively hedging their portfolio, they may simply reduce the activity that gives risk to the risk by reducing lending activities altogether and thereby constraining access to credit or other financial transactions); SIFMA I (stating that the exception should include transactions that hedge risk where a sponsor serves as an intermediary to facilitate a customer's exposure or when a sponsor provides financing to ABS investors).

desires to enter into a hedge with respect to its financing exposure that would constitute a conflicted transaction under the rule, then such person can enter into that hedge so long as such hedge satisfies the requirements of the risk-mitigating hedging activities exception. The risk-mitigating hedging activities exception applies to the individual or aggregated positions, contracts, or other holdings of the securitization participant, and this risk-mitigating hedging activity will be covered by the exception. Therefore, creating an expanded or separate exception for such hedging activity would be redundant. Intermediary functions of a securitization participant are separately addressed by the bona fide market-making activities exception in 17 CFR 230.192(b)(3) (''Rule 192(b)(3)''), which is discussed in detail in Section II.G. below and addresses the hedging of market-making positions.

Some commenters focused on the hedging of long ABS positions that are purchased by a securitization participant with respect to such ABS and requested that hedging such long positions should be allowed for under the exception.[440] As discussed above in Section II.D.3., the long purchase of an ABS is not a conflicted transaction under Rule 192(a)(3). Also, subject to the conditions discussed below, the exception does not preclude the hedging of a long position in an ABS by a securitization participant. The risk-mitigating hedging activities exception applies to the individual or aggregated positions, contracts, or other holdings of the securitization participant, and this risk-mitigating hedging activity will be covered by the exception. Therefore, creating an expanded or separate exception for such hedging activity would be redundant. Also, as described in Section II.B.3.c. above, we are making changes from the proposed rule to narrow the scope of the affiliates and subsidiaries that are subject to the rule, which should mitigate the concerns of commenters regarding the hedging activities of affiliates and subsidiaries within large, diversified financial institutions being unnecessarily restricted.[441]

One commenter focused specifically on hedging by a securitization participant in the context of tender option bonds (''TOBs'') and requested that the risk-mitigating hedging activities exception clearly state that hedges with respect to the underlying asset of a TOB are permissible to the extent that the sponsor either provides credit enhancement on the asset or the ABS issued or where the sponsor assigns, subordinates its right of payment on the hedge to or otherwise provides the benefit of the hedge to the ABS investors ahead of its benefiting therefrom.[442] We do not believe that a special exception for TOBs is necessary. This is because the risk-mitigating hedging activities exception, subject to the conditions discussed below, generally allows for the risk-mitigating hedging activities of a securitization participant in connection with and related to individual or aggregated positions, contracts, or other holdings of the securitization participant, including those arising out of its securitization activities, such as the origination or acquisition of assets that it securitizes. This includes hedging by a securitization participant of its retained and/or guaranteed exposures arising out of its ABS activity regardless of whether the relevant ABS is a TOB transaction or some or other type of ABS. Therefore, to the extent that the hedging activity of a securitization participant in connection with a TOB satisfies the conditions applicable to the exception, then such hedging activity will be permitted risk-mitigating hedging activity for purposes of the rule.

As described above in Section II.D.3., one commenter expressed a concern that using the phrase ''directly or indirectly'' in proposed Rule 192(a)(1) could be potentially interpreted to create a misalignment between the scope of the entities subject to the prohibition and the scope of the exceptions to the rule that apply to the activities of a securitization participant.[443] The final rule does not prohibit a securitization participant from using an affiliate or subsidiary as an intermediary for the purpose of effecting risk-mitigating hedging activity. This is because the risk-mitigating hedging activities exception is available to a ''securitization participant,'' which is defined to include not only the underwriter, placement agent, initial purchaser, or sponsor of an ABS but also any affiliate or subsidiary who is acting in coordination with such person or who has access to or receives information about the relevant ABS or the asset pool underlying or referenced by the relevant ABS.[444] For example, it is not inconsistent with the exception for risk-mitigating hedging activities for an entity to retain a position in an ABS for which it is an underwriter, placement agent, initial purchaser, or sponsor, under the final rule and to hedge that exposure by causing one of its subsidiaries to enter into the relevant hedge and pass through the economics of that hedge back to the parent entity.

Each of the specific conditions applicable to the risk-mitigating hedging activities exception is described in detail below.

a. Specific Risk Identification and Calibration Requirements

We are adopting proposed 17 CFR 230.192(b)(1)(ii)(A) (''Rule 192(b)(1)(ii)(A)'') as proposed. Therefore, the first condition to the risk-mitigating hedging activities exception is that, at inception of the hedging activity and at the time of any adjustments to the hedging activity, the risk-mitigating hedging activity of the securitization participant is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks arising in connection with and related to identified positions, contracts, or other holdings of the securitization participant, based upon the facts and circumstances of the identified underlying and hedging positions, contracts, or other holdings and the risks and liquidity thereof. This condition is an essential requirement of the exception to help ensure that the relevant hedging activity is risk-mitigating.

[440] *See* letters from SFA II (focusing on large, diversified financial institutions); SIFMA II (also focusing on large, diversified financial institutions).

[441] *See* Section II.B.3.c. (discussing how paragraph (ii) of the definition of a ''securitization participant'' as adopted will only capture any affiliate (as defined in 17 CFR 230.405) or subsidiary (as defined in 17 CFR 230.405) of a person described in paragraph (i) of the definition only if the affiliate or subsidiary: (A) acts in coordination with a person described in paragraph (i) of the definition; or (B) has access to or receives information about the relevant asset-backed security or the asset pool supporting or referenced by the relevant asset-backed security prior to the first closing of the sale of the relevant asset-backed security).

[442] *See* letter from SIFMA dated Mar. 27, 2023 (making comparisons to the treatment of TOBs under Regulation RR and explaining its belief that ''TOBs are a well-known form of securitization, akin to repo and securities lending finance, with unique features and functions, that are formed with high-grade or credit enhanced assets and which do not carry the risks the Proposed Rule is designed to address.'') In a typical TOB transaction, tax-exempt municipal securities are deposited into a special purpose trust that issues two classes of securities: floating rate securities with a put option marketed to short-term institutional investors, like a municipal money market fund, and inverse floating rate securities which are retained by the trust or marketed to long-term institutional investors.

[443] *See* letter from SIFMA II.

[444] If the affiliate or subsidiary is not acting in coordination with such person or does not have access to or receive information about the relevant ABS or the asset pool underlying or referenced by the relevant ABS, then such affiliate or subsidiary is not subject to the prohibition of the final rule and does not need to avail itself of the risk-mitigating hedging activities exception.

One commenter generally supported a clear standard that the relevant hedging activity must never result in a short position with respect to the relevant ABS.[445] Other commenters stated that the requirement that the relevant hedged risks are ''specific, identifiable risks'' is unrealistic as securitization participants conduct credit portfolio management on a portfolio basis and that such requirement could unduly limit risk-mitigating activities.[446] One commenter generally stated that is unclear how the condition should be interpreted due to the subjectivity involved in risk assessment and identifying a necessary degree of risk-mitigating hedging in any given circumstance.[447]

We recognize that various activities of a securitization participant, such as acquiring a portfolio of assets in anticipation of issuing an ABS or retaining a portion of an ABS issuance with respect to which it is a securitization participant, expose the securitization participant to the risk that such positions could decline in value. We also recognize that securitization participants may currently hedge such risks on an aggregated basis. Therefore, as discussed above, the final exception applies broadly to hedging of the individual or aggregated positions, contracts, or other holdings of the securitization participant. The final exception specifically allows for hedging on an aggregated basis, consistent with the rule as proposed.

Although the relevant risks are permitted under 17 CFR 230.192(b)(1)(i) (''Rule 192(b)(1)(i)'') to be hedged on an aggregated basis to address more than one exposure, we continue to believe that such risks need to be specific and identifiable at the inception of the hedging activity, as well as at the time of any adjustments to the hedging activity, and must arise in connection with and be related to identified positions, contracts, or other holdings of the securitization participant. Without this condition, it would be impractical or impossible to determine whether the securitization participant has overhedged. This condition will prohibit a securitization participant from engaging in speculative activity that is designed to gain exposure to incremental risk by, for example, entering into a CDS contract referencing a retained ABS exposure where the notional amount of the CDS exceeds the amount of the securitization participant's relevant exposure to that ABS, and any other aggregated exposures, that are intended to be hedged. Such a transaction would provide the securitization participant with an opportunity to profit from a decline in the value of the relevant retained exposure rather than simply to reduce its risk to it. For the same reason, we are not persuaded by the suggestion from certain commenters that the final rule allow, under the risk-mitigating hedging activity exception, for the hedging of specific, identifiable positions, contracts, or other holdings of a securitization that do not exist at the time of the hedging activity but that may exist at some point in the future.[448] Under such a standard, a securitization participant would, for example, be allowed to overhedge its exposure to the relevant ABS or the asset pool underlying or referenced by such ABS on the mere basis that it may at some point in the future increase its exposure to such assets even if it ultimately never does so.

One commenter stated that the requirement that the condition apply at the inception of the hedging activity and at the time of any adjustments to the hedging activity should be deleted.[449] We recognize that the risks of the relevant exposures are dynamic and may change over time and that new risks may emerge in a way that would make the hedging activity that was designed at inception less effective. As explained above in Section II.C.3., the prohibition of the rule only applies for a limited timeframe with respect to the relevant ABS,[450] and this first condition of the risk-mitigating hedging activities exception does not restrict a securitization participant from making adjustments to a hedge over time. However, consistent with the investor protection mandate of Section 27B and recognizing that a securitization participant's exposures may change over time, it is important that the requirements of this condition, as stated in the Proposing Release, must apply not only at the inception of the hedging activity but also whenever such hedging activity is subsequently adjusted during the time period in which the prohibition applies.[451] Therefore, any changed or new risks that are being hedged, including those being hedging on an aggregated basis, will need to be specifically identified, and the adjusted hedging activity needs to be designed to address them, in order for the exception to apply.

We are adopting 17 CFR 230.192(b)(1)(ii)(B) (''Rule 192(b)(1)(ii)(B)'') with certain modifications in response to comments received on the proposal. Specifically, the second condition of the exception is that the risk-mitigating hedging activity is required to be subject, as appropriate, to ongoing recalibration by the securitization participant to ensure that such hedging activity satisfies the requirements applicable to the first condition of the exception and does not facilitate or create an opportunity to materially benefit from a conflicted transaction other than through risk-reduction. This condition is designed to prevent a position that initially functions as a hedge to develop into a prohibited bet against the relevant ABS.

One commenter stated that the rule should provide that the relevant hedging activity must never result in a short position with respect to the relevant ABS.[452] Other commenters expressed concerns that this condition could unduly limit a securitization participant's risk-management abilities.[453]

We continue to believe that the recalibration requirement is a necessary condition to the exception so that subsequent changes to the hedging

[445] *See* letter from AFR.

[446] *See* letters from Andrew Davidson (stating that a firm will generally enter into risk mitigating hedges on a portfolio rather than on identified positions); IACPM (stating that credit portfolio management transactions may be designed to address portfolio credit and other risks not related to an institution's securitization exposures).

[447] *See* letter from AIMA/ACC.

[448] *See* letter from SIFMA II (providing, as an example, that this would allow for the hedging of exposures to assets that are not yet included in the asset pool underlying or referenced by the relevant ABS); LSTA IV (stating that, at a minimum, the ''identified positions, contracts, or other holdings'' need to include not only current positions, contracts, or other holdings, but also future positions, contracts, or other holdings, as hedged are sometimes arranged in advance). As described above in Section II.D.3., a transaction entered into by a securitization participant that is not entered into with respect to the relevant ABS is only a conflicted transaction under the final rule if it is substantially the economic equivalent of a transaction described in final Rule 192(a)(3)(i) or final Rule 192(a)(3)(ii) with respect to the relevant ABS.

[449] *See* letter from Andrew Davidson.

[450] *See* Section II.C.3. for a discussion of the time period during which the prohibition applies.

[451] *Id.*

[452] *See* letter from AFR.

[453] *See, e.g.,* letters from Andrew Davidson (stating that it would be difficult and costly for a firm which engages in overall portfolio hedging to comply with this requirement); IACPM (stating its belief that this condition does not accurately reflect the way credit portfolio managers manage risk in the context of credit portfolio management transactions, which can be used to hedge risks wholly unrelated to the institution's securitization exposures); SFA II (requesting that the ongoing recalibration requirement be replaced with a requirement that the primary benefit of the risk-mitigating hedging activity is risk reduction and not the facilitation or creation of an opportunity to realize some other benefit from a conflicted transaction); SIFMA II (suggesting as an alternative that the primary benefit of the risk-mitigating activity is risk reduction).

arrangements do not result in those arrangements functioning as conflicted transactions that would otherwise be prohibited by the final rule. For example, if a securitization participant enters into a hedge that is permitted under the exception at inception and the risk exposure of the securitization participant is subsequently reduced such that its hedge fails to achieve its designed purpose and constitutes a bet against the relevant ABS, the securitization participant should be required to adjust or recalibrate its hedge to continue to rely on the exception. Otherwise, securitization participants could reduce their exposures after entering into a hedge in order to achieve a net short position, which would constitute a bet against the ABS. The second condition is designed to prevent that very conduct.

In a change from the proposal, the risk-mitigating hedging activity is required to be subject, as appropriate, to ongoing recalibration by the securitization participant to ensure that such hedging activity does not facilitate or create an opportunity to ''materially'' benefit from a conflicted transaction other than through risk-reduction. We recognize that it may not be possible for a securitization participant to immediately recalibrate its hedging positions given the liquidity, maturity, and depth of the relevant market for such hedging positions. For example, if there is an unexpected early prepayment of the relevant positions being hedged, a securitization participant may be unable to immediately reduce its related hedge. The addition of the word ''materially'' is designed to address this concern and not unduly disrupt normal course hedging activities that do not present material conflicts of interest with ABS investors. We believe that this standard is more appropriate than stipulating, as some commenters suggested, that to meet the risk-mitigating hedging activities exception, it is necessary that the ''primary benefit'' of such activity must be risk reduction.[454] These commenters did not specify how to calculate or otherwise determine whether the primary benefit of a risk-mitigating hedging activity is risk reduction, and the term ''primary benefit'' implies that a securitization participant could, as a ''secondary benefit'' to the activity, materially profit from a net short position with respect to the relevant ABS. This standard would allow a securitization participant to enter into a bet against the relevant ABS in contradiction to the statutory prohibition.

One comment requested that the recalibration requirement only apply with respect to the hedging of aggregated holdings and not an individual position.[455] We believe that the recalibration requirement should apply to both the hedging of individual and aggregate positions as the relevant concerns that a securitization participant should not be able to bet against the relevant ABS are the same regardless of whether the relevant exposures are hedged on an aggregated or individualized basis.

Overall, we believe that the first and second conditions as adopted should not unduly disrupt normal course hedging activities that do not present material conflicts of interest with ABS investors and therefore should reduce the compliance burden from that of the proposed exception. In response to the comment that there is subjectivity involved in risk assessment and identifying a necessary degree of risk-mitigating hedging in any given circumstance,[456] the final rule does not include an exact negative correlation standard in the risk-mitigating hedging activities exception out of concern that such a standard could be unattainable in many circumstances given the potential complexity of positions, market conditions at the time of the hedge transaction, availability of hedging products, costs of hedging, and other circumstances at the time of the transaction that would make a hedge with exact negative correlation impractical or unworkable. For example, a securitization participant may not be able to hedge its exposure on an individualized basis and may have to enter into a broader-based hedging transaction. However, the presence of negative correlation will generally indicate that the hedging activity reduced the risks it was designed to address. The first and second conditions to the risk-mitigating hedging activities exception will serve to promote risk-mitigating hedging activity where there is negative correlation between the risk being hedged and the corresponding hedged position because the relevant risk will be required to be specifically identified and the risk-mitigating hedging activity cannot facilitate or create an opportunity to benefit from a conflicted transaction other than through risk reduction. The first and second conditions to the risk-mitigating hedging activities exception also allow for consideration of the facts and circumstances of the particular exposure or exposures and the related hedging activity, including the type of position being hedged, market conditions, depth and liquidity of the market for the underlying and hedging positions, and type of risk being hedged.

Consistent with the proposal, the risk-mitigating hedging activities exception also does not require that a hedge be entered into contemporaneously (*i.e.,* at the exact time that a risk is incurred or within a prescribed time period after a risk is incurred). Rather, both the first and second conditions are premised on the relevant hedging activity, whenever it is entered into or adjusted, being designed to mitigate a specifically identified risk and not to function as a bet against the relevant ABS. The hedging activity will cease to qualify for the risk-mitigating hedging activities exception if it is no longer reducing a specific risk to the securitization participant in connection with its individual or aggregates positions, contracts, or other holdings, for example if the securitization participant failed to unwind its risk-mitigating hedging activities after disposing of the position or holding being hedged. This is because the securitization participant will no longer be engaged in risk-mitigating hedging activities in connection with such position or holding.

As an alternative to the first and second conditions, one commenter suggested a condition that the hedging activity relates to an ABS, or any asset or assets supporting or referenced by an ABS, issued under an established and documented risk mitigation program established by the original sponsor of such asset-backed security.[457] We do not believe that this alternative would be appropriate because the suggested alternative condition fails to specify that the relevant activity cannot result in an overhedged position that constitutes a bet against the relevant ABS or the asset pool supporting or referenced by such ABS. This is the exact type of activity that the rule is intended to prohibit.

b. Compliance Program Requirement

We are adopting 17 CFR 230.192(b)(1)(ii)(C) (''Rule 192(b)(1)(ii)(C)'') as proposed. Therefore, the third condition to the

[454] *See* letters from SFA II (suggesting a requirement that the primary benefit of the risk-mitigating hedging activity is risk reduction and not the facilitation or creation of an opportunity to realize some other benefit of a conflicted transaction); SIFMA II (suggesting a requirement that the primary benefit of the risk-mitigating hedging activity is risk reduction); LSTA IV (supporting SIFMA's suggestion).

[455] *See* letter from SIFMA I.

[456] *See* letter from AIMA/ACC.

[457] *See* letter from IACPM.

exception is that the securitization participant has established, and implements, maintains, and enforces, an internal compliance program that is reasonably designed to ensure the securitization participant's compliance with the requirements applicable to the exception, including reasonably designed written policies and procedures regarding the risk-mitigating hedging activities that provide for the specific risk and risk-mitigating hedging activity to be identified, documented, and monitored. This condition is designed to promote robust compliance efforts and to help ensure that activity that would qualify for the exception is indeed risk-mitigating while also recognizing that securitization participants are positioned to determine the particulars of effective risk-mitigating hedging activities policies and procedures for their own business. Additionally, as discussed in Section IV, this condition will enhance the benefits of the rule by assuring investors that a securitization participant is less likely to engage in activities that are prohibited by Rule 192 if it has a program to monitor ongoing compliance with the rule. We believe it is important that reasonably designed written policies and procedures provide for the specific risk and the risk-mitigating hedging activities to be identified, documented, and monitored to help facilitate the securitization participant's compliance with the conditions specified in Rule 192(b)(1)(ii)(A) and Rule 192(b)(1)(ii)(B), which require that the risk-mitigating hedging activity be tied to such risks at inception and over the time period that the prohibition of the rule would apply and that the activity be subject to ongoing recalibration as appropriate, as discussed above.

A number of commenters expressly supported including a compliance program requirement.[458] However, one commenter stated that the potential confusion regarding this requirement would undercut the ability of securitization participants to rely on the exception and that it is not clear that such condition is within the scope of the congressional intent of Section 27B.[459] Other commenters also stated that the compliance program condition would be unnecessarily burdensome and have the potential to create unintended consequences.[460] In subsequent letters, certain of these commenters requested that the condition should be rephrased so that the compliance program is required to be reasonably designed to ''result in'' compliance with the requirements of the exception rather than to ''ensure'' compliance with those requirements and that the policies and procedures of a securitization participant should not provide for the monitoring of the risk-mitigating hedging activity.[461]

In response to the comment that the compliance program condition would undercut the ability of a securitization participant to rely on the exception and that it is not clear that such condition is within the scope of the congressional intent of Section 27B, we recognize that certain securitization participants may need to create a new compliance program to comply with this condition and that this may result in increased compliance costs. However, Section 27B(b) requires that the Commission adopt rules to implement the prohibition in Section 27B(a) against a securitization participant engaging in any transaction that would involve or result in any material conflict of interest with respect to any investor in a transaction arising out of the ABS activity of a securitization participant. The compliance program condition is necessary to help ensure that the activities of a securitization participant relying on the risk-mitigating hedging activities exception are indeed risk-mitigating hedging activities, and not the type of transactions that would involve or result in a material conflict of interest between a securitization participant for an ABS and an investor in such ABS. Given that the ABS exposures of a securitization participant and the financial instruments that are utilized to hedge such exposures can be inherently complex, requiring a securitization participant to establish and enforce an internal compliance program will help that entity adequately evaluate and track its ABS exposures and monitor its hedging activity in a way that is reasonably designed to help prevent violations of the rule. Similarly, given that the exposure of a securitization participant can change over time, we continue to believe that it is necessary that securitization participants develop reasonably designed policies and procedures regarding their risk-mitigating hedging activities that provide for the specific activities to be monitored on an ongoing basis. We also believe that it is important for this condition to apply to all securitization participants that seek to rely on this exception given that the focus of Section 27B is investor protection.

However, to avoid imposing a one-size-fits-all requirement that may unduly burden securitization participants that are different in size or that make markets in different financial instruments, this condition recognizes that a securitization participant that engages in risk-mitigating hedging activity is well positioned to design its own individual internal compliance program to reflect the size, complexity, and activities of the securitization participant. This should help ease compliance costs as the relevant securitization participant can tailor its compliance program to its particular business model. As a general matter, we recognize that costs of the final rule potentially may have a proportionally greater effect on small entities, as such costs may be a relatively greater percentage of the total cost of operations for smaller entities than larger entities, and thus small entities may be less able to bear such costs relative to larger entities. However, the potentially less complex securitization activities of small entities and their correspondingly less complex compliance considerations may counterbalance such costs as compared to larger and more diversified securitization participants. In addition, the changes discussed above to refine the scope of the definition of ''conflicted transaction'' and the scope of covered affiliates and subsidiaries are designed to ease the compliance program burden on securitization participants by narrowing the scope of the types of transactions and relevant entities that are subject to the rule's prohibition.[462] This should also reduce the cost of developing policies and procedures regarding the risk-mitigating hedging activity that provide for the specific

[458] *See* letters from AARP; Better Markets.

[459] *See* letter from ABA.

[460] *See* letters from AFME (supporting SIFMA's suggestions); SFA I (expressing concern that the proposed compliance program requirement would apply to a broader range of entities that those subject to the Volcker Rule); SIFMA I (initially suggesting that the compliance program be deleted in its entirety).

[461] *See* letters from SFA II; SIFMA II.

[462] *See* Section II.D.3. (discussing how Rule 192(a)(3)(iii) as adopted only applies to the purchase or sale of any financial instrument that is substantially the economic equivalent of a transaction described in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii) and provides that, for the avoidance of doubt, any transaction that only hedges general interest rate or currency exchange risk is not a conflicted transaction) and Section II.B.3.c. (discussing how paragraph (ii) of the definition of a ''securitization participant'' as adopted will only capture any affiliate (as defined in 17 CFR 230.405) or subsidiary (as defined in 17 CFR 230.405) of a person described in paragraph (i) of the definition if the affiliate or subsidiary: (A) acts in coordination with a person described in paragraph (i) of the definition; or (B) has access to or receives information about the relevant asset-backed security or the asset pool supporting or referenced by the relevant asset-backed security prior to the first closing of the sale of the relevant asset-backed security).

activity to be identified, documented, and monitored over time.

In response to comments that the compliance program requirement should specify that it would only apply to any securitization participant utilizing the exception,[463] adding that language would be redundant. Rule 192(b)(1)(ii)(C) sets forth a condition to utilizing the exception in Rule 192(b)(1)(i) and does not separately require that a securitization participant satisfy the compliance program requirement if it is not utilizing the exception.

As described above, certain commenters stated that the compliance program condition should be revised to provide that such program is reasonably designed to ''result in'' a securitization participant's compliance with the requirements of the exception rather than to ''ensure'' such securitization participant's compliance because the word ''ensure'' could be inconsistent with a reasonably designed standard [464] We are adopting the condition as proposed. The reasonably designed to ''ensure'' formulation is used in numerous other Commission rules, including a similar condition to the risk-mitigating hedging activities to the Volcker Rule.[465] Furthermore, we do not believe that the ''ensure'' formulation is inconsistent with the rule's ''reasonably designed'' standard as the two components will work together to require that a securitization participant designs a sufficiently detailed internal compliance program that promotes compliance with the requirements applicable to the exception.

One commenter suggested that any securitization participant relying on the exception for risk-mitigating hedging activities should be required to affirmatively certify that it is undertaking such activity for the sole purpose of hedging a risk arising in connection with its securitization activities and not for the purpose of generating speculative profits.[466] Certain commenters also suggested that a responsible party at the securitization participant should be required to certify the effectiveness of the applicable written policies and procedures prior to their implementation and on an ongoing basis.[467] Consistent with the discussion of this in the Proposing Release, we did not include certification requirements in the final rule because we believe that the conditions to the risk-mitigating hedging activity exception are sufficiently robust to prevent the exception from resulting in conflicted transactions in contradiction to Section 27B's prohibition.

F. Exception for Liquidity Commitments

1. Proposed Approach

The Commission proposed to implement the exception for liquidity commitments in Section 27B(c) by proposing that the prohibition in proposed Rule 192(a) would not apply when a securitization participant engages in purchases or sales of ABS made pursuant to, and consistent with, commitments of the securitization participant to provide liquidity for the relevant ABS. This approach was consistent with Section 27B(c), which provides that the prohibition in Section 27B(a) does not apply to purchases or sales of ABS made pursuant to, and consistent with, commitments of the underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity, to provide liquidity for the ABS.[468]

2. Comments Received

A number of commenters supported the proposed exception to exclude transactions pursuant to and consistent with commitments to provide liquidity for the relevant ABS. One commenter specifically supported limiting the exception to ''purchases and sales'' of ABS on the basis that such approach would be consistent with Section 27B(c).[469] Another commenter supported the Commission statement in the Proposing Release that the prohibition in proposed Rule 192(a) would not apply to liquidity commitments that promote the full and timely interest payment to ABS investors.[470] One commenter requested that the Commission confirm that ''dollar roll'' transactions for Enterprise mortgage-backed securities would fall within the exception for liquidity commitments.[471]

3. Final Rule

We are adopting the exception for liquidity commitments in 17 CFR 230.192(b)(2) (''Rule 192(b)(2)'') as proposed. Specifically, under the final exception, purchases or sales of the relevant ABS made pursuant to, and consistent with, commitments of the securitization participant to provide liquidity for such ABS are not prohibited by the final rule. We understand that commitments to provide liquidity may take a variety of forms in addition to purchases and sales of the ABS, such as commitments to promote full and timely interest payments to ABS investors or to provide financing to accommodate differences in the payment dates between the ABS and the underlying assets.[472] As discussed above in Section II.D.3., such as an extension of credit by a securitization participant that functions to support the performance of the securitization rather than to benefit from its adverse performance will not be a conflicted transaction under the final rule. Therefore, a securitization participant will not need to rely on any exception to the rule to enter into such extension of credit.

With respect to the commenter who raised concerns about ''dollar roll transactions,'' in the context of the Enterprise ABS market, we understand that dollar roll transactions are utilized as a form of short-term financing that are similar to a repurchase agreement; however, unlike a typical repurchase agreement, a similar security may be returned to the seller rather than the original security.[473] As adopted, the liquidity commitments exception will apply when a securitization participant engages in purchases or sales of Enterprise ABS made pursuant to, and consistent with, commitments of the securitization participant to provide liquidity for the relevant ABS. To the extent that the purchases and sales of the relevant Enterprise ABS in a dollar roll transaction are consistent with a commitment of the securitization participant to provide liquidity for the relevant ABS, then such dollar roll

[463] *See* letters from SFA II; SIFMA II.

[464] *See* letters from SFA II; SIFMA II. These commenters did not also address the same concerns regarding the similar formulation of the compliance program condition to the bona fide market-making activities exception.

[465] *See, e.g.,* 17 CFR 255.5(b)(1)(i), 17 CFR 240.17g–8(a), 17 CFR 240.15Fh–5(b), 17 CFR 240.15c3–5(c)(2).

[466] *See* letter from Better Markets.

[467] *See* letters from AARP; Better Markets.

[468] 15 U.S.C. 77z–2a(c)(2)(A).

[469] *See* letter from Better Markets.

[470] *See* letter from ICI (noting that its concern regarding typical liquidity arrangements for asset-backed commercial paper (''ABCP'') markets would be addressed by the Commission's example that commitments to promote full and timely interest payments to ABS investors would meet the liquidity commitment exception).

[471] *See* letter from Fannie and Freddie.

[472] For example, a sponsor of ABCP may provide a liquidity facility if a tranche of $3 million of the ABCP matures on the 30th day of the month, yet only $2 million of the underlying receivables match that maturity. If there is an inability to repay the $1 million shortfall by issuing new commercial paper, the sponsor may provide a loan secured by the receivables to provide for the $1 million shortfall.

[473] *See* Financial Accounting Manual for Federal Reserve Banks, Jan. 2017, Paragraph 40.13, Board of Governors of the Federal Reserve System, available at *https://www.federalreserve.gov/federal-reserve-banks/fam/chapter-4-system-open-market-account.htm.*

transaction will be eligible for the liquidity commitment exception.

As described above in Section II.D.3., one commenter expressed a concern that using the phrase ''directly or indirectly'' in proposed Rule 192(a)(1) could be potentially interpreted to create a misalignment between the scope of the entities subject to the prohibition and the scope of the exceptions to the rule that apply to the activities of a securitization participant.[474] The final rule does not prohibit a securitization participant from utilizing an affiliate or subsidiary as an intermediary for the purpose of fulfilling its liquidity commitment obligations with respect to the relevant ABS. This is because the liquidity commitments exception is available to a ''securitization participant,'' which is defined to include not only the underwriter, placement agent, initial purchaser, or sponsor of an ABS but also any affiliate or subsidiary who is acting in coordination with such person or who has access to or receives information about the relevant ABS or the asset pool underlying or referenced by the relevant ABS. For example, it is not inconsistent with the exception for liquidity commitments in Rule 192(b)(2) for an entity that it is an underwriter, placement agent, initial purchaser, or sponsor with respect to an ABS under the final rule to provide liquidity for the ABS by causing one of its subsidiaries to engage in purchases and sales of the relevant ABS.

G. Exception for Bona Fide Market-Making Activities

1. Proposed Approach

The Commission proposed to implement the exception for bona fide market-making activity in Section 27B(c) by proposing that the prohibition in proposed Rule 192(a), subject to specified conditions, would not apply to certain bona fide market-making activities conducted by a securitization participant. This approach was consistent with Section 27B(c), which provides that the prohibition in Section 27B(a) does not apply to purchases or sales of ABS made pursuant to and consistent with bona fide market-making in the ABS.[475] Subject to specified conditions, the proposed exception would apply to bona fide market-making activity, including market-making related hedging, of a securitization participant conducted in connection with and related to an ABS, the assets underlying such ABS, or financial instruments that reference such ABS or underlying assets. In order to distinguish permitted bona fide market-making activity from prohibited conflicted transactions, the Commission proposed the following five conditions that would need to be satisfied in order for a securitization participant to rely on the bona fide market-making activities exception:

- That the securitization participant routinely stands ready to purchase and sell one or more types of the financial instruments set forth in proposed 17 CFR 230.192(b)(3)(i) (''Rule 192(b)(3)(i)'') as a part of its market-making related activities in such financial instruments, and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of such financial instruments;
- That the securitization participant's market-making related activities are designed not to exceed, on an ongoing basis, the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments;
- That the compensation arrangements of the persons performing the market-making activity of the securitization participant are designed not to reward or incentivize conflicted transactions;
- That the securitization participant would be required to be licensed or registered to engage in the relevant market-making activity, in accordance with applicable laws and self-regulatory organization (''SRO'') rules; and
- That the securitization participant would be required to have established and must implement, maintain, and enforce an internal compliance program that is reasonably designed to ensure the securitization participant's compliance with the requirements of the bona fide market-making activities exception, including reasonably designed written policies and procedures that demonstrate a process for prompt mitigation of the risks of its market-making positions and holdings.

2. Comments Received

Most commenters that addressed this aspect of the final rule provided comments related to the proposed conditions to the exception. Certain commenters supported the proposed conditions.[476] Other commenters focused on the compliance program requirement and stated that it would be unduly burdensome and inappropriate.[477] In subsequent letters, certain of the commenters suggested that the compliance program requirement should only apply to any securitization participant utilizing or relying on the exception and that the license and registration requirement should only apply to a securitization participant to the extent that it is required to be licensed or registered to engage in market-making activity by applicable law and self-regulatory organization rules.[478] The Commission also received comments that the bona fide market-making activities exception should be available in the case of the initial distribution of an ABS.[479]

3. Final Rule

We are adopting the bona fide market-making activities exception largely as proposed, with a technical modification from the proposal to one of the conditions as discussed in further detail below. Consistent with Section 27B, we are adopting a bona fide market-making activities exception that is designed to distinguish permitted bona fide market-making activity from prohibited conflicted transactions, while permitting securitization participants to continue providing intermediation services in less liquid and illiquid markets. Specifically, subject to the specified conditions discussed in detail below, the final rule provides an exception for bona fide market-making activities, including market-making related hedging, of a securitization participant conducted in connection with and related to ABS with respect to which the prohibition in Rule 192(a)(1) applies, the assets underlying such ABS, or financial instruments that reference such ABS or underlying assets or with respect to which the prohibition in paragraph (a)(1) applies, except that the initial distribution of an ABS is not bona fide market-making activity for purposes of Rule 192(b)(3). Consistent with the proposed rule, because the prohibition in Rule 192(a)(1) extends to

[474] *See* letter from SIFMA II.

[475] 15 U.S.C. 77z–2a(c)(2)(B).

[476] *See* letters from AARP; Better Markets Letter.

[477] *See* letters from ABA (stating that the compliance program requirement could be confusing); AIC (stating that compliance would be burdensome for organizations not already subject to the Volcker Rule).

[478] *See* letters from SFA II; SIFMA II.

[479] *See* letters from SFA II (focusing on synthetic ABS and suggesting the deletion of the exclusion of the initial distribution of an ABS from the bona fide market-making activities exception); SIFMA II (stating that is unclear why the initial distribution of an ABS should not be considered bona fide market-making activity).

transactions such as the purchase of a credit derivative with respect to the relevant ABS or the assets underlying the relevant ABS,[480] the final bona fide market-making activities exception applies to market-making in not only the ABS that will be subject to the prohibition of the final rule but, as described in Rule 192(b)(3)(i), also the assets underlying such ABS as well as financial instruments that reference such ABS or the assets underlying such ABS. This would capture CDS or other credit derivative products with payment terms that are tied to the performance of the ABS or its underlying assets. Consistent with this reasoning, the final bona fide market-making activities exception will also apply to bona fide market-making in any other financial instrument with respect to which the prohibition in Rule 192(a)(1) applies. The addition of this language is designed to more appropriately align the text relating to the scope of the exception with the text relating to the scope of the categories of transactions that are captured by the definition of conflicted transaction. For example, as discussed in Section II.D.3., if a securitization participant engages in a CDS transaction with respect to a pool of assets with characteristics that replicate the idiosyncratic credit performance of the pool of assets that underlies the relevant ABS, then such CDS could be, depending on the facts and circumstances, a conflicted transaction that is prohibited by Rule 192(a)(1) even if it is not a financial instrument that directly references the assets underlying the ABS. Under the bona fide market-making activities exception, the relevant securitization participant may rely on the exception to engage in such CDS transaction if it satisfies the conditions to the exception.

Consistent with the proposed rule, the initial issuance of an ABS does not qualify as bona fide market-making activity under the final exception in Rule 192(b)(3). This means that a securitization participant is not able to rely on the adopted exception for bona fide market-making activities in ABS for primary market activities, such as issuing a new synthetic ABS.[481] As explained above in Section II.E.3., initial issuances of ABS, including new synthetic ABS, can be eligible for the risk-mitigating hedging activity exception.

Certain commenters requested the bona fide market-making activities exception be available in the case of the initial distribution of an ABS.[482] One of these commenters stated that it is unclear why the initial distribution of an ABS would not be considered bona fide market-making activity and that the concerns of the Commission regarding an initial distribution of an ABS set forth in the Proposing Release would already be addressed by the various conditions applicable to the exception and the proposed anti-circumvention provision.[483]

As explained above in Section II.D.3., Rule 192(a)(3)(iii) captures, in relevant part, the purchase or sale of any financial instrument ''(other than the relevant asset-backed security)'' or entry into a transaction that is substantially the economic equivalent of a transaction described in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii). The inclusion of the language ''(other than the relevant asset-backed security)'' is designed to specify that merely entering into an agreement to serve as a securitization participant with respect to an ABS and engaging in a purchase or sale of the ABS as an underwriter, placement agent, or initial purchaser for such ABS is not itself a conflicted transaction. Therefore, as explained above in Section II.D.3., the final rule is not designed to disincentivize an underwriter, placement agent, or initial purchaser from intermediating a synthetic ABS transaction for a customer, client, or counterparty where the securitization participant does not take a short position with respect to the investors in the relevant synthetic ABS. Accordingly, the sale of a synthetic ABS to investors by an underwriter, placement agent, or initial purchaser where such securitization participant does not take a short position in the relevant synthetic ABS is not a conflicted transaction and such activity does not need to be eligible for any exception to the final rule.

However, in cases where the securitization participant enters into a conflicted transaction as a component of the initial distribution of the synthetic ABS, we do not believe that it would be appropriate to allow that conflicted transaction to be eligible for the bona fide market-making activities exception. The relevant conflicted transaction in the context of the initial distribution of a synthetic ABS arises when a securitization participant engages in a transaction (such as CDS contract(s) with the issuer) where cash paid by investors to acquire the newly created synthetic ABS would fund the relevant contract(s) and be available to make a payment to the securitization participant upon the occurrence of an adverse event with respect to the assets included in the reference pool. If such activity is not entered into for purposes of hedging an exposure of the securitization participant to the assets included in the reference pool in accordance with the conditions of the risk-mitigating hedging activities exception as described above, then such activity is a bet by the securitization participant against the performance of the relevant reference assets. This type of material conflict of interest with investors in the new synthetic ABS is the same as those raised by the synthetic CDO transactions that were the subject of Congressional scrutiny in connection with the financial crisis of 2007–2009.[484] The final rule is designed to prohibit such conflicted transactions unless they are entered into for hedging purposes in accordance with the requirements of the risk-mitigating hedging activities exception, and they are accordingly not eligible for the bona fide market-making activities exception. In response to the comment that our concerns regarding these transactions could be addressed by the other conditions that were proposed for the bona fide market-making activities exception or by the anti-evasion provision, we do not believe that these other conditions are adequate to address our concerns that these types of transactions can only be utilized for hedging purposes and cannot be utilized as a bet against the relevant ABS in the same way as they were during the

[480] Given the nature of the ABS market and that the scope of the prohibition of the rule will prohibit transactions that include not only entering into a short sale of ABS but also entering into CDS on the relevant ABS or the asset underlying such ABS, we are specifying that the bona fide market-making activities exception extends to bona fide market-making activity in financial instruments, such as CDS on the relevant ABS, that are conflicted transactions under the final rule. However, under the final rule, if the ''conflicted transaction'' is a short sale of the relevant ABS, then, in order to rely on the exception, such sale will need to constitute bona fide market-making activity in such ABS. Similarly, if the relevant ''conflicted transaction'' is a purchase and sale of a CDS, then, in order to rely on the exception, such purchase and sale will need to constitute bona fide market-making activity of the securitization participant in such CDS.

[481] Furthermore, the activity would not qualify for the exception because even if the securitization participant purchased the CDS protection (*i.e.,* a short position) purportedly as part of its market-making activity, the creation and sale of the new ABS is primary, not secondary, market activity.

[482] *See* letter from SFA II (focusing on synthetic ABS and suggesting that the bona fide market-making activities exception should cover the initial distribution of an ABS); SIFMA II (stating that is unclear why the initial distribution of an ABS should not be considered bona fide market-making activity).

[483] *See* letter from SIFMA II.

[484] *See* Wall Street and The Financial Crisis: Anatomy of a Financial Collapse, Majority and Minority Staff Report, Permanent Subcommittee on Investigations, United States Senate (Apr. 13, 2011).

financial crises of 2007–2009. [485] The conditions to the bona fide market-making activities exception do not require that the relevant transaction be entered into only for hedging purposes, and the anti-evasion provision does not set forth any standard that the relevant transaction be entered into only for hedging purposes.

Some commenters generally stated that the requirements of the bona fide market-making activities exception would be confusing, unduly burdensome, and unnecessary.[486] Although commenters did not explain what specific aspects of the requirements would be burdensome or confusing, we do not think that these conditions will be unduly difficult for securitization participants to satisfy, as discussed in further detail below. Furthermore, we believe that the conditions to the exception are necessary to distinguish permitted bona fide market-making activity from prohibited conflicted transactions. Without the inclusion of such conditions, the scope of the bona fide market-making activities exception could be susceptible to misuse by securitization participants and give rise to conflicted transactions in contradiction of Section 27B's prohibition.

At the same time, we acknowledge the important role played by securitization participants that are market makers in less liquid financial instruments and that unduly burdensome conditions could potentially impede market-making activity in less liquid financial instruments. Consistent with the reasons stated in the Proposing Release, in order to not discourage such valuable activity, the conditions to the exception as adopted specifically take into account the liquidity, maturity, and depth of the market for the relevant financial instruments, which may vary across different types of financial instruments. In response to the commenter that stated that the exception requires certain facts and circumstances determinations that may increase compliance costs,[487] we believe that considering the relevant facts and circumstances of the relevant market is necessary in order to avoid imposing an overly restrictive one-size-fits-all standard on market participants that may be confusing for market-makers with different business models to comply with and, as a result, unnecessarily impede market-making activity. As discussed in Section IV below, we acknowledge that a securitization participant availing itself of the exception will incur certain costs to do so.[488]

Furthermore, as proposed, the adopted bona fide market-making activities exception does not include a requirement to analyze the applicability of the exception on a trade-by-trade basis.[489] The adopted bona fide market-making activities exception in 17 CFR 230.192(b)(3)(ii)(B) (''Rule 192(b)(3)(ii)(B)'') is instead focused on the overall market-making related activities of a securitization participant in assets that would otherwise be conflicted transactions, with a condition that those activities are related to satisfying the reasonably expected near term demand of the securitization participant's customers. The adopted exception also encompasses market-making related hedging in order to give a securitization participant that is a market maker the flexibility to acquire positions that hedge the securitization participant's market-making inventory.

As adopted, hedging the risk of a price decline of market-making related ABS positions and holdings while the market maker holds such ABS qualifies for the adopted bona fide market-making activities exception so long as the conditions of the bona fide market-making activities exception are satisfied. Therefore, with respect to such activity, a securitization participant does not need to separately rely on the risk-mitigating hedging activities exception, which is principally designed to address the hedging of retained exposures rather than market-making positions that are entered into in connection with customer demand. To facilitate monitoring and compliance, as discussed below in the context of the compliance program condition in 17 CFR 230.192(b)(3)(ii)(E) (''Rule 192(b)(3)(ii)(E)''), a securitization participant relying on the exception for bona fide market-making activities is required to have reasonably designed written policies and procedures that demonstrate a process for prompt mitigation of the risks of its positions and holdings arising from its market-making activity. This should allow securitization participants that are market makers to determine how best to manage the risks of their market-making activity without causing a reduction in liquidity, wider spreads, or increased trading costs for market makers and their customers.[490]

As described above in Section II.D.3., one commenter expressed a concern that using the phrase ''directly or indirectly'' in Rule 192(a)(1) could be potentially interpreted to create a misalignment between the scope of the entities subject to the prohibition and the scope of the exceptions to the rule that apply to the activities of a securitization participant.[491] The final rule does not prohibit a broker-dealer affiliate or subsidiary of a securitization participant from engaging in bona fide market-making activities. This is because the bona fide market-making activities exception is available to a ''securitization participant,'' which is defined to include not only the underwriter, placement agent, initial purchaser, or sponsor of an ABS but also any affiliate or subsidiary who is acting in coordination with such person or who has access to or receives information about the relevant ABS or the asset pool underlying or referenced by the relevant ABS. For example, it is not inconsistent with the exception for bona fide market-making activities in Rule 192(b)(3) for a broker-dealer affiliate or subsidiary of an entity that is a securitization participant with respect to an ABS under the final rule to engage in bona fide market-making activity with respect to that ABS.

Each of the specific conditions in Rule 192(b)(3) applicable to the bona fide market-making activities exception is described in detail below.

a. Requirement to Routinely Stand Ready To Purchase and Sell

The Commission did not receive comments to proposed 17 CFR 230.192(b)(3)(ii)(A), and we are adopting it as proposed. Therefore, the first condition to the final exception is that the securitization participant routinely stands ready to purchase and sell one or more types of the financial instruments set forth in Rule 192(b)(3)(i) as a part of its market-making related activities in such financial instruments, and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments, in commercially reasonable amounts and throughout market cycles on a basis

[485] *See* letter from SIFMA II.

[486] *See* letters from ABA; AIC.

[487] *See* letters from AIMA/ACC.

[488] *See* Section IV.

[489] This approach differs from the requirements under Regulation SHO, whereby the market maker must be engaged in bona fide market-making in the security at the time of the short sale for which it seeks the exception. *See* Amendments to Regulation SHO, 34–58775, 73 FR 61690, 61699 n.103 (Oct. 17, 2008) (citing Rules 203(B)(1) and 203(B)(2)(iii) of Regulation SHO). Activity that might be bona fide market-making activities for purposes of Rule 192 may not be bona fide market-making for purposes of other rules, including Regulation SHO, and vice versa.

[490] Market-makers will generally already have certain policies and procedures in place to promote compliance with other securities laws applicable to them.

[491] *See* letters from SIFMA II.

appropriate for the liquidity, maturity, and depth of the market for the relevant types of such financial instruments.

This ''routinely stands ready'' standard takes into account the actual liquidity and depth of the relevant market for ABS and financial instruments related to ABS described in Rule 192(b)(3)(i), which may be less liquid than, for example, listed equity securities. This ''routinely stands ready'' standard, as opposed to a more stringent standard such as ''continuously purchases and sells,'' [492] is designed to avoid having a chilling effect on a person's ability to act as a market maker in a less liquid market. The ''routinely stands ready'' standard is appropriate for bona fide market-making activities in ABS and related financial instruments described in Rule 192(b)(3)(i) because market makers in such illiquid markets likely do not trade continuously but trade only intermittently or at the request of customers.

However, the mere provision of liquidity is not necessarily sufficient for a securitization participant to satisfy this condition. This condition is designed to help ensure that activity that will qualify for the exception in the final rule will not apply to a securitization participant only providing quotations that are wide of (in comparison to the bid-ask spread) one or both sides of the market relative to prevailing market conditions. In order to satisfy this condition, the securitization participant needs to have an established pattern of providing price quotations on either side of the market and a pattern of trading with customers on each side of the market. Furthermore, a securitization participant needs to be willing to facilitate customer needs in both upward and downward moving markets and not only when it is favorable for the securitization participant to do so in order for it to ''routinely stand ready'' to purchase and sell the relevant financial instruments throughout market cycles. Also, in this context, ''commercially reasonable'' amounts means that the securitization participant must be willing to quote and trade in sizes requested by market participants in the relevant market. This is indicative of the securitization participant's willingness and availability to provide intermediation services for its clients, customers, or counterparties that is consistent with bona fide market-making activities in such market.

[492] For example, under Regulation SHO's bona fide market-making exception, the relevant broker-dealer should generally be holding itself out as standing ready and willing to buy and sell the relevant security by continuously posting widely disseminated quotes that are near or at the market, and must be at economic risk for such quotes. *See* 2008 Regulation SHO Amendments at 61690, 61699 (citing indicia including whether the market maker incurs any economic or market risk with respect to the securities (*e.g.,* by putting its own capital at risk to provide continuous two-sided quotes)); *see also* Further Definition of ''As a Part of a Regular Business'' in the Definition of Dealer and Government Securities Dealer, Release No. 34–94524 (Mar. 28, 2022) [87 FR 23054 (Apr. 18, 2022)] (''Dealer Release'') at 23068 n.157 (stating that broker-dealers that do not publish continuous quotations, or publish quotations that do not subject the broker-dealer to such risk (*e.g.,* quotations that are not publicly accessible, are not near or at the market, or are skewed directionally towards one side of the market) would not be eligible for the bona fide market-making exception under Regulation SHO).

b. Limited to Client, Customer, or Counterparty Demand Requirement

The Commission did not receive comments to proposed Rule 192(b)(3)(ii)(B), and we are adopting it as proposed. Therefore, the second condition to the final exception is that the securitization participant's market-making related activities are designed not to exceed, on an ongoing basis, the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments discussed in Rule 192(b)(3)(i) (permitted bona fide market-making activities). The purpose of this condition is to distinguish activity that is characteristic of bona fide market-making activities from a securitization participant entering into a conflicted transaction to bet against the relevant ABS for the benefit of its own account, while still allowing securitization participants to make a market in ABS and the related financial instruments described in Rule 192(b)(3)(i), which may be relatively illiquid. Under the final rule, this is a facts and circumstances determination that is focused on an analysis of the reasonably expected near-term demand of customers while also recognizing that the liquidity, maturity, and depth of the relevant market may vary across asset types and classes. The recognition of these differences in the condition should avoid unduly impeding a market maker's ability to build or retain inventory in less liquid instruments. The facts and circumstances that will be relevant to determine compliance with this condition include, but are not limited to, historical levels of customer demands, current customer demand, and expectations of near-term customer demand based on reasonably anticipated near term market conditions, including, in each case, inter-dealer demand. For example, a securitization participant facilitating a secondary market credit derivative transaction with respect to an ABS in response to a current customer demand will satisfy this condition. However, if the securitization participant builds an inventory of CDS positions in the absence of current demand and without any reasonable basis to build that inventory based on either historical demand or anticipated demand based on expected near term market conditions, there will be no reasonably expected near term customer demand for those positions and that transaction will fail to satisfy this condition.

c. Compensation Requirement

The Commission received no comments regarding proposed 17 CFR 230.192(b)(3)(ii)(C), and we are adopting it as proposed. Therefore, the third condition of the final exception is that the compensation arrangements of the persons performing the market-making activity of the securitization participant are designed not to reward or incentivize conflicted transactions. For example, it would be consistent with this condition if the relevant compensation arrangement is designed to reward effective and timely intermediation and liquidity to customers. It would be inconsistent with this condition if the relevant compensation arrangement is instead designed to reward speculation in, and appreciation of, the market value of market-making positions that the securitization participant enters into for the benefit of its own account. This approach is similar to that taken for purposes of the Volcker Rule.[493]

d. Registration Requirement

We are adopting proposed 17 CFR 230.192(b)(3)(ii)(D) largely as proposed to provide that the fourth condition of the exception is that the securitization participant is licensed or registered, if required, to engage in the relevant market-making activity, in accordance with applicable laws and SRO rules. This condition is designed to limit persons relying on the exception for bona fide market-making activities to only those persons with the appropriate license or registration to engage in such activity in accordance with the requirements of applicable laws and SRO rules for such activity—unless the relevant person is exempt from registration or excluded from regulation with respect to such activity under

[493] *See Prohibitions and Restrictions on Proprietary Trading and Certain Interests In, and Relationships With, Hedge Funds and Private Equity Funds,* Release No. BHCA–1 (Dec. 10, 2013) [79 FR 5536 (Jan. 31, 2014)] at 5619.

applicable law and SRO rules.[494] In a change from the proposal, the addition of the phrase ''if required'' specifies that a securitization participant that is so exempt from registration or excluded from regulation is still eligible to use the exception. This is also consistent with the suggestion of the comments that the Commission received with respect to this condition.[495]

Persons engaged in market-making activity in the securities markets in connection with ABS may be engaged in dealing activity. If so, absent an exception or exemption, these persons are required to register as ''dealers'' pursuant to Section 15(a) of the Exchange Act, as ''government securities dealers'' pursuant to Section 15C of the Exchange Act, or as ''security-based swap dealers'' pursuant to Section 15F(a) of the Exchange Act.[496] A securitization participant that is a registered broker-dealer will satisfy the market-making exception's registration condition.[497] Similarly, a securitization participant licensed as a bank or registered as a security-based swap dealer in accordance with applicable law will also be eligible for the exception.

e. Compliance Program Requirement

We are adopting proposed Rule 192(b)(3)(ii)(E) as proposed. Therefore, the fifth and final condition to the exception is that the securitization participant is required to have established and must implement, maintain, and enforce an internal compliance program that is reasonably designed to ensure the securitization participant's compliance with the requirements of the bona fide market-making activities exception, including reasonably designed written policies and procedures that demonstrate a process for prompt mitigation of the risks of its positions and holdings.

A number of commenters expressly supported including a compliance program requirement.[498] However, one commenter stated that the potential confusion regarding this requirement would undercut the ability of securitization participants to rely on the exception and that it is not clear that such condition is within the scope of the congressional intent of Section 27B.[499] One commenter initially requested that the compliance program requirement be omitted in its entirety because it would be unduly burdensome and unnecessary.[500] However, this commenter subsequently requested that the compliance program requirement instead specify that it would only apply to any securitization participant utilizing the exception.[501] Another commenter suggested a similar revision.[502]

In response to the comment that the compliance program condition would undercut the ability of a securitization participant to rely on the exception and that it is not clear that such condition is within the scope of the congressional intent of Section 27B, we recognize that certain securitization participants may need to create a new compliance program to comply with this condition and that this may result in increased compliance costs.[503] However, Section 27B(b) requires that the Commission adopt rules to implement the prohibition in Section 27B(a) against a securitization participant engaging in any transaction that would involve or result in any material conflict of interest with respect to any investor in a transaction arising out of the ABS activity of a securitization participant. The compliance program condition is necessary to help ensure that the activities of a securitization participant relying on the bona fide market-making activities exception are indeed bona fide market-making activities and not the type of transactions that would involve or result in a material conflict of interest between a securitization participant for an ABS and an investor in such ABS. The market-making activity of a securitization participant in ABS and related financial instruments described in Rule 192(b)(3)(i) can be inherently complex. Therefore, requiring a securitization participant to establish and enforce an internal compliance program will help that entity adequately evaluate and track its market-making activity in a way that is reasonably designed to help prevent violations of the rule. Additionally, as discussed in Section IV, this condition will enhance the benefits of the rule by assuring investors that a securitization participant is less likely to engage in activities that are prohibited by Rule 192 if it has a program to monitor ongoing compliance with the rule.

To avoid imposing a one-size-fits-all requirement that may unduly burden securitization participants that are different in size or that make markets in different types of financial instruments, this condition recognizes that a securitization participant that is a market maker in ABS and related financial instruments described in paragraph (b)(3)(i) is well positioned to design its own individual internal compliance program to reflect the size, complexity, and activities of the securitization participant. This should help ease compliance costs as the relevant securitization participant can tailor its compliance program to its particular business model. As a general matter, we also recognize that costs of the final rule potentially may have a proportionally greater effect on small entities, as such costs may be a relatively greater percentage of the total cost of operations for smaller entities than larger entities, and thus small entities may be less able to bear such costs relative to larger entities. However, the potentially less complex securitization activities of small entities and their correspondingly less complex compliance considerations may counterbalance such costs as compared to larger and more diversified securitization participants. We also believe that the changes discussed above to refine the scope of the

[494] For example, a person meeting the conditions of the *de minimis* exception in Exchange Act Rule 3a71–2 would not need to be a registered security-based swap dealer to act as a market maker in security-based swaps. *See* 17 CFR 240.3a71–2.

[495] *See* letters from SFA II; SIFMA II; LSTA IV.

[496] *See, e.g., Definition of Terms in and Specific Exemption for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934,* Release No. 34–46745 (Oct. 30, 2002) [67 FR 67496 (Nov. 5, 2002)] at 67498–67500; *see also Further Definition of* ''*Swap Dealer,*'' ''*Security-Based Swap Dealer,*'' ''*Major Swap Participant,*'' ''*Major Security-Based Swap Participant*'' *and* ''*Eligible Contract Participant,*'' Release No. 34–66868 (Apr. 27, 2012) [77 FR 30596 (May 23, 2012)] at 30616–30619. *See also* Dealer Release, *supra* note 492.

[497] The bona fide market-making activities exception in the final rule is narrower than market-making activity that may require a person to register as a dealer. In other words, a securitization participant who does not meet all conditions of the rule's bona fide market-making activities exception may still be required to register as a broker-dealer. *See id.; see also* 15 U.S.C. 78c(a)(38) (defining the term ''market maker'' to mean any specialist permitted to act as a *dealer,* any *dealer* acting in the capacity of block positioner, and any *dealer* who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis). Further, defined terms and the determination of eligibility for the bona fide market-making activities exception in the final rule are distinct from those available under other rules, such as Regulation SHO and recently proposed rules to include certain significant market participants as ''dealers'' or ''government securities dealers.'' *See, e.g.,* Dealer Release, *supra* note 492, at 23068 n.131 (distinguishing the determination of eligibility for the bona fide market-making exceptions of Regulation SHO from the determination of whether a person's trading activity indicates that such person is acting as a dealer or government securities dealer under the rule proposed in that Exchange Act Release).

[498] *See* letters from AARP; Better Markets.

[499] *See* letter from ABA.

[500] *See* letter from SIFMA I.

[501] *See* letter from SIFMA II.

[502] *See* letter from SFA II.

[503] *See* Section IV.

definition of ''conflicted transaction'' [504] and the scope of covered affiliates and subsidiaries [505] are designed to ease the compliance program burden on securitization participants by providing greater certainty regarding the types of transactions and relevant entities that are subject to the rule's prohibition.

In response to comments that the compliance program requirement should specify that it only applies to any securitization participant utilizing the exception,[506] it is unnecessary to do so because the requirement applies only if the securitization participant is relying on the exception. Rule 192(b)(3)(ii)(E) sets forth a condition to utilizing the exception in Rule 192(3)(i) and does not separately require that a securitization participant satisfy the compliance program requirement if it is not utilizing the exception.

In order to assist a securitization participant in determining whether it satisfies the first and second conditions of the exception, we observe that a reasonably designed compliance program of the securitization participant generally should set forth the processes by which the relevant trading personnel will identify the financial instruments described in Rule 192(b)(3)(i) related to its securitization activities that the securitization participant may make a market in for its customers and the processes by which the securitization participant will determine the reasonably expected near term demand of customers for such products. The identification of such instruments and the processes for determining the reasonably expected near term demand of customers for such instruments in the compliance program should help prevent trading personnel at the relevant securitization participant from taking positions in conflicted transactions that are not positions that the securitization participant expects to make a market in for customers or that are in an amount that would exceed the reasonably expected near term demands of customers. Furthermore, to assist a securitization participant in determining whether it satisfies the first and second conditions of the exception on an ongoing basis, we observe that a reasonably designed compliance program of the securitization participant generally should also establish internal controls and a system of ongoing monitoring and analysis that the securitization participant will utilize in order to effectively ensure the compliance of its trading personnel with its policies and procedures regarding permissible market-making under the final rule.

It is important that the reasonably designed written policies and procedures demonstrate a process for prompt mitigation of the risks of a securitization participant's positions and holdings that arise from market-making in ABS and the related financial instruments described in Rule 192(b)(3)(i), such as the risks of aged positions and holdings, because doing so should help to prevent a securitization participant from engaging in a transaction and maintaining a position that is adverse to the relevant ABS that remains open and exposed to potential gains for a prolonged period of time. While mitigating the risks of such positions and holdings is not required to be contemporaneous with the acquisition of such positions or holdings, prompt mitigation means that the mitigation occur without an unreasonable delay that will facilitate or create an opportunity to benefit from a conflicted transaction remaining in the securitization participant's market-making inventory considering the liquidity, maturity, and depth of the market for the relevant types of financial instruments.

The requirement that a process for such risk mitigation activity be included in a securitization participant's written policies and procedures should help prevent speculative activity being disguised as market-making by establishing the processes by which the relevant trading personnel will enter into, adjust, and unwind positions and holdings that arise from market-making in ABS.

One commenter suggested that any securitization participant relying on the exception for bona fide market-making activities should be required to affirmatively certify that it is undertaking such activity for the sole purpose of market-making and not for the purpose of generating speculative profits.[507] Certain commenters also suggested that a responsible party at the securitization participant should be required to certify the effectiveness of the applicable written policies and procedures prior to their implementation and on an ongoing basis.[508] Consistent with the Proposing Release, we did not include certification requirements in the final rule because we believe that the conditions to the bona fide market-making activities exception are sufficiently robust to prevent the exception from resulting in conflicted transactions in contradiction to Section 27B's prohibition.

H. Anti-Evasion

1. Proposed Rule

To address concerns that the potential circumvention of the proposed rule could undermine the investor protection goals of Section 27B, the Commission proposed Rule 192(d) to provide that, if a securitization participant engages in a transaction that circumvents the prohibition in proposed Rule 192(a)(1), the transaction would be deemed to violate proposed Rule 192(a)(1).

2. Comments Received

One commenter supported the proposed anti-circumvention provision and stated that ''it should remain broad to give the Commission ample authority to enforce efforts by market participants to evade the prohibition.'' [509] However, other commenters stated that anti-circumvention provision, as proposed, would make it difficult for market participants to understand the scope of the proposed rule and requested that the Commission delete the provision.[510] As an alternative, certain commenters suggested that the Commission should replace the provision with an anti-evasion provision, with some of these commenters stating that such anti-evasion standard should apply only with respect to the use of an exception to the rule as part of a plan or scheme to evade the rule's prohibition.[511]

[504] *See* Section II.D.3. (discussing how Rule 192(a)(3)(iii) as adopted only applies to the purchase or sale of any financial instrument that is substantially the economic equivalent of a transaction described in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii) and provides that, for the avoidance of doubt, any transaction that only hedges general interest rate or currency exchange risk is not a conflicted transaction).

[505] *See* Section II.B.3.c. (discussing how paragraph (ii) of the definition of a ''securitization participant'' as adopted will only capture any affiliate (as defined in 17 CFR 230.405) or subsidiary (as defined in 17 CFR 230.405) of a person described in paragraph (i) of the definition if the affiliate or subsidiary: (A) acts in coordination with a person described in paragraph (i) of the definition; or (B) has access to or receives information about the relevant asset-backed security or the asset pool supporting or referenced by the relevant asset-backed security prior to the first closing of the sale of the relevant asset-backed security).

[506] *See* letters from SFA II; SIFMA II.

[507] *See* letter from Better Markets.

[508] *See* letters from AARP; Better Markets.

[509] *See* letter from Better Markets.

[510] *See* letters from AIMA/ACC; AIC (alternatively requesting that an anti-evasion provision only apply to a securitization participant's intentional use of an affiliate or subsidiary to accomplish an otherwise prohibited result).

[511] *See* letters from ABA (stating that the Federal securities laws generally include anti-evasion provisions and not anti-circumvention provisions and expressing its belief that an anti-evasion standard would be more appropriate because it would be tied to the actions of the securitizations participant rather than the effect of the transaction); AFME (supporting the approach suggested by SIFMA); LSTA III (supporting the approach suggested by SIFMA); SFA II (suggesting an anti-

3. Final Rule

We are adopting Rule 192(d) with certain modifications in response to comments received on the proposal. In a change from the proposal, the anti-evasion provision will only apply with respect to the use of an exception as part of a plan or scheme to evade the rule's prohibition. Specifically, Rule 192(d) will provide that if a securitization participant engages in a transaction or a series of related transactions that, although in technical compliance with one of the exceptions described in Rule 192(b), is part of a plan or scheme to evade the prohibition in Rule 192(a)(1), that transaction or series of related transactions will be deemed to violate Rule 192(a)(1). As discussed below, this anti-evasion provision is important for helping to ensure the effectiveness of the final rule's prohibition, and we do not believe that the provision, when considered together with the other changes we are making from the proposal, will make it difficult for market participants to understand the scope of the final rule.

Rule 192(d), as adopted, is generally consistent with the suggestion of certain commenters that we adopt an anti-evasion provision as opposed to an anti-circumvention provision.[512] We are persuaded that an anti-circumvention provision could have the potential to be both overinclusive and vague in this particular circumstance given the other elements of the rule, and that an anti-evasion standard that focuses on the actions of the securitization participants as part of scheme to evade the rule's prohibition would be more appropriate. We are also persuaded by the suggestion of certain commenters that the anti-evasion provision should only apply to a securitization participant's claimed compliance with one of the exceptions to the rule.[513] This is because the prohibition in Rule 192(a), as adopted, includes certain provisions that are designed to prevent attempted evasion of the rule. For example, the prohibition in Rule 192(a)(1) captures a securitization participant ''indirectly'' engaging in any transaction that would involve or result in any material conflict of interest between the securitization participant and an investor in such ABS. Additionally, Rule 192(a)(3)(iii) captures any transaction that is substantially the economic equivalent of a transaction described in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii). Therefore, we do not believe that it is necessary to apply the anti-evasion provision to the prohibition itself.

We disagree with commenters' suggestions that the final rule should not include any anti-circumvention or anti-evasion provision.[514] The anti-evasion provision is designed to address those situations in which securitization participants engage in efforts to evade the rule's prohibition by claiming technical compliance with one of the exceptions to the rule when, in fact, such securitization participant's conduct constitutes part of a plan or scheme to evade the rule's prohibition. Such evasion would undermine the investor protection mandate of Section 27B.

I. Compliance Date

The final rule is effective February 5, 2024. Under the compliance date that we are adopting in this release, any securitization participant must comply with the prohibition and the requirements of the exceptions to the final rule, as applicable, with respect to any ABS the first closing of the sale of which occurs on or after Mon., June 9, 2025.

Numerous commenters addressed the compliance period for the final rule, with many of these commenters suggesting at least 12 months following the date that the final rule is published in the **Federal Register**.[515] These commenters cited operational challenges and systems changes, particularly with respect to the compliance program requirements applicable to the risk-mitigating hedging activities exception and the bona fide market-making activities exception, which would necessitate time to adopt and implement. One commenter recommended a compliance period of 18 to 24 months based on concerns regarding the scope of the proposed definition of conflicted transaction and the proposed application of the rule to affiliates.[516] We recognize that certain persons subject to the rule will need to update their operations and systems in order to comply with the final rule, and we are adopting the compliance date of 18 months after adoption. This delayed compliance date is designed to provide affected securitization participants that intend to utilize the risk-mitigating hedging activities exception and the bona fide market-making activities exception with adequate time to develop the internal compliance programs that are required to satisfy the conditions of such exceptions as well as adequate time to develop any internal compliance mechanisms that the securitization participant decides to implement in order to address the scope of its affiliates and subsidiaries that are subject to the final rule. We are not persuaded that any additional time is needed because we believe that the changes made from the proposed rule to narrow the scope of the definition of conflicted transaction[517] and the scope of the affiliates and subsidiaries of a securitization participant that are subject to the rule[518] generally are expected to ease compliance burdens and mitigate the need for a compliance period longer than 18 months after adoption.[519]

III. Other Matters

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid,

evasion standard); SIFMA I (suggesting an anti-evasion standard that applies to the exceptions).

[512] *See* letters from ABA (stating that the Federal securities laws generally include anti-evasion provisions and not anti-circumvention provisions and expressing its belief that an anti-evasion standard would be more appropriate because it would be tied to the actions of the securitizations participant rather than the effect of the transaction); SFA II (suggesting an anti-evasion standard).

[513] *See* letters from SIFMA Letter I (suggesting an anti-evasion standard that applies to the exceptions); AFME (supporting the approach suggested by SIFMA); LSTA III (supporting the approach suggested by SIFMA).

[514] *See* letters from AIMA/ACC; AIC.

[515] *See* letters from ICI Letter; LSTA III (requesting that the compliance period begin at least 12 months following the date that the final rule is published in the **Federal Register**); MFA II (requesting a transition period of at least 12 months); SFA I; SIFMA I (requesting that the compliance period begin at least 12 months following the date that the final rule is published in the **Federal Register**).

[516] *See* letter from SFA II.

[517] *See* Section II.D.3. (discussing how Rule 192(a)(3)(iii) as adopted only applies to the purchase or sale of any financial instrument that is substantially the economic equivalent of a transaction described in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii) and provides that, for the avoidance of doubt, any transaction that only hedges general interest rate or currency exchange risk is not a conflicted transaction).

[518] *See* Section II.B.3.c. (discussing how paragraph (ii) of the definition of a ''securitization participant'' as adopted will only capture any affiliate (as defined in 17 CFR 230.405) or subsidiary (as defined in 17 CFR 230.405) of a person described in paragraph (i) of the definition if the affiliate or subsidiary: (A) acts in coordination with a person described in paragraph (i) of the definition; or (B) has access to or receives information about the relevant asset-backed security or the asset pool supporting or referenced by the relevant asset-backed security prior to the first closing of the sale of the relevant asset-backed security).

[519] With respect to the compliance date, one commenter requested the Commission to consider interactions between the proposed rule and other recent Commission rules. In determining compliance dates, the Commission considers the benefits of the rules as well as the costs of delayed compliance dates and potential overlapping compliance dates. For the reasons discussed throughout the release, to the extent that there are costs from overlapping compliance dates, the benefits of the rule justify such costs. *See* Section IV for a discussion of the interactions of the final rule with certain other Commission rules.

such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act, the Office of Information and Regulatory Affairs has designated this rule as a ''major rule,'' as defined by 5 U.S.C. 804(2).

IV. Economic Analysis

A. Introduction

This final rule implements the requirements of Section 27B,[520] as mandated by the Dodd-Frank Act. As discussed above, Section 621 of the Dodd-Frank Act added Section 27B to the Securities Act. Section 27B prohibits an underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity, of an ABS, including a synthetic ABS, from engaging in any transaction that would involve or result in certain material conflicts of interest.[521] Section 27B also includes exceptions from this prohibition for certain risk-mitigating hedging activities, bona fide market-making activities, liquidity commitments, and a foreign transaction safe-harbor provision. [522]

As discussed above in Sections I.A. and I.B., Section 27B requires that the Commission issue rules for the purpose of implementing the prohibition in Section 27B. We are sensitive to the economic impact, including the costs and benefits, imposed by this rule.[523] This section presents an analysis of the expected economic effects—including costs, benefits, and impact on efficiency, competition, and capital formation—that may result from the final rule, as well as possible alternatives to the final rule. Many of these effects, costs, and benefits stem from statutory mandates, while others are affected by the discretion exercised in implementing these mandates.

Where possible, we have sought to quantify the benefits, costs, and effects on efficiency, competition, and capital formation expected to result from the final rule. However, we are unable to reliably quantify many of the economic effects due to limitations on available data. Therefore, parts of the discussion below are qualitative in nature, although we try to describe, where possible, the direction of these effects. We further note that even in cases where we have some data regarding certain economic effects, the quantification of these effects is particularly challenging due to the number of assumptions that we need to make to forecast how the ABS issuance practice will change in response to the final rule, and how those responses will, in turn, affect the broader ABS market. For example, the rule's effects will depend on how sponsors, borrowers, investors, and other parties to the ABS transactions (*e.g.,* originators, trustees, underwriters, and other parties that facilitate transactions between borrowers, issuers, and investors) adjust on a long-term basis to this new rule and the resulting market conditions. The ways in which these parties may adjust, and the associated effects, are complex and interrelated. As a result, we are unable to predict some of them with specificity or quantify them.

The Commission received comments related to various aspects of the economic analysis of the proposed rule. The Commission has considered and responds to these comments in the sections that follow.

B. Economic Baseline

The baseline against which the costs, benefits, and the effects on efficiency, competition, and capital formation of the final rule are measured consists of the current state of the ABS market, current practice as it relates to securitization participants, and the current regulatory framework. The economic analysis considers existing regulatory requirements, including recently adopted rules, as part of its economic baseline against which the costs and benefits of the final rule are measured.[524]

One commenter requested the Commission consider interactions between the economic effects of the proposed rule and other recent Commission proposals.[525] The commenter indicated there could be interactions between this rulemaking and three proposals that have since been adopted: [526] the Beneficial Ownership Reporting Release,[527] the Private Fund Advisers Adopting Release,[528] and the Short Position Reporting Release.[529] In

[520] 15 U.S.C. 77z–2a.

[521] *See* Section I.A.

[522] *See* Sections II.E. through II.G.

[523] Section 2(b) of the Securities Act (15 U.S.C. 77b(b)) requires us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

[524] *See, e.g., Nasdaq* v. *SEC,* 34 F.4th 1105, 1111–15 (D.C. Cir. 2022). This approach also follows SEC staff guidance on economic analysis for rulemaking. *See* Staff's ''Current Guidance on Economic Analysis in SEC Rulemaking'' (Mar. 16, 2012), *available at https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf* (''The economic consequences of proposed rules (potential costs and benefits including effects on efficiency, competition, and capital formation) should be measured against a baseline, which is the best assessment of how the world would look in the absence of the proposed action.''); *Id.* at 7 (''The baseline includes both the economic attributes of the relevant market and the existing regulatory structure.''). The best assessment of how the world would look in the absence of the proposed or final action typically does not include recently proposed actions, because doing so would improperly assume the adoption of those proposed actions.

[525] *See* letter from MFA III (''We urge the Commission to evaluate the costs and benefits of the Proposals, in the aggregate, for private fund advisers, their investors, and the markets generally.'').

[526] *Modernization of Beneficial Ownership Reporting,* Release No. 33–11030 (Feb. 10, 2022), 87 FR 13846 (Mar. 10, 2022) (*see* letter from MFA III, at 14–15); *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews,* Release No. IA–5955 (Feb. 9, 2022), 87 FR 16886 (Mar. 24, 2022) (*see* letter from MFA III, at 10–12); *Short Position and Short Activity Reporting by Institutional Investment Managers,* Release No. 34–94313 (Feb. 25, 2022), 87 FR 14950 (Mar. 16, 2022) (*see* letter from MFA III, at 15–16).

[527] *See Modernization of Beneficial Ownership Reporting,* Release Nos. 33–11030; 34–94211 (Oct. 6, 2023) (''Beneficial Ownership Reporting Release''). Among other things, the amendments generally shorten the filing deadlines for initial and amended beneficial ownership reports filed on Schedules 13D and 13G, and require that Schedule 13D and 13G filings be made using a structured, machine-readable data language. The new disclosure requirements and filing deadlines for Schedule 13D are effective 90 days after publication in the **Federal Register**. The new filing deadline for Schedule 13G takes effect on Sept. 30, 2024, and the rule's structured data requirements have a one-year implementation period ending Dec. 18, 2024. *See* Beneficial Ownership Reporting Release, Section II.G.

[528] *See Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews,* Release No. IA–6383 (Aug. 23, 2023), 88 FR 63206 (Sept. 14, 2023) (''Private Fund Advisers Adopting Release''). The Private Fund Advisers Adopting Release includes new rules designed to protect investors who directly or indirectly invest in private funds by increasing visibility into certain practices and restricting other practices, along with amendments to the Advisers Act books and records rule and compliance rule. The amended Advisers Act compliance provision for registered investment advisers has a Nov. 13, 2023, compliance date. The compliance date is Mar. 14, 2025, for the rule's quarterly statement and audit requirements for registered investment advisers with private fund clients. For the rule's adviser-led secondaries, restricted activity, and preferential treatment requirements, the compliance date is Sept. 14, 2024, for larger advisers and Mar. 14, 2025, for smaller advisers. *See* Private Fund Advisers Adopting Release, Sections IV., VI.C.1.

[529] *See Short Position and Short Activity Reporting by Institutional Investment Managers,* Release No. 34–98738 (Oct. 13, 2023), 88 FR 75100 (Nov. 1, 2023) (''Short Position Reporting Release''). The new rule and related form are designed to provide greater transparency through the publication of short sale-related data to investors and other market participants. Under the new rule, institutional investment managers that meet or exceed certain specified reporting thresholds are required to report, on a monthly basis using the related form, specified short position data and short activity data for equity securities. The compliance date for the rule is Jan. 2, 2025. In addition, the Short Position Reporting Release amends the national market system plan governing the consolidated audit trail (''CAT'') to require the reporting of reliance on the bona fide market

addition, the commenter identified one rule that had recently been adopted prior to the commenter's letter, the May 2023 SEC Form PF Amending Release.[530] These rules were not included as part of the baseline in the Proposing Release because they were not adopted at that time. In response to commenters, this economic analysis considers potential economic effects arising from any overlap between the compliance period for the final rule and each of these recently adopted rules.[531]

The requirements of the final rule will affect ABS market participants, including securitization participants, as defined in Rule 192, and investors in ABS, and indirectly affect loan originators, consumers, businesses, municipal entities, and nonprofits that seek access to credit. The costs and benefits of the requirements depend largely on the current market practices specific to each securitization market. The economic significance or the magnitude of the effects of the requirements also depend on the overall size of the securitization market and the extent to which the requirements affect access to, and the cost of, capital. Below, we describe our current understanding of the securitization markets that will be affected by the final rule.

1. Overview of the Securitization Markets

The securitization markets are important for the U.S. economy and constitute a large fraction of the U.S. debt market.[532] Securitizations play an important role in the creation of credit by increasing the amount of capital available for the origination of loans and other receivables through the transfer of those assets—in exchange for new capital—to other market participants. The intended benefits of the securitization process include reduced cost of credit and expanded access to credit for borrowers, ability to match risk profiles of securities to investors' specific demands and increased secondary market liquidity for loans and other receivables.[533]

Since the final rule applies to a securitization participant commencing on the date on which such person has reached an agreement to become a securitization participant until one year after the date of the first closing of the sale of the ABS, we generally use ABS issuance information rather than information on ABS amounts outstanding to estimate the number of affected parties and the size of the affected ABS market. Information presented regarding securitized asset fund advisors is instead based on amounts outstanding due to data availability. For the purposes of establishing an economic baseline and to estimate affected market size, we use data covering the most recent full calendar year 2022 to avoid any seasonal effects on estimates (''baseline period'').[534]

We estimate that the baseline period annual issuance of private-label[535] non-municipal ABS in the United States was $603 billion in 1,122 individual ABS deals and the baseline period annual issuance of municipal ABS in the U.S. was $74 billion in 1,332 deals.[536] Out of private-label non-municipal ABS, 10 deals totaling $2.8 billion were risk transfer ABS deals; some or all of these risk transfer ABS deals could be synthetic ABS or hybrid cash and synthetic ABS deals.[537] During the baseline period, Ginnie Mae provided a government guarantee to $527 billion of newly issued MBS, and the Enterprises issued $1.20 trillion of Enterprise-guaranteed MBS[538] and 19 CRT securities deals worth $21.6 billion.[539] Currently, the Enterprises are in conservatorship with the U.S. Treasury and are regulated by the FHFA.[540]

making exception in the Commission's short sale rules. The compliance date for the CAT amendments is July 2, 2025.

[530] *See Form PF; Event Reporting for Large Hedge Fund Advisers and Private Equity Fund Advisers; Requirements for Large Private Equity Fund Adviser Reporting,* Release No. IA–6297 (May 3, 2023), 88 FR 38146 (June 12, 2023) (''May 2023 SEC Form PF Amending Release''). The Form PF amendments require large hedge fund advisers and all private equity fund advisers to file reports upon the occurrence of certain reporting events. For new sections 5 and 6 of Form PF, the compliance date is Dec. 11, 2023; for the amended, existing sections, it is June 11, 2024. *See* May 2023 SEC Form PF Amending Release, section II.E.

[531] In addition, one commenter indicated there could also be overlapping compliance costs between the final amendments and proposals that have not been adopted. *See,* letter from MFA III. To the extent those proposals are adopted, the baseline in those subsequent rulemakings will reflect the existing regulatory requirements at that time. One of the proposals identified by the commenter, *Prohibition Against Fraud, Manipulation, or Deception in Connection With Security-Based Swaps; Prohibition Against Undue Influence Over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions,* Exchange Act Release No. 93784 (Dec. 15, 2021), [87 FR 6652, 6678 (Feb. 4, 2022)], has been partially adopted. *See Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers,* Release No. 34–97656 (June 7, 2023), [88 FR 42546 (June 20, 2023)] (''Security-Based Swaps Release''). However, the commenter focused their comments on the portion of that proposal that has not yet been adopted (*i.e.,* reporting of large security-based swap positions), and the adopted rule would not have any significant effects from overlapping compliance periods because that rule was effective Aug. 23, 2023.

[532] *See, e.g.,* SEC Staff Report, U.S. Credit Markets Interconnectedness and the Effects of the COVID–19 Economic Shock (Oct. 2020), *available at https://www.sec.gov/files/US-Credit-Markets_COVID-19_Report.pdf.* Among other things, the report provides an overview of the various parts of the securitization markets and their connections to the broader U.S. financial markets. This is a report of the staff of the U.S. Securities and Exchange Commission. This report represents the views of Commission staff, and is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved the content of this report and, like all staff statements, it has no legal force or effect, does not alter or amend applicable law, and creates no new or additional obligations for any person.

[533] *See, e.g.,* Board of Governors of the Federal Reserve System, Report to the Congress on Risk Retention (Oct. 2010), *available at https://www.federalreserve.gov/boarddocs/rptcongress/securitization/riskretention.pdf;* Financial Stability Oversight Council, Macroeconomic Effects of Risk Retention Requirements (Jan. 2011), *available at https://www.lexissecuritiesmosaic.com/gateway/treasury/pr/Documents_Section_20946_20Risk_20Retention_20Study_20_20(FINAL).pdf.*

[534] The primary data source for our numeric estimates of issuance of private-label non-municipal ABS are the Green Street Asset-Backed Alert Database and the Green Street Commercial Mortgage Alert Database. The databases present the initial terms of all ABS, MBS, CMBS, and CLOs collateralized by assets, and synthetic CDOs, rated by at least one major credit rating agency, and placed anywhere in the world (however, only deals sold in the U.S. are included in our analysis). The databases identify the primary participants in each transaction. The primary data source of our numeric estimates of issuance of municipal ABS is Mergent Municipal Bond Securities Database. The proposing release used calendar year 2021 as its baseline due to data availability at time of proposal.

[535] Private-label ABS are ABS that are not sponsored or guaranteed by U.S. Government agencies or the Enterprises.

[536] Data drawn from the Green Street Asset-Backed Alert Database, the Green Street Commercial Mortgage Alert Database, and Mergent Municipal Bond Securities Database.

[537] Data drawn from the Green Street Asset-Backed Alert Database and the Green Street Commercial Mortgage Alert Database.

[538] *See* Laurie Goodman, *et al., Housing Finance At a Glance: Monthly Chartbook, July 2023,* Urban Institute (July 28, 2023), at 34, *available athttps://www.urban.org/research/publication/housing-finance-glance-monthly-chartbook-july-2023.*

[539] *See* The Green Street Asset-Backed Alert Database. Of the 29 CRT transactions in 2022, 19 were issued by Freddie Mac ($12.72 billion) and 9 were issued by Fannie Mae ($8.92 billion). Broadly, the Enterprise CRT programs transfer mortgage credit risk from the Enterprises to private investors. In doing so, CRT issuance lowers Enterprise capital requirements and increases their return on capital, while providing the Enterprises with market-based pricing information on Enterprise ABS credit risk. *See* Freddie Mac, CRTcast E4: CRT Then and Now, A Conversation with Don Layton (Nov. 17, 2021), *available at https://crt.freddiemac.com/_assets/pdfs/insights/crtcast-episode-4-transcript.pdf;* Jonathan B. Glowacki, *CRT 101: Everything you need to know about Freddie Mac and Fannie Mae Credit Risk Transfer,* Milliman (Oct. 11, 2021), *available at https://www.milliman.com/en/insight/crt-101-everything-you-need-to-know-about-freddie-mac-and-fannie-mae-credit-risk-transfer.*

[540] *See* discussion in Section II.B.3.b.iv.

2. Affected Parties

Parties potentially affected by the final rule include:

- Parties that have direct compliance obligations under the final rule with respect to the prohibition, namely, underwriters, placement agents, initial purchasers, and sponsors, or any affiliates or subsidiaries of such entities which act in coordination with such entities, or have access to or receive information about the relevant ABS or its underlying or referenced asset pool prior to the first closing of the sale of the ABS.
- U.S. agencies with respect to certain types of ABS.[541]
- Other entities that provide services in the securitization process, including depositors, servicers, special servicers, and other contractual service providers, as well as their domestic and foreign affiliates and subsidiaries with involvement in or knowledge concerning the securitization prior to its closing.
- Counterparties that invest/deal in financial products, including derivatives, related to synthetic ABS (and hybrid cash and synthetic ABS). For example, dealers that trade CDS on the ABS to securitization participants.
- Investment advisers and ABS investors. For example, pension funds, endowments, foundations, hedge funds, and mutual funds.
- Ultimate borrowers that rely on ABS markets for capital (*e.g.,* corporations, households, municipal entities) and participants in the markets where the borrowed capital is applied.[542]
- Other market participants that may be affected by changes in securitization practices. For example, originators that retain a residual interest in the underlying or referenced asset pool or their creditors.

As explained in Section II.B.3., the final definition of the term ''sponsor'' is a functional definition that will apply regardless of a person's title, so long as its activities with respect to the ABS meet the definition. Accordingly, a person who organizes and initiates an ABS transaction, (a Regulation AB-based sponsor) or who has a contractual right to direct or cause the direction of the structure, design, or assembly of an ABS or the composition of the pool of assets underlying or referenced by the ABS (a Contractual Rights Sponsor) is a sponsor under the definition. Whether a person is a sponsor will be based on the specific facts and circumstances and which part of the sponsor definition the person qualifies under. For example, Registered Investment Advisers (''RIAs'') that advise hedge funds could be a Contractual Rights Sponsor under the final rule if they have a contractual right to direct or cause the direction of the structure, design, or assembly of an ABS or the composition of the pool assets underlying the ABS.

We estimate that, in the baseline period, there were 385 unique sponsors of private-label non-municipal ABS and there were 106 unique underwriters for such ABS deals; of these, we estimate that there were 6 unique sponsors and 10 unique underwriters of risk transfer ABS.[543] We also estimate that, in the baseline period, there were 180 unique issuers of Ginnie Mae-guaranteed MBS,[544] 53 unique mortgage securities approved dealers of Freddie Mac-guaranteed MBS,[545] and 15 unique underwriters of Enterprise CRT securitizations.[546] We estimate that there were 352 unique municipal entities that sponsored municipal ABS, 145 unique underwriters of municipal ABS, and 97 unique municipal advisors.[547] We estimate that in the baseline period there were 177 securitized asset fund advisers associated with 2482 securitized asset funds.[548] Changes in numbers vis-à-vis the Proposing Release can be attributed to different stages in the business cycle: the significant increase in interest rates that occurred in 2022 may explain some of the decrease in the number of sponsors.

There is an overlap between these categories of sponsors and underwriters since some sponsors and underwriters might perform multiple functions and might be active in multiple market segments and, thus, the total number of potentially affected sponsors and underwriters may be lower than the sum of the numbers above. As for Contractual Rights Sponsors, we note that the definition of sponsor does not capture persons that direct or cause the direction of the structure, design, or assembly of ABS or the composition of the underlying or referenced asset pool unless they have contractual rights to do so. As discussed in Section II.B.3.b.ii., certain investment advisers could be Contractual Rights Sponsors. We derived an estimate of the number of investment advisers that would be subject to the rule from Form PF and Form ADV data.

Table 1 shows the number of private fund advisors along with estimates of their assets which may be affected by the rule, including those smaller firms which may face difficulties establishing and demonstrating sufficient separation between staff involved in activities that lead to the firm being included as a securitization participant and those advising other funds, as of the fourth quarter of 2022.[549]

[541] The exclusion from the definition of ''sponsor,'' as discussed in Section II.B.3.b.iv., with respect to these entities is expected to lessen the impact of the final rule on the United States or an agency of the United States with respect to ABS that is fully insured or fully guaranteed, but these entities may still be otherwise affected. Notably, the Enterprises are more directly affected under the final rule while operating under conservatorship of the FHFA than contemplated by the proposed rule, but this is offset somewhat by other changes between the proposed and final rule. *See* Section IV.D.2.

[542] Households benefit from the ABS markets in a variety of ways, including for example the Enterprises' issuance of RMBS which adds liquidity and reduces credit risk to investors who finance home purchases. *See* The Fed. Nat'l Mortg. Ass'n, *Mortgage-Backed Securities, available at https://capitalmarkets.fanniemae.com/mortgage-backed-securities.*

[543] The Green Street Asset-Backed Alert Database.

[544] To arrive at the figure of 180 unique issuers, we used the number of unique issuer IDs for securities issued in the baseline period, less one to account for the value ''Multiple Issuers'' (*see* Ginnie Mae MBS SF Monthly New Issues data, *available at https://www.ginniemae.gov/data_and_reports/disclosure_data/Pages/disclosurehistoryfiles.aspx?prefix=nimonSFPS&grp=MBS%20(Single%20Family)*). It is possible that some issuers of Ginnie Mae-guaranteed MBS were never a sole issuer, and thus were only included in the data as an unspecified member of ''Multiple Issuers.''

[545] *See* Freddie Mac Mortgage Securities Approved Dealer Group, *available at* Internet Archive of *https://capitalmarkets.freddiemac.com/mbs/products/dealer-groups,* captured on Nov. 17 and Dec. 6, 2022.

[546] The Green Street Asset-Backed Alert Database.

[547] Mergent Municipal Bond Securities Database. The Commission received a comment stating that this analysis conflates ABS issued by municipalities and municipal securitizations issued by special purpose entities. *See* letter from SIFMA I. Both are subject to the rule and should be counted as part of the baseline.

[548] *See* Division of Investment Management: Analytics Office, Private Funds Statistics Report: Fourth Calendar Quarter 2022 (July 18, 2023) (''Form PF Statistics Report''), at 4, *available at https://www.sec.gov/files/investment/private-funds-statistics-2022-q4.pdf* (showing number of funds and advisers by category as reported on Form PF).

[549] Cross-referencing Form PF and Form ADV data.

TABLE 1—PRIVATE SECURITIZED ASSET FUND ADVISOR STATISTICS AS OF 2022Q4

Stratification	Adviser count	Fund count	Gross asset value ($B)	Net asset value ($B)
All	177	2482	936.8	275.9
With at Least 1 Fund >10% Relevant Strategy Exposure	72		586.6	194.6
With at Least 1 Fund >10% Relevant Strategy Exposure and <50 Non-clerical or <100 Investment Adviser Employees	25		133.5	36.9

Note: These statistics related to the "Adviser Count," "Fund Count," "Gross Asset Value," "Net Asset Value," and "Relevant Strategy Exposure" rely on Form PF. The statistics related to "Non-clerical" and "Investment Adviser Employees" rely on Form ADV. Only SEC-registered advisers with at least $150 million in private fund assets under management must report to the Commission on Form PF; SEC-registered investment advisers with less than $150 million in private fund assets under management, SEC-exempt reporting advisers, and state-registered investment advisers are not required to file Form PF.

Data aggregated to Level 1.

">10% Relevant Strategy Exposure" refers to gross exposure attributable to specified strategies (Credit, Event Driven, Relative Value, Macro), as reported in Form PF, Q20. The same fund may allocate its assets to multiple strategies. We believe these private fund strategies are those most likely to engage in a conflicted transaction with an affiliate or subsidiary that issues an ABS, and that the 10% threshold will capture those funds which employ those strategies to a sufficient degree to be meaningfully conflicted. The cutoff for employees is based on estimates of the size of firm in terms of employees at which information barriers including physical separation will be feasible and is based on the number of employees typical of a single floor of an office building in New York. Fund counts and asset values are based on funds outstanding, not primary issuance. For comparison, in 2022 there were 283 broadly syndicated and middle market CLOs issued in the United States, totaling $130 billion. *See* Fitch Ratings, "Global CLO 4Q22 Activity Struggles Amid High Spreads, Low Corporate Issuance," *available at https://www.fitchratings.com/research/structured-finance/global-clo-4q22-activity-struggles-amid-high-spreads-low-corporate-issuance-24-01-2023.*

3. Current Relevant Statutory Provisions, Regulations, and Practices

As an initial matter, the general anti-fraud and anti-manipulation provisions of the Federal securities laws, including Section 17(a) of the Securities Act and Section 10(b) and Rule 10b–5 under the Exchange Act, apply to ABS transactions.

Several ABS deals that originated in the pre-financial crisis years between 2005–2007 exhibited conflicts of interest targeted by the final rule. These deals resulted in significant investor harm and received increased attention from Congress, the market, and regulators in the 2010s.[550] However, despite the increased scrutiny at that time, we do not have data on the extent of securitization participants' involvement in ABS transactions that are tainted by material conflicts of interest following the financial crisis of 2007–2009. We note that the types of transactions with material conflicts of interest exhibited during the 2007–2009 financial crisis and targeted by Section 621 of the Dodd-Frank Act may not be easily detected or as prevalent under current market practices as they were prior to the law's passage, possibly because of market participants' compliance with existing rules and reputational incentives, as described below.

Following the financial crisis of 2007–2009, the Commission adopted several rules that reinforce the alignment of economic incentives of securitization participants and investors and reduce information asymmetries. Regulation RR, adopted by the Commission in 2014 for the purpose of implementing Section 941 of the Dodd-Frank Act, generally requires certain ABS sponsors (as defined under Regulation RR) to retain not less than 5 percent of the credit risk of the assets collateralizing an ABS for a period from five to seven years, after the date of closing of the securitization transaction, as specified by the rule.[551] Credit risk retention aims to align the economic interest of ABS sponsors and long investors in an ABS by requiring ABS sponsors to retain financial exposure to the same credit risks as ABS investors and, in this regard, differs from the final rule, which does not require securitization participants to retain any exposure to securitization risks. Generally, a sponsor of an ABS deal that is required to retain exposure to the credit risk of the deal is not expected to engage in the transactions prohibited by the final rule because Regulation RR prohibits them from hedging, subject to an exception for certain permitted hedging activities under that regulation, the interest that they retain and, otherwise, such transactions would perform against the economic interest of the sponsor resulting from the extent of the retained exposure.

Compared to Rule 192, Regulation RR is narrower in its scope: it applies to only those persons that are "sponsors" for purposes of Regulation RR, the definition of which is roughly analogous to paragraph (i) of the final rule's multi-part definition of "sponsor."[552] However, Rule 192 is not limited to such "sponsors" and thus final Rule 192 applies to a broader set of persons that are not sponsors under Regulation RR and that are not required to retain credit risk under Regulation RR. Additionally, Regulation RR applies to certain types of securitizations and does not apply to other types of securitizations (*e.g.,* arbitrage or open-market CLO, synthetic ABS, or a security issued or guaranteed by any State, or by any political subdivision of a State, or by any public instrumentality of a State that is exempt from the registration requirements of the Securities Act by reason of Section 3(a)(2) of that Act) while the final rule applies to a wider range of ABS, such as synthetic ABS, as discussed in Section II.A.

Further, SEC-registered ABS offerings must comply with the SEC's registration, disclosure, and reporting requirements. Commission disclosure requirements, including asset-level disclosures which are required for some asset classes,[553] reduce asymmetric information about securitization participants and underlying assets in ABS and allow investors easy access to data and tools to review ABS deals, including to assess underlying asset quality. While such disclosure creates incentives for securitization participants to avoid potential conflicts of interest by

[550] *See, e.g.,* Consent and Final Judgement as to Defendant J.P. Morgan Securities LLC in *SEC* v. *J.P Morgan Securities LLC* (*f/k/a/ J.P. Morgan Securities Inc.*), 11 CV 4206 (S.D.N.Y. 2011) Litigation Release No. 22008 (June 21, 2011), 2010 WL 6796637; Consent and Final Judgement as to Defendant Goldman, Sachs & Co. in *SEC* v. *Goldman, Sachs & Co. and Fabrice Tourre,* 10 CV 3229 (S.D.N.Y 2010) Litigation Release No. 21592 (July 15, 2010), 2010 WL 2799362 (July 15, 2010); Senate Financial Crisis Report, *supra* note 13.

[551] *See* RR Adopting Release, *supra* note 54.

[552] *See* RR Adopting Release, Subpart A.2. at 77742, *supra* note 54.

[553] Asset-level requirements are specified in Item 1125 of Regulation AB (17 CFR 229.1125).

making such conflicts visible to a large set of potential investors, these disclosure rules only apply to SEC-registered ABS offerings. In contrast, the final rule applies to both ABS offered and sold in registered and unregistered transactions (including synthetic ABS as well as hybrid cash and synthetic ABS) that are not subject to the Commission's disclosure requirements for registered offerings, and therefore the broader scope of the final rule prohibits certain types of transactions involving registered ABS and unregistered ABS that involve or would result in a material conflict of interest. Also, the final rule applies to underwriters, placement agents, initial purchasers, and sponsors of an ABS, as well as to certain of their affiliates and subsidiaries, such that it prohibits misconduct by securitization participants that may or may not have disclosure liability under the Federal securities laws.

Furthermore, securitization participants might be incentivized to avoid conflicted transactions to maintain their industry reputation and avoid reputational harm. A securitization participant that is known to regularly engage in ''conflicted transactions,'' as defined in Rule 192(a)(3), might harm its reputation among investors and be excluded from ABS deals that a participant facilitates. Failure to disclose a person's substantial role in selecting assets underlying an ABS and that person engaging in conflicted transactions with respect to those ABS would make a securitization participant potentially subject to enforcement actions under the anti-fraud provisions of the securities laws, as occurred in certain cases following the financial crisis.[554] On the other hand, disclosing conflicted transactions to investors would create negative reputational effects for securitization participants. Thus, as a baseline matter, securitization participants may be incentivized to avoid conflicts of interest and make assurances to ABS investors about the absence of such conflicts of interest, which might serve as a signal to some investors that securitization participants have investors' interest in mind while facilitating ABS transactions and might increase investor participation in such deals; however, it may be difficult for investors to assess the credibility of those assurances.

C. Broad Economic Considerations

Securitizations are an important part of the financial system, facilitating capital formation and capital flows from investors to borrowers. However, they can generate significant risks to the economy and ABS investors. Specifically, securitization markets are characterized by information asymmetries between securitization participants and investors in ABS, who are the ultimate providers of credit, and such information asymmetries may give rise to two groups of adverse effects.

First, asymmetric information can reduce the willingness of less informed market participants[555] to transact in a market. This is a secondary effect of ''adverse selection,'' the situation in which information asymmetry benefits some market participants (*i.e.,* securitization participants) to the detriment of others (*i.e.,* ABS investors).[556] Adverse selection has been thoroughly documented in the economic literature, and its deleterious effects on market liquidity and efficiency are well known in sectors such as banking[557] and insurance.[558] In securitization markets, adverse selection could possibly manifest itself through a reduction in the number of investors, because investors would be less informed about the quality of underlying assets than securitization participants, a consequence that reduces liquidity and increases transaction costs.[559]

Second, asymmetric information may increase risk-taking by more informed counterparties if they do not bear the adverse consequences of such risks—an effect commonly known as ''moral hazard.''[560] In the realm of securitizations, loan originators and securitization participants potentially create or increase risks in the underwriting or securitization process for which they do not bear the consequence, and about which the investor lacks information.[561]

Securitization participants have access to more information about the credit quality and other relevant borrower characteristics than the ultimate investors in the securitized assets. Securitization participants may also participate in the selection of assets for ABS. This information asymmetry can have adverse market effects to the extent that securitization participants seek to profit from their differential information. Prior to the financial crisis of 2007–2009, sponsors sold assets that they knew to be very risky, without adequately conveying that information to ABS investors, and sometimes even while taking financial positions to benefit from adverse performance of underlying assets to the detriment of investors.

The patterns for adverse selection and misreporting low-quality assets were even more severe in CDOs and synthetic CDOs in the period prior to the financial crisis of 2007–2009.[562] One paper finds evidence consistent with the tailoring of CDO structures for short bets and negative performance and finds that the synthetic CDOs issued in 2005–2007 that were shorted in CDS contracts performed even worse in 2008–2010 than other CDOs.[563] This is consistent with incentives of underwriters to structure these securities to profit from short positions on such securities enabled by the information asymmetries in the market at the time.

There are several possible ways, which can be complementary, to mitigate the effects of such information

[554] *See, e.g.,* Consent and Final Judgement as to Defendant J.P. Morgan Securities LLC in *SEC* v. *J.P Morgan Securities LLC* (*f/k/a/ J.P. Morgan Securities Inc.*), 11 CV 4206 (S.D.N.Y. 2011) Litigation Release No. 22008 (June 21, 2011), 2010 WL 6796637; Consent and Final Judgement as to Defendant Goldman, Sachs & Co. in *SEC* v. *Goldman, Sachs & Co. and Fabrice Tourre,* 10 CV 3229 (S.D.N.Y 2010) Litigation Release No. 21592 (July 15, 2010), 2010 WL 2799362 (July 15, 2010). Further, as part of an adviser's fiduciary duty to a hedge fund, the duty of loyalty requires it to ''make full and fair disclosure to its clients of all material facts relating to the advisory relationship'' and ''eliminate, or at least expose, through full and fair disclosure all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.'' *See Commission Interpretation Regarding Standard of Conduct for Investment Advisers,* Release No. IA–5248 (June 5, 2019) [84 FR 33669 (July 12, 2019)] at 33675.

[555] The term ''market participants'' used in this section encompasses all participants in the ABS markets, including ABS investors, and is a broader term than the proposed defined term ''securitization participant.''

[556] *See* George A. Akerlof, *The Market for 'Lemons': Quality Uncertainty and the Market Mechanism,* 84 The Quarterly J. of Econ. 488–500 (1970).

[557] *See* Joseph E. Stiglitz & Andrew Weiss, *Credit Rationing in Markets with Imperfect Information,* 71 The Am. Econ. Rev. 393–410 (1981).

[558] *See* Amy Finkelstein & James Poterba, *Adverse Selection in Insurance Markets: Policyholder Evidence from the U.K. Annuity Market,* 112 J. of Pol. Econ. 183–208 (2004).

[559] *See* Adam B. Ashcraft & Til Schuermann, *Understanding the Securitization of Subprime Mortgage Credit,* Fed. Reserve Bank of N.Y. Staff Report No. 318 (2008) (identifying frictions in the residential mortgage securitization chain and explaining that the overarching friction that creates all other problems at every step in the securitization process is asymmetric information).

[560] *See, e.g.,* Bengt Holmstrom, *Moral hazard and observability,* Bell Journal of Economics, pp. 74–91 (1979) and references therein.

[561] *See supra* note 559.

[562] *See, e.g.,* Senate Financial Crisis Report.

[563] *See* Oliver Faltin-Traeger and Christopher Mayer, *Lemons and CDOs: Why Did So Many Lenders Issue Poorly Performing CDOs?,* Columbia Business School Working Paper (2012) (analyzing the characteristics and performance of underlying assets going into CDOs and synthetic CDOs issued in 2005–2007 and comparing the ABS observed in a CDO with other ABS not observed in a CDO).

asymmetries in the securitization process. One way to partially offset information asymmetries is to require that sponsors retain some ''skin in the game,'' through which loan performance can affect sponsors' profits as much as—or more than—those of the ABS investors: that is accomplished by the credit risk retention mandated for some securitization participants by Regulation RR.[564] To the extent that Regulation RR reduces adverse selection costs and moral hazard, affected currently issued ABS are less likely to be instruments used in conflicted transactions. Another way to partially offset information asymmetries is to require securitization participants to have robust disclosures of information about ABS deals or individual assets. The Commission has employed this strategy previously, including in amendments to Regulation AB in 2014, which enhanced disclosure requirements, including by requiring asset-level disclosures.[565] More broadly, securitization participants may be able to take steps to credibly signal that they are not engaging in actions to exploit information asymmetries with investors, or investors can require information disclosures and other means of reducing the threat of adverse selection and moral hazard as part of underlying ABS contracts or in the marketing and sales process. An additional approach to partially offset the effects of information asymmetries is to directly prohibit securitization participants from engaging in certain transactions through which they could benefit from that information asymmetry, which is what the final rule, as mandated under the Dodd-Frank Act, is designed to achieve.

The adverse selection problem may be especially severe when it is costly for investors to demand from securitization participants sufficient transparency about the assets or securitization structure to overcome informational differences between these securitization participants and investors or when it is costly for investors to process such information. In these cases, the securitization process can misalign incentives so that the welfare of some market participants is maximized at the expense of other market participants. Some of these risks may not be adequately disclosed to investors in securitizations, an issue that may be compounded as sponsors introduce increasingly complex structures like CDOs or synthetic ABS.

The final rule is designed to enhance investor protection and the integrity of the ABS markets by helping to constrain the ability of securitization participants to benefit from the information asymmetry and limiting their incentives to exploit the information asymmetry at the expense of ABS investors. In particular, under the final rule, securitization participants will be precluded from obtaining a short position in an ABS, purchasing a credit default swap or other credit derivative pursuant to which the securitization participant would be entitled to receive payments upon the occurrence of specified credit events in respect of the ABS or purchasing or selling any financial instrument (other than the relevant ABS) or entering into a transaction that is substantially the economic equivalent of the aforementioned transactions, other than, for the avoidance of doubt, any transaction that only hedges general interest rate or currency exchange risk or that otherwise satisfies the conditions of one of the exceptions. The final rule will help prevent the sale of ABS that are tainted by the material conflicts of interest that Section 27B is designed to address, to the extent such sales currently occur, and will curb activity that is viewed as having contributed to the financial crisis of 2007–2009 and may continue today. In this way, the final rule will help discourage the creation and sale of ABS that facilitate amplification of risk transfer from informed to uninformed parties and the spread of risks from low quality or riskier loans throughout the financial system.

Accordingly, the final rule may have economic effects on broader credit markets. ABS investors may be willing to pay more or accept a lower rate of return for bearing the credit risk, which in turn could reduce borrowing costs for underlying borrowers. Additional compliance costs, frictions in matching borrowers and lenders, or increased difficulty managing risk can have the opposite effect. The direction and magnitude of this possible impact on borrowing rates will depend on the tradeoff between the costs of complying with the final rule and how market participants reprice ABS due to the enhanced investor protection that the final rule will provide.

The economic considerations above are significantly less applicable to ABS backed by the full faith and credit of the United States Government. Even though investment in such fully insured or fully guaranteed ABS is not risk-free, investors in such ABS are not exposed to the credit risk of individual underlying assets and, thus, are not subject to the adverse selection and moral hazard issues described above.[566] As a result, such ABS are less susceptible to the conflicts of interest that Section 27B is designed to prevent and are excluded from the final rule.

Some commenters have stated that municipal issuers of ABS do not have an incentive to enter into conflicted transactions relative to for-profit issuers and sponsors and suggested that such municipal ABS and their issuers should be excluded from Rule 192.[567] However, application of the final rule is not conditioned on a securitization participant having a profit motive.[568] Additionally, as discussed earlier, the exclusion from the definition of sponsor for the United States or an agency of the United States with respect to ABS that are fully insured or fully guaranteed by the United States is primarily based on the insulation of investors from credit risk in such ABS.[569] Municipal securities are considered safe investments with default rates at significantly lower levels compared to corporate and foreign government bonds.[570] However, unlike the United States Government, issuers of municipal ABS are in most cases not responsible for repaying obligations they issue on behalf of conduit borrowers, including borrowers in single-asset conduit bonds.[571] As noted previously by the Commission, non-governmental conduit borrowers account for the majority of municipal bond defaults.[572] In particular, certain conduit issuers which are managed by private firms have elevated default risks on their bonds.[573]

[564] *See* discussion of current market practices with respect to credit risk retention in Section IV.B.3.

[565] *See Asset-Backed Securities Disclosure and Registration,* Release No. 33–9638 (Sept. 4, 2014) [79 FR 57184 (Sept. 24, 2014)] (''2014 Regulation AB 2 Adopting Release'').

[566] *See* discussion in Section II.B.3.b.iv.

[567] *See* letters from NABL et al.; NAHEFFA.

[568] *See* Section II.B.3.b.i.

[569] *See* Section II.B.3.b.iv.

[570] *See* SEC, Report on Municipal Securities Market, July 31, 2012, at p. 22 and references therein for a discussion on municipal bond default rates, *available at https://www.sec.gov/files/munireport073112.pdf.*

[571] *See* footnote 56 for a discussion of municipal conduit assets.

[572] Yang, LK, *General Purpose Local Government Defaults: Type, Trend, and Impact.* 2020 Public Budgeting & Finance, 40(4): 62–85 (showing that defaulted bonds are more likely to be conduit debt and unrated).

[573] Heather Gillers, *How Did Things Go So Wrong at This Arizona Park Built With Muni Bonds?,* WALL ST. J. (Aug. 28, 2023), *available at https://www.wsj.com/finance/investing/how-did-things-go-so-wrong-at-this-arizona-park-built-with-muni-bonds-a30a54f0* (retrieved from Factiva database) (discussing the shortcomings of the conduit structure and how conduit-related defaults are piling up); Martin Z Braun, Bloomberg, Aug. 10, 2020, *Muni Bonds Sold by Phantom Agency Draw Texas Town's Scrutiny, available at https://*

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Because investors in municipal ABS are exposed to credit risk in a way that investors in ABS that are fully guaranteed by the United States Government are not, carving out municipal ABS or their issuers from the final rule would reduce the investor protection benefits of the rule more significantly as compared to the carve-out for U.S. Government guaranteed ABS.[574]

Similarly, the Enterprises' ABS guarantees as to principal and interest payments are not fully guaranteed by the United States Government.[575] Given that the Enterprises may eventually emerge from FHFA conservatorship and to avoid granting unnecessary competitive benefits to the Enterprises as market participants, as discussed in Section II.B.3.b.iv., we are not excluding the Enterprises from the definition of sponsor.[576] Changes between the proposed and final rule, most notably in the risk-mitigating hedging activities exception, will enable the Enterprises to maintain their CRT issuance without such general exclusion from the securitization participant definition where guaranteed ABS are concerned.[577]

D. Costs and Benefits

The overall costs and benefits of the final rule depend on the extent to which existing market practices and other regulations, including the anti-fraud and anti-manipulation provisions of the Federal securities laws, already reduce the risk of conflicts in ABS transactions. We discuss costs and benefits separately in the next sections in more detail.

1. Benefits

Investors benefit when an ABS performs in a manner that is commensurate with the level of risk that investors are willing to take and, generally, they do not benefit from the adverse performance of an ABS. The final rule will benefit investors by prohibiting securitization participants from engaging in a short sale of the relevant ABS, purchasing a credit default swap or other credit derivative pursuant to which the securitization participant would be entitled to receive payments upon the occurrence of specified credit events in respect of the relevant ABS. These benefits are supported by the rule's further prohibition against securitization participants purchasing or selling any financial instrument (other than the relevant ABS) or entering into a transaction that is substantially the economic equivalent of the aforementioned transactions, other than, for the avoidance of doubt, any transaction that only hedges general interest rate or currency exchange risk. The final rule may thus help alleviate investor concerns that the securities they purchase might be tainted by certain material conflicts of interest. It can also help reduce moral hazard and adverse selection costs in the ABS market, leading to better investor protection and a lower cost of capital.[578]

The final rule will enhance market stability through reduced incentives to engage in conflicted transactions and other speculative activity in the ABS market. This effect could be especially pronounced for asset pools that are involved in re-securitizations or synthetic ABS because of their complexity and the relative difficulty of assessing information about underlying assets of such ABS. Enhanced market stability may reduce the variance of ABS prices in the primary market and volatility of ABS prices in the secondary market.

Lower adverse selection costs, higher expected liquidity, and lower expected volatility in ABS markets are expected to lower the expected return required by ABS investors to invest in ABS. These effects, in turn, may lower credit costs in loan markets for households and corporations whose debts enter the asset pools underlying the asset-backed securitizations.

The definitions of the terms ''underwriter,'' ''placement agent,'' ''initial purchaser,'' ''sponsor,'' ''material conflict of interest,'' and ''conflicted transaction'' in the final rule encompass an array of securitization participants and conduct. This coverage will reduce asymmetries of information between securitization participants and investors at various stages of the transaction structuring and marketing process, which, in turn, is expected to enhance investor protection and reduce evasion.[579]

The final rule's prohibition commences when a person has reached an agreement to become a securitization participant. As discussed in Section II.C., this approach helps ensure that the prohibition will apply during the transaction structuring and marketing process when a securitization participant may be incentivized to engage in conflicted transactions, and, thus, further enhances investor protection benefits of the final rule. Similarly, covering certain affiliates or subsidiaries of securitization participants under the definition of ''securitization participant'' helps ensure that the benefits of the final rule are robust with respect to securitization participants that are part of large, complex entities, while leaving each affiliate or subsidiary primarily liable for its own conduct rather than that of other persons within the larger organization.

In addition, the final rule specifies the scope of conflicts of interest subject to the prohibition by defining the terms ''material conflict of interest'' and ''conflicted transaction,'' as well as including an anti-evasion provision. Under Rule 192(a)(2), ''engaging in any transaction would involve or result in a material conflict of interest between a securitization participant of an ABS and an investor in such ABS if such a transaction is a conflicted transaction.'' The definition of ''conflicted transaction'' identifies specific types of conflicting transactions and also includes any transaction that is substantially the economic equivalent of the specified transactions, provided that in either case ''there is a substantial likelihood that reasonable investor would consider the transaction important to the investor's investment decision, including a decision whether

www.bloomberg.com/news/articles/2020-08-19/muni-bonds-sold-by-phantom-agency-draw-texas-town-s-scrutiny (The Public Finance Authority had a much higher rate of borrower payment defaults than any other issuer over a three year period).

[574] See Sections II.A.3.a. and II.B.3.b. for discussion of the rule's applicability to municipal ABS and issuers.

[575] *See, e.g., Mortgage Backed Securities,* Fannie Mae, *available at https://capitalmarkets.fanniemae.com/mortgage-backed-securities* (stating that ''[t]he certificates and payments of principal and interest on the certificates are not guaranteed by the U.S. Government and do not constitute a debt or obligation of the United States or any of its agencies or instrumentalities other than Fannie Mae.'').

[576] *See* letters from Fannie Mae and Freddie Mac; HPC; M. Calabria; SFA I.

[577] Part of the reason for excluding the Enterprises in the proposed rule had been to enable them to continue to issue CRTs. *See* Proposing Release Section II.B.2.c.ii.

[578] *See supra* note 559.

[579] One commenter on the rule proposal supported a broader definition of sponsor to ''capture any person that directs or causes the direction of the structure, design, or assembly of an ABS or the composition of the pool of assets underlying the ABS or has the right to do so.'' *See* letter from Better Markets. As discussed below, we have revised the definition of sponsor in the final rule to remove the Directing Sponsor prong in light of commenter concerns regarding the scope of the proposed definition. To the extent a party is able to direct the structuring of the ABS without contractual provisions granting them the right to do so, opportunities to bet against the ABS may remain, which would limit the extent of the benefits described above. For the reasons discussed in Section II.B.3.b., the final definition of sponsor appropriately balances commenter concerns about the Directing Sponsor prong being a potential impediment to a long investor's negotiating power with the need to protect investors against potential conflicts of interests in securitization transactions.

to retain the asset-backed security.'' [580] These aspects of the final rule tailor the prohibition to specified conflicts of interest that are likely to present the most acute investor protection concerns.

Under the anti-evasion provision, if a securitization participant engages in a transaction or series of related transactions that, although in technical compliance with the Rule's exceptions, is a part of a plan or scheme to evade the prohibition in Rule 192(a)(1), then the transaction will be deemed to violate the final rule's prohibition. To the extent market participants are more familiar with complying with anti-evasion restrictions than anti-circumvention provisions, as stated by a commenter, the final rule's anti-evasion restriction may reduce the compliance burden imposed by the rule in comparison to that of the proposed rule.[581] To the extent that the anti-evasion provision reduces uncertainty by focusing on the actions of securitization participants rather than the effect of transactions, the final rule may reduce compliance costs imposed relative to the proposed rule. In addition, the final definition of the term ''conflicted transaction'' is consistent with Section 27B's prohibition of conflicts of interest that are ''material'' and looks to whether there is a substantial likelihood that a reasonable investor would consider the conflicted transaction important to the investor's investment decisions. By using a definition of materiality grounded in the Federal securities laws, the final rule sets forth a standard that is familiar to both investors and registrants, facilitating compliance and enhancing investor confidence in the rule's effectiveness. These elements of the final rule will work together to capture certain types of material conflicts of interest that give rise to adverse selection and moral hazard costs.

The Commission received comment that the extent of benefits from the rule's prohibition of conflicts of interest may be reduced relative to when the Dodd-Frank Act was passed due to other new regulatory requirements and evolving market practices and incentives.[582] We acknowledge this consideration and have considered these developments in our assessment of the economic effects of the final rule, but note that these developments do not remove the possibility of conflicts occurring in securitization transactions, and thus the final rule will provide additional investor protection benefits as compared to the baseline. In addition, implementing Section 27B remains a Congressional mandate.

The adopted definition of conflicted transactions differs from the proposed definition by including any transactions that constitute substantially the economic equivalent of the specified transactions. This definition replaces the proposed broader category of any financial transactions through which the participant would benefit from the actual, anticipated, or potential adverse performance of an ABS or its underlying assets. This narrowed definition addresses the concerns of various commenters who stated that adverse performance of an ABS can be associated with many factors not unique to the security, such as general interest rates or foreign exchange rates,[583] and it is similar to commenter suggestions.[584] As discussed in Section II.D, the revised definition is intended to cover bets placed against an ABS to effectuate Section 27B's investor protection mandate while not unnecessarily restricting transactions wholly unrelated to credit performance of the ABS, such as reinsurance agreements, hedging of general market risk (such as interest rate and foreign exchange risks), or routine securitization activities (such as the provision of warehouse financing or the transfer of assets into a securitization vehicle).

The final rule provides exceptions for risk-mitigating hedging activities, liquidity commitments, and bona fide market-making activities, which are consistent with Section 27B. As discussed below, all these exceptions taken together can improve market efficiency and facilitate investor protection without diluting the investor protection benefits of the final rule. The final rule's conditions for the availability of these exceptions will permit valuable risk-mitigating hedging, liquidity provision, and bona fide market-making, while minimizing the likelihood of conflicts of interest between securitization participants and investors in ABS, thus enhancing investor protections. Defining the scope of these exceptions may also ease compliance with the rule, although benefits from specificity can be limited by the anti-evasion provision which states that a transaction which is part of a scheme to evade the prohibition will be deemed a conflicted transaction, because the anti-evasion provision is necessarily less certain. However, the potential ambiguity under the anti-evasion restriction may be minimal, to the extent that it covers transactions that are part of a scheme to evade the rule's prohibitions rather than considering the effects of a transaction and to the extent the prohibitions are clearly and tightly defined. To the extent the anti-evasion provision prevents misuse of the exceptions, that provision will strengthen investor protections.

Risk-mitigating hedging activities permit a securitization participant to fine-tune the amount of credit or other risk taken or to limit some of the consequences of taking a risk. Consistent with Section 27B, we are adopting a risk-mitigating hedging activities exception that permits securitization participants to continue to hedge their risk exposures. Subject to specified conditions, the final rule provides an exception for risk-mitigating hedging activities of a securitization participant in connection with, and related to, individual or aggregated positions, contracts, or other holdings of the securitization participant, including those arising out of its securitization activities, such as the origination or acquisition of assets that it securitizes. The final risk-mitigating hedging activities exception are expected to promote the final rule's benefits of investor protection without prohibiting securitization participants' risk mitigation activities, unduly increasing securitization participants' costs of engaging in such activities or increasing barriers to entry in ABS markets. Thus, the exception may improve efficiency of ABS markets and help protect ABS investors.

The final rule includes the following conditions to the risk-mitigating hedging activities exception: (i) at the inception of the hedging activity and at the time of any adjustments to the hedging activity, the risk-mitigating hedging activity is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks arising in connection with and related to identified positions, contracts, or other holdings of the securitization participant, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof; (ii) the risk-mitigating hedging activity is subject, as appropriate, to ongoing recalibration by the securitization participant to ensure that the hedging activity satisfies the requirements of the exception and does not facilitate or create an opportunity to

[580] *See* Section II.D for a more detailed discussion of the definition of a ''conflicted transaction'' under the final rule.

[581] *See* letter from ABA.

[582] *See, e.g.,* letter from AIMA/ACC.

[583] *See, e.g.,* letters from AFME; Representatives Wagner and Huizenga; U.S. Representative Brad Sherman dated June 21, 2023 (''Representative Sherman''); Senator Kennedy.

[584] *See* letter from AIC.

materially benefit from a conflicted transaction other than through risk-reduction, and (iii) the securitization participant has established, and implements, maintains, and enforces, an internal compliance program that is reasonably designed to ensure the securitization participant's compliance with the requirements of the exception, including reasonably designed written policies and procedures regarding the risk-mitigating hedging activities that provide for the specific risk and risk-mitigating hedging activity to be identified, documented, and monitored.

The scope of these conditions enhances the benefits of the rule by assuring investors that risk-mitigating hedging activities of securitization participants will be less likely to create (intentionally or inadvertently) economic conflicts of interest with investors. Moreover, the policies and procedures in the risk-mitigating hedging activities exception that provide for the identification, monitoring, and documentation of the risk and related hedging can be used by the Commission in its examination programs for regulated entities. Thus, the final risk-mitigating hedging activities exception will help ensure the investor protection benefits of the rule, while allowing risk-reducing actions of securitization participants.

The exceptions for liquidity commitments and bona fide market-making activities may help prevent a loss of secondary liquidity and efficiency in the ABS market and, thus, benefit ABS investors. The final rule conditions for the availability of and limits on the liquidity commitments and bona fide market-making activities exceptions, including the requirement that a securitization participant establish an internal compliance program when relying on the bona fide market-making activities exception, may enhance the benefits of the final rule by assuring investors that such activities of securitization participants will be less likely to create (intentionally or inadvertently) economic conflicts of interest with investors.

2. Costs

The final rule will create direct compliance costs for securitization participants, some of which are discussed in detail in Section V. The compliance costs will result from the need to implement and monitor policies, procedures, and information barriers to ensure compliance with the final rule, as well as associated legal review.[585] Some commenters also expressed concerns that compliance with the rule will be more costly for securitization participants that are not subject to the Volcker Rule.[586] We agree that the final rule may impose additional compliance and legal costs on certain securitization participants. These costs are likely to be higher if a securitization participant has no established compliance framework that facilitates the Volcker Rule requirements since the conditions of the final rule share similarities with the Volcker Rule. However, we expect that after incurring initial start-up costs to establish the necessary compliance systems, or modify the existing compliance frameworks, some of these costs will decrease over time as securitization participants gain experience in fulfilling the requirements and implementing the rule.

Section V below estimates, for the purposes of the Paperwork Reduction Act, the initial and ongoing compliance costs to implement, maintain, test, and enforce written policies and procedures for securitization participants that rely on the risk-mitigating hedging activities or bona fide market-making activities exceptions of the final rule.[587] As reported in Section V, the total annual paperwork burden of the final rule for securitization participants to prepare, review, and update the policies and procedures under the final rule is estimated to be 31,606 burden hours and cost $6,321,150.

The Commission received comment that considering all short sales of ABS to be conflicted transactions would have a disproportionate impact and be unworkable and that only short positions that result in a profit for the securitization participant should be considered potentially conflicted.[588] A short sale of an ABS by a securitization participant is a bet against the relevant ABS regardless of whether the bet is successful, and this is the exact type of transaction that the rule is intended to prohibit in order to remove the incentive for securitization participants to place their own interests ahead of those of investors. However, we do not believe that this provision will have a disproportionate effect on the market because Rule 192(a)(3)(i) will not prohibit all ABS short selling. Rather, the prohibition only applies to parties that are securitization participants with respect to the relevant ABS. Third parties that are not securitization participants, as defined in the final rule, with respect to the relevant ABS are not prohibited from entering into short sales of such ABS. Furthermore, a short sale of the relevant ABS may, subject to satisfaction of the applicable conditions, be permitted by the final rule pursuant to one of its exceptions.

In response to commenters' concerns about the broad scope of the terms ''material conflict of interest'' and ''conflicted transaction'' under the proposed rule, the final rule defines these terms more precisely by including descriptions of specific types of conflicting transactions: the short sale of an ABS, the purchase of a CDS or other credit derivative pursuant to which the securitization participant would be entitled to receive payments upon the occurrence of specified credit events in respect of the relevant asset-backed security, or any transaction that is substantially the economic equivalent of the previous two transactions. These definitions should enable securitization participants to better evaluate a potentially conflicted transaction, including those covered by the anti-evasion provision, mitigating the costs of uncertainty. In addition, the exclusion of certain general interest rate or currency exchange risk hedges from the definition of ''conflicted transaction'' is designed to address the concerns of several commenters, who stated that hedges for interest rate or foreign exchange risk, for example, could in some cases benefit from adverse ABS performance while having no meaningful connection to the credit quality of the assets included in a securitization pool.[589]

Also, the final rule, in response to several commenters' concerns regarding the commencement point of the prohibition,[590] begins application of the rule's prohibition when a person has reached an agreement to become a securitization participant. This timing will provide a more definite point of reference that securitization participants can use to structure their transactions and monitor their market activities and thereby ensure compliance with the rule. The revised commencement point

[585] Various commenters suggested that meeting the requirements of the rule would create additional legal and compliance costs. These costs will make it more costly to participate in securitization transactions. *See, e.g.,* letters from AIMA/ACC; NAMA.

[586] *See, e.g.,* letters from AIC; LSTA II.

[587] *See* Section V (discussing costs and burdens relating to the final rule for purposes of the Paperwork Reduction Act).

[588] *See* letter from AIMA/ACC.

[589] *See, e.g.,* letters from AFME; LSTA III; SFA I; SIFMA I.

[590] *See, e.g.,* letters from ABA; AIMA/ACC (stating that ''uncertainty surrounding what constitutes compliance will increase costs and potentially reduce securitization activity'').

will thus help limit the costs imposed by the rule generally.

The scope of securitization participants in the final rule includes certain affiliates and subsidiaries of underwriters, placement agents, initial purchasers, and sponsors rather than any affiliate or subsidiary of such persons, as was proposed. The Commission received several comments on the proposed definition to the effect that monitoring costs would be substantial and that an exception for affiliates and subsidiaries separated from securitization participants by information barriers would be a mechanism to mitigate conflicts of interest.[591] The final rule does not include an exception or requirement for information barriers. However, as adopted, the prohibition of the final rule will apply only to affiliates and subsidiaries of securitization participants that act in coordination with an underwriter, placement agent, initial purchaser, or sponsor or have access to or receive information about the relevant ABS or the asset pool underlying or referenced by the relevant asset-backed security prior to the first closing of the sale of the relevant asset-backed security.

The Commission received comments requesting that the final rule permit the use of information barriers or other indicia of separateness to mitigate potential conflicts of interest, with some commenters supporting a specific exception if certain conditions were satisfied, and others instead requesting that the final rule consider the presence or absence of information barriers (and the robustness and effectiveness thereof) as part of a multi-factor analysis as a preferred alternative to affirmatively requiring the use of prescriptive information barriers. As discussed in greater detail in Section II.B.3.c., the revised definition of ''securitization participant'' will capture the range of affiliates and subsidiaries with the opportunity and incentive to engage in conflicted transactions while still obviating the need for a prescriptive information barrier exception. Information barriers, including barriers which exist for purposes other than compliance with the final rule, may be used to support a claim that an affiliate or subsidiary should be excluded from the rule's prohibitions on the basis of an absence of coordination with a securitization participant or access to information, along with other potential indicia such as maintaining separate accounts and a lack of common officers or employees.[592] This revision may help mitigate cost concerns of those commenters who maintain information barriers separating securitization participants from affiliates and subsidiaries, as they do not need to incur the costs of recalibrating the existing information barriers. They can use the information barriers to support a claim that the affiliates and subsidiaries are not involved in conflicted transactions, reducing the compliance costs. Furthermore, the final rule enables flexibility in ensuring affiliates and subsidiaries are not securitization participants rather than prescribing a set of policies and procedures, so that entities may have less costly options to do so than formal information barriers.

The Commission received comments that without accommodations to facilitate compliance, additional costs to comply with the rule may limit participation in securitizations by smaller firms or those unfamiliar with compliance programs similar to the Volcker Rule, or smaller or emerging advisors and managers, potentially limiting investor choice through a decline in the available set of investment opportunities.[593] The revised scope of conflicted transactions, affiliates and subsidiaries covered by the rule, and exceptions to the rule's prohibitions all serve to reduce the costs associated with compliance to the rule. Smaller entities may tend to have less complex operations requiring less substantial compliance considerations, which would result in lower costs of compliance relative to larger and more complex entities.

The compliance date for the final rule is 18 months following adoption. One commenter stated that the Commission should consider that ''the sheer number and complexity of the Commission's Proposals, when considered in their totality, if adopted, would impose staggering aggregate costs, as well as unprecedented operational and other practical challenges.'' [594] But, consistent with its long-standing practice, the Commission's economic analysis in each adopting release considers the incremental benefits and costs for the specific rule—that is the benefits and costs stemming from that rule compared to the baseline. In doing so, the Commission acknowledges that, in some cases, resource limitations can lead to higher compliance costs when the compliance period of the rule being considered overlaps with the compliance period of other rules. In determining compliance periods, the Commission considers the benefits of the rules as well as the costs of delayed compliance periods and potentially overlapping compliance periods.

We considered here whether recently adopted rules identified by one commenter that affect market participants subject to the final rule have overlapping implementation timeframes with the final rule.[595] The Commission acknowledges that there are compliance dates for certain requirements of these rules that overlap in time with the final rule, which may impose costs on resource-constrained entities affected by multiple rules.[596] However, we do not think these increased costs from overlapping compliance periods will be significant for several reasons. First, the number of ABS market participants who are also private fund advisers, and who will be subject to one or more of these recently adopted rules could be limited; as discussed above, we estimate that in the baseline period there were 177 securitized asset fund advisors associated with 2,481 securitized asset funds, and of those securitized asset fund advisors, depending on their activities, only a portion, if potentially a substantial one, may also be required to comply with one or more of the recently adopted rules raised by one commenter (and even fewer may need to comply with more than one of those other rules).[597] In addition, the commenter's concerns about the costs of overlapping compliance periods were raised in response to the proposal and as discussed above, we have taken steps to reduce costs of the final rule.[598]

[591] *See, e.g.,* letters from ABA; AFME; AIC; ICI; SIFMA I.

[592] *See* Section II.B.3.c. (discussing the availability of information barriers or other indicia of separateness under the final rule).

[593] *See* letters from AIMA/ACC; SFA I; MFA III.

[594] *See* letter from MFA III.

[595] Specifically, we considered the Beneficial Ownership Reporting Release, the May 2023 SEC Form PF Amending Release, the Private Fund Advisers Adopting Release, and the Short Position Reporting Release. *See supra* notes 527–30. As noted above, one commenter also specifically suggested the Commission consider potential overlapping compliance costs between the final rule and certain proposing releases. *See supra* note 531. These proposals have not been adopted and thus have not been considered as part of the baseline here. To the extent those proposals are adopted in the future, the baseline in those subsequent rulemakings will reflect the regulatory landscape that is current at that time.

[596] *See supra* notes 527–30 (summarizing compliance dates).

[597] For example, an ABS market participant who reports on Form PF may need to comply with both the final rule and the May 2023 SEC Form PF Amending Release but may not have to comply with all of the other recently adopted rules.

[598] The final rule mitigates costs relative to the proposal. As discussed above, the revised definition of affiliates and subsidiaries includes only those

Continued

Finally, although the compliance periods for these rules overlap in part, the compliance dates adopted by the Commission are generally spread out over a two-year period from 2023 to 2025.[599]

The Commission also received a comment stating that existing guidance places the ''burden of proof'' in conducting a rulemaking with the Commission and the Commission must establish ''substantial evidence'' of a market failure as well as the sufficiency of the purported benefits of the rule in light of any costs.[600] In response, we note that this rule is being issued pursuant to a Congressional mandate in the Dodd-Frank Act that the Commission implement a rule prohibiting certain transactions by specified parties. Furthermore, the analysis set forth in this release, as well as the corresponding discussion in the Proposing Release, describes in detail the investor protection concerns that the final rule is designed to address.[601]

The Commission received comments stating that investors intending to purchase a long position in a securitization can have a role in determining the composition of the asset pool but have little incentive to engage in conflicted transactions, and can operate as a check against asymmetric information by negotiating over what risks may be included in the asset pool.[602] The commenters expressed concern that such negotiation may become less desirable if it carries additional regulatory costs, as these costs can prove significant and thus operate in opposition to the purpose of the rule, which is to protect the purchasers of ABS. In a change from the proposal, the final rule does not include the Directing Sponsor prong of the definition of sponsor and the final rule's Contractual Rights Sponsor prong of the definition excludes a person that is solely a purchaser of a long position in the ABS.

Some commenters also requested an exemption for the B-piece buyers of CMBS on a similar basis.[603] B-piece buyers are generally affected by the rule's prohibitions in roughly the same way as any other securitization participant. They may face greater exposure to the performance of an ABS than investors due to their role as a holder of a lower-seniority economic interest. They may thus be more affected by the rule than other parties, but they also may utilize the same exceptions for risk-mitigating hedging and transactions intrinsic to the operation of an ABS. Because the role of B-piece buyers is more involved, including potentially acting as a special servicer or making decisions such as whether to release a borrower from a lien, we believe the benefits of providing such an exception to be less than those for long-only investors, and the potential for conflicted transactions to be greater.

Subject to certain conditions, the final rule provides an exception for risk-mitigating hedging activities of a securitization participant in connection with, and related to, individual or aggregated positions, contracts, or other holdings of the securitization participant, including those arising out of its securitization activities, such as the origination or acquisition of assets that it securitizes. Despite the inclusion of the risk-mitigating hedging activities exception, restrictions under the final rule may limit some options for risk mitigation and revenue-enhancing investment available to affected securitization participants. For example, securitization participants wanting to engage in risk mitigation may face additional costs to comply with the conditions to the risk-mitigating hedging activities exception.[604] This outcome could require securitization participants to increase their fees to compensate for such costs. Alternatively, such costs could be borne by securitization participants or passed to investors in the form of lower expected returns or to borrowers in the form of higher cost of capital.

To help mitigate such unintended effects, the final rule uses narrower definitions of both conflicted transactions and affiliates and subsidiaries subject to the rule (via changes to the definition of ''securitization participant'') than the proposed rule and permits the initial issuance of an ABS to qualify for the risk-mitigating hedging activities exception. These changes relative to the proposed rule are expected to substantially reduce the restrictions and additional costs associated with risk-mitigating hedging by securitization participants. For example, these changes enable risk-mitigating hedging by affiliates or subsidiaries that act in coordination with the parts of a firm actively engaged in securitization activities as well as the issuance of new ABS as a means of transacting a risk-mitigating hedge.

We recognize that the definition of conflicted transaction can affect the scope of some current activities undertaken by underwriters, sponsors, and other securitization participants if they perceive such activities as conflicting with the rule. For example, several commenters suggested paragraph (iii) of the conflicted transaction definition in the proposed rule could include a wide range of activities deemed essential for the functioning and issuance of ABS and the risk- and balance sheet-management of many securitization participants. These commenters suggested that the rule could therefore result in participants leaving or reducing involvement in the market and potentially require a complete restructuring of the market to issue ABS with only parties who would be free of conflicted transactions.[605]

As discussed above, the revised definition in the final rule is intended to cover bets placed against an ABS to effectuate Section 27B's investor protection mandate, while not unnecessarily restricting transactions wholly unrelated to credit performance of the ABS, such as reinsurance agreements, hedging of general market risk (such as interest rate and foreign exchange risks), or routine securitization activities (such as the provision of warehouse financing or the transfer of assets into a securitization vehicle).[606] The reduction in scope and increased precision of clause (iii) is expected to result in lower costs associated with compliance with the final rule. Securitization participants are prohibited from a narrow range of transactions under the final rule, resulting in minimal limitation to the exposures they may take on or lay off, which is further reduced by the rule's exceptions. The monitoring of transactions unrelated to positions in the ABS is expected to impose modest costs, relative to the baseline and will be

that act in coordination with an underwriter, placement agent, initial purchaser, or sponsor or receive, or have access to, information about relevant ABS or underlying or referenced asset pools prior to the first closing sale of the ABS. We believe that this revision may help mitigate cost concerns of those commenters who maintain information barriers separating securitization participants from affiliates and subsidiaries.

[599] For example, the compliance period for the May 2023 SEC Form PF Amending Release concludes by mid-2024 while reporting under the final rule will be required by the end of 2024 at the earliest. For the Private Fund Advisers Adopting Release, the compliance date is Mar. 14, 2025, for the rule's quarterly statement and audit requirements for registered investment advisers with private fund clients. *See supra* notes 527–30.

[600] *See* letter from MFA III.

[601] *See* Sections I.C. and IV.C and Sections I.B. and III.C. of the Proposing Release.

[602] *See, e.g.,* letters from ABA; AFME; CREFC I; IACPM; MBA; LSTA III; Representatives Wagner and Huizenga; Senator Kennedy; SFA I; SIFMA I.

[603] *See* letters from ABA; CREFC I; Fannie and Freddie; MBA.

[604] *See* letter from IACPM.

[605] *See, e.g.,* letters from AIC; AFME; IACPM.

[606] *See* Section II.D. and included citations.

far simpler than would have been expected under the proposed rule. Indeed, many transactions that might plausibly have caused a participant to benefit from adverse performance of an ABS will not need to be considered under the final rule because only transactions directly linked to an ABS, or series of transactions constructed to be directly linked to an ABS, which may include those linked to a substantially overlapping and/or similar asset pool, will qualify as conflicted.

The Commission received comments that not providing a definition of synthetic ABS creates ambiguity about what constitutes synthetic transactions.[607] Some commenters suggested that clarifying which specific synthetic securitizations are subject to the rule will help market participants comply with new requirements.[608] While we believe that most securitization participants understand and are able to identify synthetic ABS transactions, we acknowledge that not having an explicit definition of synthetic securitizations may impose compliance costs on certain securitization participants who may seek legal advice and incur other costs to ascertain whether the transactions they seek to participate in are subject to the final rule. We also expect that some securitization participants may refrain from entering transactions if they are uncertain about whether the final rule applies.

Not defining synthetic securitizations may lessen benefits to investors who may not be certain if they can rely on the rule's protections for a transaction. However, we believe that these costs may be partially offset by a higher degree of substantive compliance with the rule. The compliance costs of the rule should also decrease with time, as market participants gain experience in applying the new rule. In addition, not including an explicit definition of synthetic securitizations will help the rule remain effective over time by increasing its responsiveness to financial innovation.

Additionally, as discussed above, we do not believe that there is a significant amount of activity in the synthetic or hybrid cash and synthetic securitization markets outside of the Enterprises' CRT market and a CRT market for U.S. banks. Because CRTs are eligible for the risk-mitigating hedging activities exception under the final rule, due to the removal of the carve-out of initial distributions of an ABS from the risk-mitigating hedging activities exception, we do not expect economic effects in the synthetic securitization markets to be substantial.

We recognize that the curtailment or cessation of certain activities by securitization participants, in turn, can lead to potential costs for such participants and the broader securitization market. Material conflicts of interest may arise between an investor and a particular securitization participant that may lead that investor to seek a relationship with another securitization participant. However, depending upon the nature or structure of the transaction considered, there may be a lack of counterparties willing or able to accept the regulatory costs and risks required to engage in the transaction under the final rule. In such cases, investors and securitization participants may seek alternative, potentially less efficient transaction structures to effect a similar investment strategy, if even feasible. This may have an adverse impact on securitization participant revenues as well as costs, due to the nature of the business (for example, underwriting), where finding and retaining clientele could be an expensive activity.

At the same time, clients, customers, or counterparties of securitization participants in the ABS market could face higher search costs should they lose the ability to utilize firms with experience in certain areas due to real or perceived material conflicts of interest and, therefore, need to find non-conflicted counterparties. Some potential clients, customers, or counterparties might choose to forgo the ABS investment, in which instance the investor could incur costs in seeking out alternative investments as well as the opportunity cost of the loss of return on the ABS investment. This could reduce market liquidity and investor choice, and this effect may be more acute in the short-term when securitization participants and clients, customers, or counterparties realign their business practices to comply with the rule. Having said that, there remain significant incentives for securitization participants to find efficient means of complying with the rule, which could serve to limit the magnitude of these costs to securitization participants, investors, and the broader market.

The Commission also received a comment suggesting the additional costs of the rule could limit the appetite of smaller firms to participate in securitizations and potentially limit investor choice.[609] The extent to which this occurs may be limited as smaller firms may have less extensive and complex securitization activities and a smaller range of other operations, thus potentially reducing their compliance costs relative to large, diversified securitization participants. We believe that some of these disruptions will be temporary, since securitization participants will have incentives to adapt the methods they use to avoid conflicted transactions over time to minimize costs. The potential costs to investors will be mitigated to the extent that a securitization participant who leaves the market was profiting at investors' expense through undisclosed conflicted transactions.

The Commission received comments that municipal ABS issuers are unlikely to engage in conflicted transactions yet may face ''unnecessary'' or ''unjustifiable'' costs, burdens, or liability and should be excluded from Rule 192.[610] Since the final rule does not exclude municipal issuers from the definition of sponsor, these issuers may seek legal guidance and incur costs to ascertain that the activities they seek to engage in are not violating the final rule. We expect that the overall impact of the final rule on the municipalities will be modest as it will be limited to those municipalities that issue ABS covered by the rule, an approximated 352 in the baseline year out of over 50,000 issuers of municipal securities in the United States as of 2018.[611] Thus, even among municipalities issuing securities, under 1% of municipalities are expected to be covered by the final rule. The final rule does not exclude the Enterprises from the definition of sponsor with respect to any ABS for which they provided a guarantee of principal and interest payments. The final rule could thus result in some additional costs, such as compliance costs, for the Enterprises. These costs will be mitigated, however, by the rule's risk-mitigating hedging activities exception, which the final rule extends to the initial distribution of an ABS. This change is intended in large part to permit CRT transactions, including by the Enterprises, given that the Enterprises are now included as ABS sponsors under the final rule.[612]

The Commission received various comments that the inclusion of the Directing Sponsor prong in the proposed rule's definition of sponsor

[607] *See, e.g.,* letter from ABA.

[608] *See, e.g.,* letter from AIMA/ACC.

[609] *See* letter from AIMA/ACC.

[610] *See* letters from NABL et al.; NAHEFFA; SIFMA I.

[611] Municipal Securities Rulemaking Board, 2018, as reported in ''Self-Regulation and the Municipal Securities Market,'' *available at https://www.msrb.org/sites/default/files/MSRB-Self-Regulation-and-the-Municipal-Securities-Market.pdf.*

[612] *See* letter from M. Calabria at 4.

was too broad and thus costly.[613] The Directing Sponsor prong defined a ''sponsor'' functionally as any person that directs or causes the direction of the structure, design, or assembly or the composition of the pool of assets of an ABS other than a person that is solely a purchaser of a long position in the ABS. Removing this prong from the final rule will help limit the costs for securitization participants by limiting the scope of persons encompassed by the sponsor definition.

Notwithstanding this change, the adopted definition of sponsor will impose certain compliance costs for securitization participants. For example, compliance costs may arise even for entities performing solely administrative, legal, due diligence, custodial, or ministerial functions, because such entities would have needed to determine whether they fall within the Service Provider Exclusion from the term ''sponsor.'' Likewise, such costs may arise for entities that are solely service providers or the holder of long positions in an ABS, when such entities need to determine whether they have affiliates or subsidiaries that are participants in the ABS. In some cases, an organization containing various affiliates and subsidiaries may engage in activities that cause it to be a securitization participant as well as activities that will fall within the Service Provider Exclusion or other exclusion. If such an organization is unable to arrange these activities in such a way that they take place in separate affiliates or subsidiaries wherein the servicer affiliate does not coordinate with or receive information regarding the ABS from the sponsor affiliate, then the organization will need to ensure that such servicing activities either do not entail conflicted transactions or otherwise fall within other exceptions to the rule. Organizations unable to do so may need to abandon one set of activities or the other, leading to costs for that organization and their counterparties.

Finally, the rule provides exceptions for risk-mitigating hedging activities, liquidity commitments, and bona fide market-making activities, which are consistent with Section 27B. As discussed in Section II.E.3., we believe that such exceptions will preserve the ability of securitization participants to reduce and mitigate specific risks that arise out of underwriting, placement, initial purchase, or sponsorship of an asset-backed security, and may preserve secondary market liquidity and efficiency, while enhancing investor protections. We recognize that certain securitization participants will incur costs related to complying with the conditions for the availability of these exceptions, such as costs related to the requirement to establish, and to implement, maintain, and enforce an internal compliance program, including certain reasonably designed written policies and procedures, when relying on the risk-mitigating hedging activities exception or the bona fide market-making activities exception.

The rule includes a safe harbor for foreign ABS transactions if the ABS is not issued by a U.S. person and the offer and sale of the ABS are in compliance with Regulation S. This safe harbor will provide regulatory certainty for securitization participants in connection with securitizations occurring outside the United States and thus may help to reduce certain compliance costs. It is not expected to have a significant effect on the costs of U.S. securitization participants.

E. Anticipated Effects on Efficiency, Competition, and Capital Formation

The scope of activities under the final rule that could constitute material conflicts of interest and therefore would be prohibited can potentially impact market efficiency, competition among asset-backed securitization market participants, and capital formation via the ABS markets. As with the general costs and benefits discussed above, we are sensitive to these factors and consider the rule's effects through those lenses below.

1. Competition

Larger entities with multiple business lines could have unavoidable material conflicts of interest because of their structure. Such entities may abandon their participation in certain securitizations to avoid violating the final rule. In addition, an investor that utilizes such entities for multiple services may have to switch to competitors or, depending on the structure of asset-backed security, forgo the transaction. Thus, relatively smaller entities may gain market share at the expense of relatively larger entities, or firms with less diverse operations may gain market share at the expense of those with more diverse operations. This effect may be limited by the final rule's exclusion of affiliates and subsidiaries that do not act in coordination with a sponsor or other securitization participant within an entity or receive, or have access to, information about the ABS or asset pool prior to the first closing of the ABS sale. We also expect that the costs on smaller securitization participants may adversely impact competition, notably the ability of smaller investment advisers to compete, due to their limited ability to effectively implement information barriers.

On the other hand, certain requirements of the final rule that apply to the risk-mitigating hedging activities exception and bona fide market-making activities exception are similar to those under the Volcker Rule (see discussion in Sections II.E. and II.G.). Such similarity will be more beneficial to securitization participants that are already familiar with the Volcker Rule compliance requirements and already have relevant programs in place, because these securitization participants will incur lower marginal costs of compliance, especially in the short run. Securitization participants of this type tend to be larger entities (*e.g.,* bank holding companies). Accordingly, those that are not subject to the requirements of the Volcker Rule may incur larger initial compliance costs to the extent they wish to utilize the risk-mitigating hedging activities exception or the bona fide market-making activities exception. This may be offset by smaller entities having smaller and less complex securitization activities, as well as fewer and less complex non-securitization activities which could result in conflicted transactions, leading to less intensive compliance requirements than entities that are larger, more complex, and more diversified. Furthermore, both smaller and larger entities can also benefit from the flexibility provided by the final rule since it does not prescribe a specific set of policies and procedures with which market participants need to comply to demonstrate the separation of their affiliates and subsidiaries.

To the extent that the rule could lead to reduced moral hazard and curb excessive risk-taking, it can both draw more capital into the ABS market and lead to better allocation of capital between market participants, increasing competition among underwriters. Alternatively, if some of the activity in the ABS market is pursued only because sponsors or underwriters are subsidized by exploiting moral hazard, the market may shrink while still achieving a better allocation of resources and more competitive landscape.

In addition, as stated above, one commenter requested the Commission consider interactions between the economic effects of the proposed rule and other recent Commission rules, as well as practical realities such as

[613] *See, e.g.,* letters from ABA; AIMA/ACC; AFME; CREFC I, CREFC II; NAMA; Representatives Wagner and Huizenga; Senator Kennedy; SFA I; SFA II; SIFMA I.

implementation timelines.[614] As discussed above, the Commission acknowledges that overlapping compliance periods may in some cases increase costs.[615] This may be particularly true for smaller entities with more limited compliance resources.[616] This effect can negatively impact some competitors because these entities may be less able to absorb or pass on these additional costs, making it more difficult for them to remain in business or compete. However, the final rule mitigates overall costs relative to the proposal,[617] and we do not believe these increased compliance costs will be significant for most ABS market participants.[618] We therefore do not expect the risk of negative competitive effects from increased compliance costs due to simultaneous compliance periods to be significant.

2. Efficiency

As discussed above in Section IV.D.1., the final rule will generally lead to lower adverse selection costs, higher expected liquidity, and lower expected volatility in the ABS markets. In particular, the rule will reduce the effects of information asymmetries between securitization participants and ABS investors, which may reduce adverse selection costs and increase the willingness of ABS investors to engage in ABS transactions, thus, possibly improving informational efficiency of ABS prices. These effects will improve the efficiency of the ABS markets.

ABS investors could incur additional search costs and less efficient business processes due to the loss of relationships with securitization participants described above. These costs would be mitigated to the extent that securitization participants that leave the market were profiting at investors' expense through conflicted transactions. Securitization participants and ABS investors might also find the application of the final rule disruptive to existing firm-investor relationships, which are costly to develop, but valuable to maintain.[619] Thus, the final rule may result in a contraction in the securitization markets' size, liquidity, or efficiency, and these adverse effects may flow through to asset markets underlying ABS. This could result in higher costs for borrowers and lower risk- and liquidity-adjusted returns for investors.

3. Capital Formation

We believe that the final rule will improve pricing efficiency and reduce adverse selection costs. These effects will benefit investors, who are less informed about the quality of underlying assets than securitization participants. The final rule is also likely to increase investor confidence because it restricts activities that possibly deter investors from participating in the ABS market. Furthermore, the final rule will reduce the screening costs of those investors who prefer to ensure that securitization participants have no prior reputation of engaging in conflicted transactions. Thus, the final rule will lead to greater investor participation, and more efficient allocation of capital, thereby enhancing capital formation.

However, the potential benefits of the final rule for capital formation may be offset by potential losses in investment opportunities due to disruptions in relationships with securitization participants, at least in the short-term. The rule may negatively affect those securitization participants and investors who seek to invest in asset pools that back ABS, if certain ABS transactions do not occur because of the scope of the final rule. Additionally, new compliance requirements under the rule may also increase costs of securitizations that are not currently associated with a material conflict of interest.

The net effect of the final rule on capital formation is likely to be small given the offsetting factors discussed above. The potential costs of the final rule will be further limited due to the narrowed scope of transactions restricted by the final rule relative to the proposed rule.

F. Reasonable Alternatives

We considered several alternative approaches, including alternatives suggested by commenters to the proposed rule. This section considers the potential economic effects of these reasonable alternatives.

1. Changes to Scope of Definitions

We considered changing the scope of the definition for securitization participants. One alternative to our definition would be to broaden the definition of the terms ''placement agent'' and ''underwriter'' to include language used in the Volcker Rule that would include ''a person who has agreed to participate or is participating in a distribution of such securities for or on behalf of the issuer or selling security holder.'' While this approach could offer additional investor protections, we believe that the benefits associated with applying the rule's prohibitions to persons with an ancillary role in the distribution of an ABS, such as selling group members who have no direct relationship with an issuer or selling security holder, would not offer substantial benefit, and could substantially increase compliance costs. We also considered commencing the prohibition at an earlier point in time, *i.e.,* when a person has taken substantial steps to reach an agreement to become an underwriter, placement agent, initial purchaser, or sponsor of an ABS. This approach was revised from the proposal in response to comments regarding ambiguity and undue compliance costs associated with determining when the potential securitization participant has taken substantial steps to reach an agreement to participate.[620] Alternatively, we could narrow the scope of securitization participants. We could, for example, narrow the scope of securitization participants, as suggested by some commenters, to capture only those with direct involvement in structuring the ABS or choosing the underlying assets.[621] This approach, by reducing the number of covered participants, would limit costs associated with complying with the rule. However, it would not offer the investor protection benefits associated with including these persons, given that this could also create opportunities to evade the intended prohibition of Section 27B and the final rule.

We also considered changing the scope of material conflicts of interest for purposes of the final rule. As discussed above in Section II.D., the final rule defines such conflicts of interest as those that arise between a securitization participant and ABS investors, as a result of engaging in a short sale of the relevant ABS, purchasing a credit default swap or other credit derivative pursuant to which the securitization participant would be entitled to receive payments upon the occurrence of specified credit events in respect of the relevant ABS or purchasing or selling any financial instrument (other than the relevant ABS) or entering into a transaction that is substantially the economic equivalent of the aforementioned transactions, other than,

[614] *See* Section IV.B.

[615] *See id.*

[616] *But see infra* Section VI. (noting that the final rule will not affect smaller entities other than those that will be a ''sponsor'' for purposes of the final rule).

[617] *See supra* note 598.

[618] *See* Section IV.D.2.

[619] *See, e.g.,* Murat M. Binay, Vladimir A. Gatchev, and Christo A. Pirinsky. *The Role of Underwriter-Investor Relationships in the IPO Process,* Journal of Financial and Quantitative Analysis 42, no. 3, 785–809 (2007), and the literature reviewed therein.

[620] *See, e.g.,* letters from ABA; AIMA/ACC.

[621] *See* letters from AFR; Better Markets; SFA I; SIFMA I; SIFMA II.

for the avoidance of doubt, any transaction that only hedges general interest rate or currency exchange risk. This aspect of the rule limits the scope of the prohibition to certain conflicts of interest, rather than extending the proposed rule's prohibition to broader conflicts of interest that are wholly independent of and unrelated to a specific ABS. Defining the scope of the final rule to broadly cover any conflict of interest between securitization participants and investors would potentially offer some incremental investor protection but would significantly increase the costs of the rule and decrease efficiency of the securitization markets. The tailored approach to this prohibition in the final rule should limit the economic costs of the rule as discussed above while still providing substantial investor protection benefits.

2. Information Barriers

The final rule's definition of affiliates or subsidiaries of named securitization participants includes only those affiliates or subsidiaries that act in coordination with an underwriter, initial purchaser, placement agent, or sponsor of an ABS or receive, or have access to, information about an ABS or its underlying or referenced asset pool prior to the first closing of sale of the ABS. We considered not including this limitation or not permitting securitization participants to rely on information barriers to be excluded from the ''securitization participant'' definition. As discussed above in Section IV.D.2., Rule 192, as proposed, might have been significantly more costly for large and diversified securitization participants with an extensive network of affiliates and subsidiaries, such as investment companies and investment advisers, engaged in unrelated businesses. Relative to the final rule, defining certain uninvolved and uninformed affiliates and subsidiaries as securitization participants could increase the compliance costs of the final rule for securitization participants with large affiliate and subsidiary networks. Such increased costs could be greatest for affiliates or subsidiaries not subject to existing rules and regulations that provide for conflict management or restricting information flow. Similarly, those operating subject to existing information barriers that could complicate implementation of steps to avoid conflicted transactions would face greater costs.[622] To the degree that such an alternative could increase the scope of ABS transactions that would become conflicted, it could allow a smaller number of securitization participants to retain relationships with ABS investors and continue transacting in ABS. Thus, the alternative might increase disruptions to counterparty relationships, with potential detrimental effects on efficiency and capital formation in ABS and underlying asset markets.

In the Proposing Release, the Commission also requested comment with respect to certain conditions that securitization participants could satisfy to qualify for a potential information barrier exception to the final rule, including, for example, the establishment of written policies and procedures to prevent the flow of information between securitization participants and their affiliates and subsidiaries, internal controls, etc. While commenters suggested that affiliates and subsidiaries should only be subject to the rule if they have direct involvement in, or access to information about, the relevant ABS or are otherwise acting in coordination with the named securitization participant, they expressed concerns, as discussed in Section II.B.3.c., that the inclusion of a prescriptive information barrier exception could be too burdensome or expensive and suggested instead that the final rule consider the presence, robustness, and effectiveness of information barriers as part of a multi-factor analysis. Relative to the prescriptive information barrier conditions discussed in the Proposing Release, the adopted approach of including as securitization participants only those affiliates and subsidiaries which acted in coordination with a securitization participant or received or had access to information regarding an ABS or its underlying or referenced asset pool prior to the first closing of the sale of the ABS should result in lower implementation and compliance costs. We expect these costs to be lower because securitization participants are not required to establish a customized information barrier compliance program for Rule 192, but can instead rely on existing information barriers or other mechanisms that would effectively prevent coordination or flow of information between named securitization participants and their affiliates and subsidiaries. Similar potential limitations and exceptions to the rule were suggested by commenters. Two commenters proposed that, rather than including as securitization participants all affiliates and subsidiaries of a named securitization participant, the rule should specify that any transaction described in paragraph (a)(3) of the final rule, entered into at the direction of a related person, would be presumed to be a conflicted transaction unless that person demonstrates that it had no substantive role in structuring, selecting the assets for, marketing, or selling the ABS.[623] This alternative would substantially reduce compliance costs for affiliates and subsidiaries which do not engage in conflicted transactions, but does not sufficiently address the potential for conflicts of interest because it would still permit information transfer which could enable bets against an ABS. Similarly, a commenter's suggestion[624] that the Regulation M ''Separate Accounts Exception'' framework could be used to determine whether the prohibition applied to affiliates and subsidiaries could likewise reduce compliance costs but may not sufficiently address the concerns motivating Section 27B(a).

3. Changes to Exclusions

The Commission proposed an exclusion from the definition of ''sponsor'' for the Enterprises while operating under conservatorship of the FHFA with respect to ABS that are fully insured or fully guaranteed by the Enterprises.[625] This exception would have reduced the costs of compliance with the rule for the Enterprises while they remained in conservatorship. The final rule's removal of this exclusion will encourage market efficiency and competition by applying the same treatment to a larger proportion of market participants and reducing any competitive advantages accruing to the Enterprises because of the final rule's implementation. At the same time, the expansion of the risk mitigating hedging activities exception to provide for initial distributions of ABS should help to mitigate the additional costs to

[622] *See, e.g.,* letters from ABA; AIMA/ACC; ICI.

[623] *See* letters from SFA II; SIFMA II.

[624] *See* letter from SIFMA I.

[625] *See* Proposed Rule text, ''(B) The Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation operating under the conservatorship or receivership of the Federal Housing Finance Agency pursuant to section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617) with capital support from the United States; or any limited-life regulated entity succeeding to the charter of either the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation pursuant to section 1367(i) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617(i)), provided that the entity is operating with capital support from the United States; will not be a sponsor for purposes of this rule with respect to an asset-backed security that is fully insured or fully guaranteed as to the timely payment of principal and interest by such entity.''

Enterprises. Applying the rule to all of the Enterprises' ABS (together with changing the risk-mitigating hedging activities exception to permit the Enterprises' CRT transactions) addresses commenter concerns regarding the treatment of Enterprise securities if and when they emerge from conservatorship, including whether CRT transactions would continue to be issued post-conservatorship under a rule that would not have considered such ABS eligible for the risk-mitigating hedging activities exception.[626]

Another alternative exception concerns entirely excepting synthetic balance sheet transactions from the rule without imposing any conditions on such transactions (such as those specified in the adopted risk-mitigating hedging activities exception). Providing such an unconditional exception would reduce compliance costs to certain banks and sponsors who could engage in such synthetic balance sheet transactions without needing to satisfy the conditions applicable to the risk-mitigating hedging activities exception. However, such an alternative might limit the scope of reduced adverse selection and investor protection benefits relative to the final rule because a conflicted transaction could be structured using such instruments, thus running counter to the investor-protection mandate of Section 27B. To ensure that these types of transactions cannot be utilized as a bet by a securitization participant against the performance of the reference assets, the final rule requires compliance with each of the conditions to the risk-mitigating hedging activities exception.

4. Conditions of the Exceptions

We considered alternative conditions to the exceptions for risk-mitigating hedging activities, liquidity commitments, and bona fide market-making activities as described in detail in Sections II.E., II.F., and II.G., respectively, including alternatives suggested by commenters. Generally, making the conditions for the exceptions less stringent would reduce investor protection benefits of the final rule while also reducing compliance costs. Conversely, making the exceptions more stringent (*e.g.,* making the exception for bona fide market-making activities more stringent than the equivalent concept in the Volcker Rule) would increase compliance costs and could restrict the relevant activities, although it may provide additional investor protection benefits. We believe that the final conditions, in particular their similarity to the existing rules (*e.g.,* in the case of the bona fide market-making activities exception, with the concept of market-making in both the Volcker Rule and 15 U.S.C. 78c(a)(38)), strike the appropriate balance between investor protection benefits and compliance costs of the final rule. For those entities already subject to the Volcker Rule, the similarities could make it less costly to comply with the final rule. The conditions allow securitization participants sufficient flexibility to design their securitization-related risk-mitigating hedging activities, liquidity commitments, and bona fide market-making activities in a way that is not unduly complicated or cost prohibitive. To the extent smaller entities engage in less complex securitization activities or have fewer or less complex other operations that might require costs to comply with the rule, these costs may be proportionally less than larger entities with more complex and diverse securitization activities and other operations. Notably, the final rule's risk-mitigating hedging activities exception includes the initial distribution of an ABS which is used to mitigate the risks associated with another ABS, allowing for a greater range of risk management tools available to market participants than proposed.

We also considered adopting a certification requirement for using the risk-mitigating hedging activities and bona fide market-making activities exceptions. Under this alternative, an officer within the securitization participant would certify that the conditions supporting the exception had been met. This additional step might provide additional investor protection but would also create additional paperwork and procedural burdens associated with documenting the exception. To avoid these burdens, or potential enforcement or liability risk, securitization participants might choose not to engage in the excepted activities even in circumstances where they do not represent a bet against the relevant ABS.

V. Paperwork Reduction Act

A. Summary of the Collections of Information

Certain provisions of the final rule contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[627] The Commission published a notice requesting comment on these collections of information in the Proposing Release and submitted these requirements to the Office of Management and Budget (''OMB'') for review in accordance with the PRA. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid OMB control number. The title for the affected collection of information is ''Securities Act Rule 192'' (OMB Control No.: 3235–0807).

The final rule implements Section 621 of the Dodd-Frank Act, which added Section 27B to the Securities Act, by prohibiting securitization participants from directly or indirectly engaging in any transaction that would involve or result in any material conflict of interest between a securitization participant for such ABS and an investor in such ABS. The final rule includes certain exceptions for risk-mitigating hedging activities and bona fide market-making activities, both of which are conditioned on the securitization participant implementing, maintaining, and enforcing certain written policies and procedures. A more detailed description of the final rule, including the need for the information collection associated with these exceptions and its use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the economic effects of the final rule can be found in Section IV above.

The collection of information is mandatory for securitization participants that rely on two exceptions to the final rule described below. The collection of information is not required to be filed with the Commission or otherwise made publicly available but will not be confidential.

[626] *See* Section II.B.3.b.iv. and footnotes 261, 265, 267, and 274 for further discussion of the proposed exception for the Enterprises and related comments.

[627] 44 U.S.C. 3501 *et seq.*

B. Summary of Comment Letters

In the Proposing Release, the Commission requested comment on the PRA burden hour and cost estimates and the analysis used to derive the estimates.[628] While a number of parties commented on the potential costs of the proposed rule, only two commenters specifically addressed the PRA analysis.[629] One of these commenters stated that the PRA analysis in the Proposing Release underestimated the number of securitization participants that could rely on the risk-mitigating hedging activities exception given the scope of securitization participants that would be subject to the rule, as proposed, and the scope of the proposed definition of ''conflicted transaction.'' [630] The other commenter expressed similar concerns regarding the scope of the proposed rule and stated that the PRA underestimated the annual hourly burden for each securitization participant relying on the risk-mitigating hedging activities or bona fide market-making activities exceptions and the total annual direct compliance cost of the proposed rule.[631]

While we acknowledge the commenter's concerns about costs of the proposal, for the reasons discussed in Sections II.E. and II.G. and elsewhere throughout this release, we believe that the information required by the final rule with respect to the compliance program conditions to the risk-mitigating hedging activities and the bona fide market-making activities exceptions is necessary and appropriate in the public interest and for the protection of investors. Further, a discussion of the economic effects of the final rule, including consideration of comments that expressed concern about the expected costs associated with the proposed rule, can be found in Section IV above. With regard to the calculation of paperwork burdens, we note that both the Proposing Release's PRA analysis and our PRA analysis of the final rule here estimate the burden of the collection of information requirements of the applicable exceptions and fully comport with the requirements of the PRA. In response to the comments that the PRA analysis in the Proposing Release underestimated the number of affected securitization participants and their average annual hourly burden given the scope of the proposed rule, the modifications to the proposed rule that we are adopting in response to commenter concerns, including the changes discussed above in Section II.B.3.c. regarding the scope of affiliates and subsidiaries that will be subject to the final rule [632] and the changes discussed above in Section II.D.3. regarding the scope of the defined term ''conflicted transaction'' [633] should reduce both the number of respondents and the burden hours associated with the collection of information. We are adjusting our PRA estimates to reflect these modifications.

C. Effects of the Final Rule on the Collections of Information

The final rule requires a securitization participant to implement, maintain, and enforce written policies and procedures when it relies on the risk-mitigating hedging activities exception in 17 CFR 230.192(b)(1) (''Rule 192(b)(1)'') or the bona fide market-making activities exception in Rule 192(b)(3). Specifically, when a securitization participant relies on the risk-mitigating hedging activities exception it is required, under Rule 192(b)(1)(ii)(C), to have established, and to implement, maintain, and enforce, an internal compliance program that is reasonably designed to ensure the securitization participant's compliance with the other requirements of the exception, including reasonably designed written policies and procedures regarding the risk-mitigating hedging activities that provide for the specific risk and risk-mitigating hedging activity to be identified, documented, and monitored. Similarly, when a securitization participant relies on the bona fide market-making activities exception it is required, under Rule 192(b)(3)(ii)(E), to have established, and to implement, maintain, and enforce, an internal compliance program that is reasonably designed to ensure the securitization participant's compliance with the other requirements of the exception, including reasonably designed written policies and procedures that demonstrate a process for prompt mitigation of the risks of its market-making positions and holdings. Accordingly, securitization participants will be required to either prepare new policies and procedures or update existing ones in order to rely on these exceptions.[634] As adopted, these written policies and procedures requirements will help prevent evasion of the final rule and discourage practices that resulted in the misconduct that Section 27B was enacted to prohibit. If a securitization participant is a regulated entity, the collection of such information (*i.e.,* policies and procedures) required by Rule 192 will provide important information to staff in the Commission's examination and oversight program, and if such securitization participant is also subject to oversight by a self-regulatory organization, this collection of information should provide important compliance information to the relevant self-regulatory organization in connection with its oversight of the securitization participant.[635] As discussed in Section II, we have made some changes to the proposed rule as a result of comments received.[636]

As stated below in PRA Table 1, we estimate that there are a total of 1,277

[628] Proposing Release at 9723.

[629] *See* letters from ABA; AIC.

[630] *See* letter from ABA.

[631] *See* letter from AIC.

[632] *See* Section II.B.3.c. (discussing how paragraph (ii) of the definition of a ''securitization participant'' as adopted will only capture any affiliate (as defined in 17 CFR 230.405) or subsidiary (as defined in 17 CFR 230.405) of a person described in paragraph (i) of the definition if the affiliate or subsidiary: (A) acts in coordination with a person described in paragraph (i) of the definition; or (B) has access to or receives information about the relevant asset-backed security or the asset pool supporting or referenced by the relevant asset-backed security prior to the first closing of the sale of the relevant asset-backed security).

[633] *See* Section II.D.3. (discussing how Rule 192(a)(3)(iii) as adopted only applies to the purchase or sale of any financial instrument that is substantially the economic equivalent of a transaction described in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii) and provides that, for the avoidance of doubt, any transaction that only hedges general interest rate or currency exchange risk is not a conflicted transaction).

[634] We estimate that only a subset of securitization participants (*e.g.,* broker-dealers) will rely on the bona fide market-making activities exception and that, while amending their written policies and procedures to address the more broadly applicable risk-mitigating hedging activities exception, such securitization participants will also amend their written policies and procedures to address the bona fide market-making activities exception.

[635] We recognize that not all securitization participants that will rely on the risk-mitigating hedging activities exception or the bona fide market-making activities exception (*e.g.,* municipal entities that are sponsors of municipal ABS) would be subject to the Commission's examination and oversight programs (or, if applicable, those of the relevant self-regulatory organization).

[636] *See* Section II.B.3.c. (discussing how paragraph (ii) of the definition of a ''securitization participant'' as adopted will only capture any affiliate (as defined in 17 CFR 230.405) or subsidiary (as defined in 17 CFR 230.405) of a person described in paragraph (i) of the definition if the affiliate or subsidiary: (A) acts in coordination with a person described in paragraph (i) of the definition; or (B) has access to or receives information about the relevant asset-backed security or the asset pool supporting or referenced by the relevant asset-backed security prior to the first closing of the sale of the relevant asset-backed security) and Section II.D.3. (discussing how Rule 192(a)(3)(iii) as adopted only applies to the purchase or sale of any financial instrument that is substantially the economic equivalent of a transaction described in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii) and provides that, for the avoidance of doubt, any transaction that only hedges general interest rate or currency exchange risk is not a conflicted transaction).

securitization participants, all of whom could rely on the risk-mitigating hedging activities exception, and 156 securitization participants who could rely on the bona fide market-making activities exception. For the purposes of this analysis, as described below, we have made assumptions regarding actions respondents are expected to take to implement, manage, and ensure compliance with the final rule.

PRA TABLE 1—ESTIMATED NUMBER OF SECURITIZATION PARTICIPANTS [1]

Private-label ABS sponsors	420
Municipal ABS sponsors [2]	516
Sponsors related to government-backed securities	185
Unique underwriters, placement agents, and initial purchasers that are not included in the categories above	156
Total	1,277

[1] The securitization participant estimates are derived from data in the Green Street Asset-Backed Alert Database, the Green Street Commercial Mortgage Alert Database, the Mergent Municipal Bond Securities Database, and information on *www.ginniemae.gov* and *https://capitalmarkets.freddiemac.com/mbs/products/dealer-groups*. To account for recent market variability, these estimates represent a two-year average of the data available from such sources for calendar year 2021 and calendar year 2022.

[2] This estimate includes municipal advisors, municipal issuers, and issuers of securitizations of municipal securities that may be sponsors for purposes of the final rule but are not municipal issuers.

We estimate that for each securitization participant relying on these exceptions, it would take approximately 80 hours to initially prepare new written policies and procedures [637] and approximately 10 hours annually to review and update those policies and procedures.[638] As a result, we estimate that the annual burden for each securitization participant would be 33 hours.[639] Because these estimates are an average, the burden could be more or less for any particular securitization participant, and might vary depending on a variety of factors, such as the degree to which the participant uses the services of outside professionals or internal staff.

The following table summarizes the estimated paperwork burdens associated with the final rule.

PRA TABLE 2—ESTIMATED PAPERWORK BURDEN OF FINAL RULE 192

Final Rule 192	Estimated burden increase	Brief explanation of estimated burden increase
Require policies and procedures implementing, maintaining, and enforcing written policies and procedures reasonably designed to ensure compliance with the requirements of the applicable exceptions, including the identification, documentation, and monitoring of such activities.	An increase of 33 burden hours	This is the estimated burden to initially prepare and subsequently review and update the policies and procedures.

D. Aggregate Burden and Cost Estimates for the Final Rule

Below we estimate the paperwork burden in hours and costs as a result of the new collection of information established by the final rule. These estimates represent the average burden for all securitization participants who could rely on the risk-mitigating hedging activities exception or the bona fide market-making activities exception, both large and small. In deriving our estimates, we recognize that the burdens would likely vary among individual securitization participants. We estimate the total annual burden of the final rule to be 42,141 burden hours. We calculated the burden estimate by multiplying the estimated number of securitization participants by the estimated average amount of time it would take a securitization participant to prepare and review and update the policies and procedures under the final rule. For purposes of the PRA, the burden is to be allocated between internal burden hours and outside professional costs. PRA Table 3 sets forth the percentage estimate for the burden allocation for the new collection of information. We also estimate that the average cost of retaining outside professionals is $600 per hour.[640]

[637] While some securitization participants may have policies and procedures in place related to hedging or market-making, we are estimating the same burden hour estimates for all securitization participants. Burden hour estimates for the preparation of new policies and procedures (80 hours) are derived from similar estimates for the documentation of policies and procedures by RIAs as required by Rule 206(4)–7 of the Advisers Act. *See Compliance Programs of Investment Companies and Investment Advisers,* Release No. IA–2204 (Dec. 17, 2003) [68 FR 74714 (Dec. 24, 2003)] (taking into account industry participant comments specific to the 80-hour estimate). Because the final exceptions would require the drafting or updating of reasonably designed written policies and procedures regarding each requirement applicable to such exception, we believe 80 hours is an appropriate burden estimate.

[638] Burden hour estimates for the annual review of policies and procedures (10 hours) are derived from the same estimates for recently proposed Exchange Act Rule 17Ad–25(h). Rule 17Ad–25(h) requires updating current policies and procedures or establishing new policies and procedures to ensure ongoing compliance, which would impose an ongoing annual burden similar to the one imposed by the proposed risk-mitigating hedging activities exception here. *See Clearing Agency Governance and Conflicts of Interest,* Release No. 34–95431 (Aug. 8, 2022) [87 FR 51812 (Aug. 23, 2022)].

[639] These estimates represent a three-year average. In deriving our estimate, the burden hour estimates for the preparation of new policies and procedures (80 hours) were added to the ongoing estimates for the annual review of policies and procedures (10 hours) for the following two years resulting in a 100 hour burden over three years, or approximately 33 hours per year. Some securitization participants may experience costs in excess of this average in the first year of compliance with the amendments and some securitization participants may experience less than the average costs. Averages also may not align with the actual number of estimated burden hours in any given year.

[640] We recognize that the costs of retaining outside professionals (*e.g.,* compliance professionals and outside counsel) might vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $600 per hour, consistent with other recent rulemakings.

PRA TABLE 3—ESTIMATED BURDEN ALLOCATION FOR THE COLLECTION OF INFORMATION

Collection of information	Internal (%)	Outside professionals (%)
Prohibition Against Conflicts of Interest in Certain Securitizations	75	25

The following PRA Table 4 summarizes the requested paperwork burden, including the estimated total reporting burdens and costs, under the final rule.

PRA TABLE 4—REQUESTED PAPERWORK BURDEN FOR THE NEW COLLECTION OF INFORMATION

Collection of information	Requested paperwork burden		
	Securitization participants (A)	Burden hours (A) × 33 × (0.75)	Cost burden (A) × 33 × (0.25) × $600
Prohibition Against Conflicts of Interest in Certain Securitizations	1,277	31,606	$6,321,150

VI. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (''RFA'') requires the Commission, in promulgating rules under Section 553 of the Administrative Procedure Act,[641] to consider the impact of those rules on small entities. We have prepared this Final Regulatory Flexibility Analysis (''FRFA'') in accordance with Section 604 of the RFA.[642] An Initial Regulatory Flexibility Analysis (''IRFA'') was prepared in accordance with the RFA and was included in the Proposing Release.[643]

A. Need for, and Objectives of, the Final Rule

We are adopting Rule 192 to implement Section 27B of the Securities Act. The final rule is designed to prevent the sale of ABS that are tainted by material conflicts of interest by prohibiting securitization participants from engaging in certain transactions that could incentivize a securitization participant to structure an ABS in a way that would put the securitization participant's interests ahead of those of ABS investors. As discussed in more detail in Section II.D.3. above, the final rule specifies which types of transactions will be prohibited so that activities that are routinely undertaken in connection with the securitization process or that are unrelated to the securitization process will not be unnecessarily restricted. Also, as discussed in more detail in Sections II.E.3., II.F.3. and II.G.3., the final rule also provides specific exceptions to its prohibition with respect to the types of risk-mitigating hedging, liquidity commitment, and bona fide market-making activities of securitization participants that do not give rise to the risks that Section 27B addresses. The need for, and objectives of, the final rule are discussed in more detail in Section II above. We discuss the economic impact and potential alternatives to the final rule in Section IV above, and the estimated compliance costs and burdens of the final rule under the PRA in Section V above.

B. Significant Issues Raised by Public Comments

In the Proposing Release, the Commission requested comment on any aspect of the IRFA, and particularly on the number of small entities that would be affected by the proposed rule, the existence or nature of the potential impact of the proposed rule on small entities discussed in the analysis, how the proposed rule could further lower the burden on small entities, and how to quantify the impact of the proposed amendments.

The Commission did not receive any comments specifically addressing the IRFA. The Commission did receive, however, one comment expressing concern that the proposed rule would apply to small entities without a longer implementation period or other accommodations to facilitate their compliance.[644] This commenter stated the additional costs that would be imposed under the rule, as proposed, would limit the ability of smaller firms to participate in securitizations, potentially limiting investor choice.[645] The Commission also received comments expressing concerns regarding the compliance burdens that would be imposed under the rule, as proposed, on municipal advisors that are small entities.[646] We have considered these comments in developing the FRFA.

C. Small Entities Subject to the Rule

The final rule will affect some small entities—such as municipal entities, small broker-dealers, and RIAs that advise hedge funds—that will be ''sponsors'' for purposes of the final rule.[647] The RFA defines ''small entity'' to mean ''small business,'' ''small organization,'' or ''small governmental jurisdiction.'' [648]

For purposes of the RFA, under 17 CFR 230.157 and 17 CFR 240.0–10(a), an issuer, other than an investment company, is a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year and is engaged or proposing to engage in an offering of securities not exceeding $5 million. We estimate that no sponsors of private-label ABS will meet the definition of ''small entity'' applicable to issuers.

[641] 5 U.S.C. 553.

[642] 5 U.S.C. 604.

[643] *See* Proposing Release at 9724–9726.

[644] *See* letter from AIMA/ACC.

[645] *See* letter from AIMA/ACC.

[646] *See* letters from AIMA/ACC; NAMA (stating that many municipal advisors are small entities and that including them within in the scope of the rule would require them to ''spend a great deal of time, effort and expense'' and suggesting an exclusion from the rule for municipal advisors); Wulff Hansen (supporting NAMA's statements).

[647] We believe that the final rule will not affect small entities other than those that will be a ''sponsor'' for purposes of the final rule.

[648] 5 U.S.C. 601(6).

A municipal entity is a small entity for purposes of the RFA (*i.e.,* a ''small government jurisdiction'') if it is a city, county, town, township, village, school district, or special district, with a population of less than fifty thousand.[649] We estimate that, of the 415 municipal entities who act as sponsors of ABS, between 69 and 90 will meet the definition of small entity applicable to municipal entities.[650]

A broker-dealer is a small entity if it has total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to 17 CFR 240.17a–5(d), or, if not required to file such statements, had total capital of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been a business, if shorter); and it is not affiliated with any person (other than a natural person) that is not a small business or small organization.[651] We estimate that two sponsors that are broker-dealers will meet the applicable definition of small entity.[652]

RIAs other than broker-dealers that advise hedge funds and municipal advisors that advise with respect to municipal securitizations, could also qualify as a ''sponsor'' under the final rule. A RIA is a small entity if it: (i) has assets under management having a total value of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[653] We estimate that, of the RIAs that advise hedge funds, up to 16 will be a small entity as defined for investment advisers.[654]

We estimate that there are 105 municipal advisors who will be sponsors of ABS for purposes of the final rule.[655] There is no Commission definition regarding small municipal advisors. In adopting rules relating to municipal advisors, the Commission has used the Small Business Administration's definition of small business for municipal advisors.[656] The Small Business Administration defines small business for purposes of entities that provide financial investment and related activities as a business that had annual receipts of less than $47 million during the preceding fiscal year and is not affiliated with any person that is not a small business or small organization.[657] Based on this definition, a majority of municipal advisors will be small businesses. The Commission recently estimated that approximately 75% of municipal advisors would be small entities;[658] therefore, we estimate that 79 will be small entities.

This results in a Commission estimate of 166 to 187 small entities that could be impacted by the final rule.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The final rule will apply to small entities to the same extent as other entities, irrespective of size. Therefore, we expect that the nature of most of the benefits and costs associated with the final rule to be similar for large and small entities. We discuss the economic effects, including the estimated costs and burdens, of the final rule on all affected entities, including small entities, in Section IV above. Consistent with that discussion, we anticipate that the economic benefits and costs could vary widely among small entities based on a number of factors, such as the nature and conduct of their businesses, which makes it difficult to project the economic impact on small entities with precision. We note, however, that reliance on certain exceptions to the final rule may be more burdensome for small entities than larger entity securitization participants (*e.g.,* banking entities and affiliated broker-dealer entities) due to the similarity of these exceptions to the Volcker Rule, with which such larger entities will be familiar, thereby reducing their costs. Conversely, as discussed above in Section IV, small entities may face fewer compliance costs than large and diversified securitization participants that have an extensive network of affiliates and subsidiaries. This may allow such small entities to gain market share at the expense of such large and diversified securitization participants.

As a general matter, we also recognize that costs of the final rule potentially may have a proportionally greater effect on small entities, as such costs may be a relatively greater percentage of the total cost of operations for smaller entities than larger entities, and thus small entities may be less able to bear such costs relative to larger entities. However, the potentially less complex securitization activities of small entities and their correspondingly less complex compliance considerations may counterbalance such costs as compared to larger and more diversified securitization participants. Compliance with the final rule might require the use of professional skill, including legal skills.

E. Agency Action To Minimize Effect on Small Entities

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. Accordingly, we considered the following alternatives:

- Establishing different compliance requirements or timetables that take into account the resources available to small entities;
- Exempting small entities from all or part of the requirements;
- Using performance rather than design standards; and

[649] 5 U.S.C. 601(5).

[650] We analyzed and averaged calendar year 2021 data and calendar year 2022 data from the Mergent Municipal Bond Securities Database to determine the scope and characteristics of municipal entities that are sponsors of municipal ABS, including ABS issued by municipal issuers and securitizations of municipal securities issued by special purpose entities. Although certain securitizations of municipal securities issued by special purpose entities might not have a sponsor that is a municipal entity, we are taking the conservative approach to include such securitizations in these estimates to avoid any potential undercounting for purposes of the FRFA.

[651] *See* 17 CFR 240.0–10.

[652] We analyzed and averaged calendar year 2021 and calendar year 2022 data to determine whether their characteristics and affiliations (as described in FOCUS data and other disclosures) would result in their being ''small entities'' for purposes of Section 605 of the RFA.

[653] *See* 17 CFR 275.0–7(a).

[654] We analyzed and averaged calendar year 2021 data and calendar year 2022 data from Form ADV. Based on Form ADV data, we estimate that (i) for calendar year 2021, only 17 RIAs that advise hedge funds, representing 0.7% of all RIAs advising hedge funds, would be a small entity as defined by Rule 0–7(a) of the Advisers Act and (ii) for calendar year 2022, only 15 RIAs that advise hedge funds, representing 0.6% of all RIAs advising hedge funds, would be a small entity as defined in Rule 0–7(a) of the Advisers Act. *See Definitions of ''Small Business'' or ''Small Organization'' Under the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Exchange Act of 1934, and the Securities Act of 1933,* Release Nos. 33–7548, 34–40122, IC–23272, and IA–1727 (June 24, 1998) [63 FR 35508 (June 30, 1998)]. Furthermore, we believe that not all of those RIAs act as sponsors of ABS transactions.

[655] We analyzed and averaged calendar year 2021 data and calendar year 2022 data from Mergent Municipal Bond Securities Database. We note that some municipal advisors are broker-dealers and/or RIAs.

[656] *See Registration of Municipal Advisors,* Release No. 34–70462 (Sept. 20, 2013) [78 FR 67468 (Nov. 12, 2013)] (''MA Adopting Release'').

[657] *See* 13 CFR 121.201.

[658] The Commission estimated for purposes of the PRA, as of Dec. 31, 2022, approximately 446 municipal advisors were registered with the Commission and an estimated 333 of these municipal advisors, or approximately, 75%, were small entities. *See* PRA Supporting Statement for Registration of Municipal Advisors (Aug. 1, 2023), *available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202307-3235-012.*

• Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities.

The final rule is designed to prevent the sale of ABS that are tainted by material conflicts of interest by prohibiting securitization participants from engaging in certain transactions that could incentivize a securitization participant to structure an ABS in a way that would put the securitization participant's interests ahead of those of ABS investors. Exempting small entities from the final rule's prohibition could frustrate Section 27B's investor protection purpose by narrowing the scope of the rule to transactions with respect to which the relevant securitization participants are larger entities. We see no reason why investors should not be protected from securitization participants that are small entities betting against the relevant ABS in the same way that they will be for larger entities. Similarly, applying different standards and legal requirements based on the size of an entity would dimmish investor protection, create unnecessary complexity, and likely result in additional costs associated with ascertaining whether a particular securitization participant is eligible to claim an exception from the rule or avail itself of such different standards and legal requirements. For these reasons, we are not adopting different compliance or reporting requirements, or an exception, for small entities as suggested by certain commenters.[659] The final rule, however, does include a delayed implementation period for all entities as discussed in detail in Section II.I. One commenter generally expressed a concern that the proposed rule did not include an implementation period for small entities.[660] Another commenter recommended a compliance period of 18–24 months based on concerns regarding the scope of the proposed definition of conflicted transaction and the proposed application of the rule to affiliates.[661] We recognize that certain persons subject to the rule will need to update their operations and systems in order to comply with the final rule, and we are adopting the compliance date of 18 months after adoption. We believe that this delayed compliance date will provide affected securitization participants that intend to utilize the risk-mitigating hedging activities exception and the bona fide market-making activities exception, including small entities, with adequate time to develop the internal compliance programs that are required to comply with such exceptions. We are not persuaded that any additional time is needed for smaller entities because we believe that the changes made from the proposed rule to narrow the scope of the definition of conflicted transaction[662] and the scope of the affiliates and subsidiaries of a securitization participant that are subject to the rule[663] should generally ease compliance burdens and mitigate the need for a compliance period longer than 18 months after adoption.

As discussed in Section II, we have made certain changes from the proposal to clarify and simplify the scope of the final rule for all entities by further specifying the type of conduct that will be prohibited as well as the applicability of the final rule to an entity's affiliates and subsidiaries. With respect to using performance rather than design standards, the prohibition of the final rule is a performance standard that will prohibit a securitization participant from entering into a conflicted transaction during the covered time-period. Although the bona fide market-making activities and risk-mitigating hedging activities exceptions do include design standards such as those specified in Rule 192(b)(1)(ii)(A) and Rule 192(b)(3)(ii)(B), we believe that those design standards will promote the investor protection objectives of the final rule while still providing flexibility to securitization participants to design compliance programs that are tailored to their specific business models.

[659] *See* letters from AIMA/ACC (expressing a concern about the lack of accommodations for small entities to facilitate their compliance); NAMA (stating that many municipal advisors are small entities and that including them within in the scope of the rule would require them to ''spend a great deal of time, effort and expense'' and suggesting an exclusion from the rule for municipal advisors); Wulff Hansen (supporting NAMA's statements). *See also* Section II.B.3.b. above for a discussion of why we are not adopting an exclusion from the rule for municipal advisors.

[660] *See* letter from AIMA/ACC.

[661] *See* letter from SFA II.

[662] *See* Section II.D.3. (discussing how Rule 192(a)(3)(iii) as adopted only applies to the purchase or sale of any financial instrument that is substantially the economic equivalent of a transaction described in Rule 192(a)(3)(i) or Rule 192(a)(3)(ii) and provides that, for the avoidance of doubt, any transaction that only hedges general interest rate or currency exchange risk is not a conflicted transaction).

[663] *See* Section II.B.3.c. (discussing how paragraph (ii) of the definition of a ''securitization participant'' as adopted will only capture any affiliate (as defined in 17 CFR 230.405) or subsidiary (as defined in 17 CFR 230.405) of a person described in paragraph (i) of the definition if the affiliate or subsidiary: (A) acts in coordination with a person described in paragraph (i) of the definition; or (B) has access to or receives information about the relevant asset-backed security or the asset pool supporting or referenced by the relevant asset-backed security prior to the first closing of the sale of the relevant asset-backed security).

Statutory Authority

The Commission is adopting new 17 CFR 230.192 under the authority set forth in Sections 10, 17(a), 19(a), 27B, and 28 of the Securities Act.

List of Subjects in 17 CFR Part 230

Reporting and recordkeeping requirements, Securities.

Text of Amendments

For the reasons set forth in the preamble, the Commission amends title 17, chapter II of the Code of Federal Regulations as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 1. The general authority citation for part 230 continues to read, in part, as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78o–7 note, 78t, 78w, 78ll(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, and Pub. L. 112–106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

■ 2. Add § 230.192 to read as follows:

§ 230.192 Conflicts of interest relating to certain securitizations.

(a) *Unlawful activity*—(1) *Prohibition.* A securitization participant shall not, for a period commencing on the date on which such person has reached an agreement that such person will become a securitization participant with respect to an asset-backed security and ending on the date that is one year after the date of the first closing of the sale of such asset-backed security, directly or indirectly engage in any transaction that would involve or result in any material conflict of interest between the securitization participant and an investor in such asset-backed security.

(2) *Material conflict of interest.* For purposes of this section, engaging in any transaction would involve or result in a material conflict of interest between a securitization participant for an asset-backed security and an investor in such asset-backed security if such a transaction is a conflicted transaction.

(3) *Conflicted transaction.* For purposes of this section, a conflicted transaction means any of the following transactions with respect to which there is a substantial likelihood that a reasonable investor would consider the transaction important to the investor's investment decision, including a

decision whether to retain the asset-backed security:

(i) A short sale of the relevant asset-backed security;

(ii) The purchase of a credit default swap or other credit derivative pursuant to which the securitization participant would be entitled to receive payments upon the occurrence of specified credit events in respect of the relevant asset-backed security; or

(iii) The purchase or sale of any financial instrument (other than the relevant asset-backed security) or entry into a transaction that is substantially the economic equivalent of a transaction described in paragraph (a)(3)(i) or (a)(3)(ii) of this section, other than, for the avoidance of doubt, any transaction that only hedges general interest rate or currency exchange risk.

(b) *Excepted activity.* The following activities are not prohibited by paragraph (a) of this section:

(1) *Risk-mitigating hedging activities*—(i) *Permitted risk-mitigating hedging activities.* Risk-mitigating hedging activities of a securitization participant conducted in accordance with this paragraph (b)(1) in connection with and related to individual or aggregated positions, contracts, or other holdings of the securitization participant, including those arising out of its securitization activities, such as the origination or acquisition of assets that it securitizes.

(ii) *Conditions.* Risk-mitigating hedging activities are permitted under paragraph (b)(1) of this section only if:

(A) At the inception of the hedging activity and at the time of any adjustments to the hedging activity, the risk-mitigating hedging activity is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks arising in connection with and related to identified positions, contracts, or other holdings of the securitization participant, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof;

(B) The risk-mitigating hedging activity is subject, as appropriate, to ongoing recalibration by the securitization participant to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(1) of this section and does not facilitate or create an opportunity to materially benefit from a conflicted transaction other than through risk-reduction; and

(C) The securitization participant has established, and implements, maintains, and enforces, an internal compliance program that is reasonably designed to ensure the securitization participant's compliance with the requirements set out in paragraph (b)(1) of this section, including reasonably designed written policies and procedures regarding the risk-mitigating hedging activities that provide for the specific risk and risk-mitigating hedging activity to be identified, documented, and monitored.

(2) *Liquidity commitments.* Purchases or sales of the asset-backed security made pursuant to, and consistent with, commitments of the securitization participant to provide liquidity for the asset-backed security.

(3) *Bona fide market-making activities*—(i) *Permitted bona fide market-making activities.* Bona fide market-making activities, including market-making related hedging, of the securitization participant conducted in accordance with this paragraph (b)(3) in connection with and related to asset-backed securities with respect to which the prohibition in paragraph (a)(1) of this section applies, the assets underlying such asset-backed securities, or financial instruments that reference such asset-backed securities or underlying assets or with respect to which the prohibition in paragraph (a)(1) of this section otherwise applies, except that the initial distribution of an asset-backed security is not bona fide market-making activity for purposes of paragraph (b)(3) of this section.

(ii) *Conditions.* Bona fide market-making activities are permitted under paragraph (b)(3) of this section only if:

(A) The securitization participant routinely stands ready to purchase and sell one or more types of the financial instruments described in paragraph (b)(3)(i) of this section as a part of its market-making related activities in such financial instruments, and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(B) The securitization participant's market-making related activities are designed not to exceed, on an ongoing basis, the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments described in paragraph (b)(3)(i) of this section;

(C) The compensation arrangements of persons performing the foregoing activity are designed not to reward or incentivize conflicted transactions;

(D) The securitization participant is licensed or registered, if required, to engage in the activity described in paragraph (b)(3) of this section in accordance with applicable law and self-regulatory organization rules; and

(E) The securitization participant has established, and implements, maintains, and enforces, an internal compliance program that is reasonably designed to ensure the securitization participant's compliance with the requirements of paragraph (b)(3) of this section, including reasonably designed written policies and procedures that demonstrate a process for prompt mitigation of the risks of its market-making positions and holdings.

(c) *Definitions.* For purposes of this section:

Asset-backed security has the same meaning as in section 3(a)(79) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(79)), and also includes a synthetic asset-backed security and a hybrid cash and synthetic asset-backed security.

Distribution means:

(i) An offering of securities, whether or not subject to registration under the Securities Act of 1933, that is distinguished from ordinary trading transactions by the presence of special selling efforts and selling methods; or

(ii) An offering of securities made pursuant to an effective registration statement under the Securities Act of 1933.

Initial purchaser means a person who has agreed with an issuer to purchase a security from the issuer for resale to other purchasers in transactions that are not required to be registered under the Securities Act in reliance upon 17 CFR 230.144A or that are otherwise not required to be registered because they do not involve any public offering.

Placement agent and *underwriter* each mean a person who has agreed with an issuer or selling security holder to:

(i) Purchase securities from the issuer or selling security holder for distribution;

(ii) Engage in a distribution for or on behalf of such issuer or selling security holder; or

(iii) Manage or supervise a distribution for or on behalf of such issuer or selling security holder.

Securitization participant means:

(i) An underwriter, placement agent, initial purchaser, or sponsor of an asset-backed security; or

(ii) Any affiliate (as defined in 17 CFR 230.405) or subsidiary (as defined in 17 CFR 230.405) of a person described in paragraph (i) of this definition if the affiliate or subsidiary:

(A) Acts in coordination with a person described in paragraph (i) of this definition; or

(B) Has access to or receives information about the relevant asset-backed security or the asset pool underlying or referenced by the relevant asset-backed security prior to the first closing of the sale of the relevant asset-backed security.

Sponsor means:

(i) Any person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the entity that issues the asset-backed security; or

(ii) Any person with a contractual right to direct or cause the direction of the structure, design, or assembly of an asset-backed security or the composition of the pool of assets underlying or referenced by the asset-backed security, other than a person who acts solely pursuant to such person's contractual rights as a holder of a long position in the asset-backed security.

(iii) Notwithstanding paragraph (ii) of this definition, a person that performs only administrative, legal, due diligence, custodial, or ministerial acts related to the structure, design, assembly, or ongoing administration of an asset-backed security or the composition of the pool of assets underlying or referenced by the asset-backed security will not be a sponsor for purposes of this rule.

(iv) Notwithstanding paragraphs (i) and (ii) of this definition, the United States or an agency of the United States will not be a sponsor for purposes of this rule with respect to an asset-backed security that is fully insured or fully guaranteed as to the timely payment of principal and interest by the United States.

(d) *Anti-evasion.* If a securitization participant engages in a transaction or a series of related transactions that, although in technical compliance with paragraph (b) of this section, is part of a plan or scheme to evade the prohibition in paragraph (a)(1) of this section, that transaction or series of related transactions will be deemed to violate paragraph (a)(1) of this section.

(e) *Safe harbor for certain foreign transactions.* The prohibition in paragraph (a)(1) of this section shall not apply to any asset-backed security for which all of the following conditions are met:

(1) The asset-backed security (as defined in this section) is not issued by a U.S. person (as defined in 17 CFR 230.902(k)); and

(2) The offer and sale of the asset-backed security (as defined by this section) is in compliance with 17 CFR 230.901 through 905 (Regulation S).

By the Commission.

Dated: November 27, 2023.

Vanessa A. Countryman,

Secretary.

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